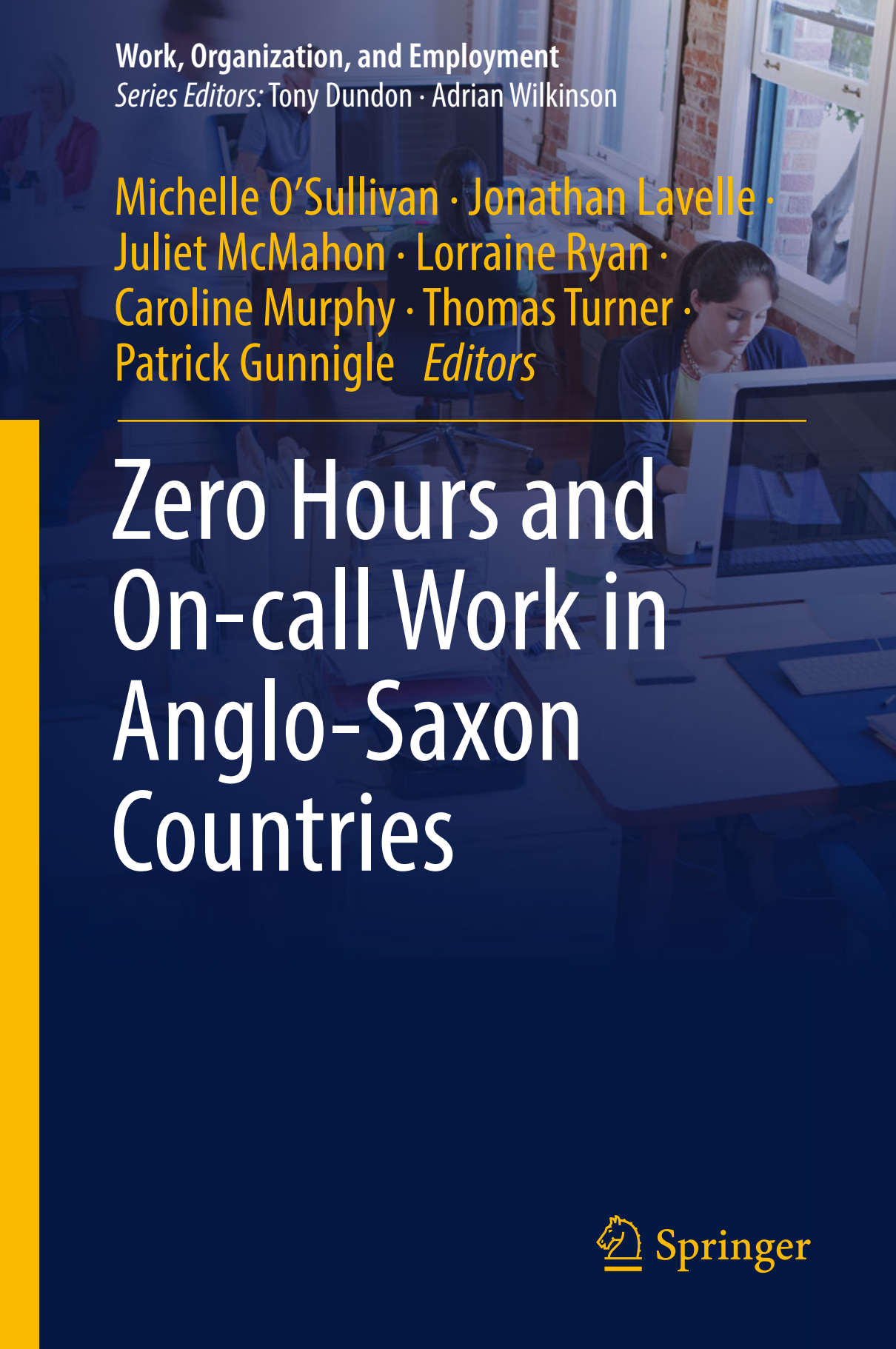

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Zero Hours and On-call Work in Anglo-Saxon Countries

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Patrick Gunnigle
Editors

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Editors
Michelle O'Sullivan
Department of Work and Employment Studies, Kemmy Business School
University of Limerick
Limerick, Ireland

Juliet McMahon
Department of Work and Employment Studies, Kemmy Business School
University of Limerick
Limerick, Ireland

Caroline Murphy
Department of Work and Employment Studies, Kemmy Business School
University of Limerick
Limerick, Ireland

Patrick Gunnigle
Department of Work and Employment Studies, Kemmy Business School
University of Limerick
Limerick, Ireland

Jonathan Lavelle
Department of Work and Employment Studies, Kemmy Business School
University of Limerick
Limerick, Ireland

Lorraine Ryan
Department of Work and Employment Studies, Kemmy Business School
University of Limerick
Limerick, Ireland

Thomas Turner
Department of Work and Employment Studies, Kemmy Business School
University of Limerick
Limerick, Ireland

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Chapter 1
Introduction to Zero Hours and On-call Work in Anglo-Saxon Countries

Michelle O'Sullivan

Abstract This chapter provides the introductory backdrop to the study of employment arrangements variously termed zero hours and on-call work. The chapter focuses on two essential features of such work—job instability and working time uncertainty. Given the centrality of working time to the analysis of on-call work, the chapter provides an outline of the evolution of working time in the employment relationship from its increasing formalisation during industrialisation to contemporary organisation's use of working time in fragmented ways and without the regulations associated with standard working time arrangements. The chapter assesses definitions of zero hours and on-call work by international bodies. As regulation is a central focus in the study of work, the chapter examines the potential for regulating working time by social actors and the state, particularly emphasising the tensions that arise as states try to fulfil multiple and sometimes competing functions. This is followed by a comparative overview of the characteristics of the six Anglo-Saxon countries studied in the book in regards to their production, industrial relations and welfare systems.

Keywords Job stability · Working time · Zero hours · On-call · Social actors · State functions · Anglo-Saxon

1.1 Introduction

This book focuses on zero hours and on-call work, which represents the zenith of labour flexibility for organisations. There are two overarching themes to the book. The first theme concerns the extent to which zero hours and on-call work is a phenomenon similarly experienced across six Anglo-Saxon countries often categorised as having substantial similarities in production, welfare and employment regimes. The second theme concerns the extent to which employment regulation has developed in the six

M. O'Sullivan (✉)
Department of Work & Employment Studies, Kemmy Business School, University of Limerick, Limerick, Ireland
e-mail: michelle.osullivan@ul.ie

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countries, particularly by the state, specifically in response to zero hours work and working time uncertainty. If the state does take regulatory action, the critical issue is the extent to which such responses positively alter the nature of work for workers or merely involve 'tinkering at the edges', resulting in overall little disruption to the state function of maintaining competitiveness through minimum regulation. Of course, the outcomes of state policies are not always predictable as social actors interpret and contest regulations in different ways but state regulations do critically contour the employment relationship, workers' day-to-day experiences and the nature of contestation between social actors. We conceive of regulation as a specific set of rules (Baldwin et al. 2012) but which are not necessarily the result of objective, evidence based, neutral decision-making but are also reflective of a state's balancing of tensions between its functions in a democratic society. Moving to external sources of regulation, initiatives at the international level can influence state responses or can be used by social actors, particularly unions, as a channel through which inadequate state regulation can be challenged. The book examines the potential for hard and soft regulation of zero hours work and working time uncertainty at the EU level and more globally by the ILO. Thus, the book has a comparative institutionalist focus which recognises the importance of different societal contexts and power resources of the major social actors (Grimshaw et al. 2017). Zero hours work and working time uncertainty have become especially topical in light of the growth of platform companies and the book examines the precarious and fragmented activities of workers and how platform companies structure power relations with workers. Finally, moving away from a focus on regulation is a consideration of zero hours and on-call work from an ethical perspective, particularly how such work contradicts the values espoused in the growing number of corporate social responsibility policies.

This chapter provides the setting for the subsequent discussions of zero hours work by focusing on two essential features of such work—job instability and working time uncertainty, meaning a lack of regularity for workers, and control by workers, in the number or scheduling of hours. It reviews the evolution of working time to the current concerns over fragmented working time, operationalised through zero hours type hiring practices. This is followed by a discussion on the defining characteristics of zero hours and on-call work and an examination of the groups of workers in the labour market more likely to be exposed to poor-quality jobs. The chapter then turns towards issues relevant to the second theme on the regulation of work, and in particular, the tensions that can emerge as the state seeks to fulfil its functions of accumulation and legitimation. Given the interest in the book on Anglo-Saxon countries, the chapter then assesses the similarities and differences between the countries in production, welfare and employment regimes.

1.2 Job Stability and Working Time Uncertainty

Work is a dominant and critical aspect of people's lives, contributing to their survival and self-development, as well as being essential to the functioning of economies

and societies (Grint 2005; Marx 1887; Thomas 1999). There are concerns though that work is failing to meet these goals given the proliferation of poor-quality jobs characterised by job insecurity and working time uncertainty. While job insecurity is a perennial reality of work (Thomas 1999), it is argued that it is becoming a more prominent feature of developed labour markets (Kalleberg 2018). An absence of job security is a central feature of jobs described as precarious which are characterised by 'uncertainty, low income, and limited social benefits and statutory entitlements' (Vosko 2010, 2). Standing (2011) links employment insecurity with the wider development of a *precariat* with class characteristics. This precariat consists of people with a dearth of multiple forms of labour-based security, who lack 'a secure work-based identity', have minimal trust in capital or the state and are 'without social contract relationships of the proletariat whereby labour market securities were provided in exchange for subordination and loyalty' (Standing 2011, 8–11). While the identification of a precariat class has been disputed (Alberti et al. 2018), there is significant concern about employment security and an increasing knowledge base on the negative outcomes of insecurity and precarious jobs for workers and societies. Poor-quality and precarious jobs have adverse consequences for the financial and psychological well-being of workers and their life-course decisions as well as worker productivity, economic performance, inequality and state finances (Eurofound 2013; Clark 2015).

Organisational strategies which seek to maximise revenue and minimise costs through, for example, zero hours and on-call work have been enabled, it is argued, by a shift in recent decades from economic models based on state intervention in the labour market and increasing protections for the working class to ones based on competitiveness and labour market flexibility (Standing 2011). The transference of labour market risk onto workers has become a common theme of studies on the 'flexible firm' (Atkinson 1984), the 'fissured workplace' (Weil 2014), 'liquid modernity' (Bauman 2000), and precarious and 'bad' jobs (Warhurst et al. 2012; Kalleberg 2011, 2018). For Bauman (2000, 147–149), labour market flexibility in contemporary societies denotes a 'working life … saturated with uncertainty' in which 'the place of employment feels like a camping site which one visits for just a few days …'. This uncertainty extends to working time. The regulation of working time was a critical element in the evolution of the standard employment relationship, but the increasing diversification and fragmentation of working time have been used by some employers to detach from such rules and increasingly transfer labour market risk onto workers (Campbell 2017). Working time is a key aspect of the frontier of control in the employment relationship.

1.3 Changing Perspectives on Working Time

Industrialisation and the movement of workers into factories established the importance of working time by creating a distinction between work and private life and by employers using working time as tool of worker discipline (Lee and McCann 2006; Thompson 1967). Industrial society and production were built on blocks of

time, fixed workplaces and homes (Standing 2011), and a recognition of the division of time devoted to production and leisure (Lee and McCann 2006). The importance of time in the capitalist system was reflected in Marx's (1887) observation that 'the working day is determinable, but is, per se, indeterminate' and he was pessimistic about workers burden as capitalism 'only lives by sucking living labour, and lives the more, the more labour it sucks'. In this context, the concern was over capitalism's efforts to increase the hours of work and the length of the working day was an early contested part of the employment relationship; a cause which also helped spurn the development of trade unions (Hermann 2014). Statutory regulations were introduced to place limits on the working day following workers collective actions with support from social reformers and progressive employers (Hermann 2014). Sidney Webb predicted the eight-hour day while John Maynard Keynes famously predicted that the age of leisure. These predictions were reflective of a burgeoning view in early twentieth century that a reduction of working hours would accompany economic progress (Gershuny and Fisher 2014). A statutory eight-hour day was a widespread demand of unions in Europe and the US in the late 19th century, but it was not realised in many countries until after the First World War and was written into an ILO convention on working time (Hermann 2014). Time became a central feature of the development of the standard employment relationship (SER) in terms of establishing the pay-effort relationship and ensuring a limit to employers' extent of control (Rubery et al. 2005; Hermann 2014). Standard days and hours of work evolved so that workers would need additional pay for working during non-standard hours (Rubery et al. 2005).

There was a long-term pattern of declining annual working hours in industrialised countries during the twentieth century (Maddison 2001). However, the decline in working hours 'has slowed down considerably in almost all OECD countries and has even come to a halt in some countries' (Constant and Otterbach 2011, 2). Working hours have slowed noticeably since the 1970s in the US, UK and Canada (Boulin et al. 2006). The fall in working time in many countries was due to a reduction in full-time hours and a growth in part-time employment (Boulin et al. 2006). The growth in part-time employment but also of long working hours such as in US and Australia led to a dispersion of working time (Boulin et al. 2006; Anxo and O'Reilly 2000; Campbell 2004).

In the 1980s, Atkinson (1984) argued that as basic working time was declining, organisations sought more effective ways of deploying it. His flexible firm was based on a conception of an emerging employment model that allows firms to attain functional, numerical and financial flexibility in staffing strategies. This resulted in employment practices which involve maintaining a core group of functionally flexible workers with firm-specific skills and on stable, full-time contracts with development opportunities. This group would be protected by the establishment of periphery groups to provide numerical flexibility and sourced from the external market. The first peripheral group could have full-time employment but lower job security and little career opportunities, while the second peripheral group would work under part-time and temporary arrangements, providing maximum flexibility and minimal costs for the firm (Atkinson 1984). A 1996 study estimated that between one-third and one

half of US establishments had adopted some form of core-periphery labour utilisation strategy (Kalleberg 2003). While the model acknowledges the insecurity of the secondary labour force, it has been criticised for presenting the expansion of the secondary sector as inevitable and with placing responsibility on workers to deal with the consequences (Pollert 1988). An important impact of the model has been the widespread usage and normalisation of its terminology (Pollert 1988). The model paid insufficient attention to activities in service firms where non-standard workers can account for the majority of staff (Gamble and Huang 2009; Walsh 1990). In service firms, it may not be the case that only core workers are indispensable as on-demand, part-time and temporary workers are used by service organisations at peak business times (Walsh 1990). Rather than strict dichotomies between core and peripheral workers' terms and conditions, the core can include workers with low security and few development opportunities (Kalleberg 2003).

The core-periphery model illustrated the way in which organisations were changing employment relationships to maximise efficiencies though lacked consideration on time-based flexibility, which has often been subsumed under numerical flexibility (Blyton 1992). Standing (2011, 116) argues that in the global market, 'traditions of time are nuisances, rigidities, barriers to trading and to the totem of the age, competitiveness and contrary to the dictate of flexibility'. Studies increasingly show how firms are using time as a key source of flexibility. Firms are increasingly fragmenting working time through increased monitoring of time, a reduction of inactive periods in jobs and an intensification and 'densification' of working time (Boulin et al. 2006; Walsh 1990). For some firms, labour is 'to a considerable extent dispensable at least for periods of lower than average sales' (Walsh 1990, 519). By fragmenting time, employers minimise or eliminate the costs previously determined by time under the SER, such as overtime and premium payments and other benefits. Temporal flexibility can often be employed in conjunction with numerical flexibility. Zero hours or on-call work allows firms to both increase the available pool number of people to work at any time and in short blocks without the traditional employer obligations associated with an employment relationship such as a commitment to future work. Zero hours work allows firms to realise the full efficiency potential of fragmented working time.

As firms fragment working time so that work can be scheduled at any time in the week, it draws attention to the fact that the regularity, scheduling and control of hours are as important issues of contestation as the number of hours of work. Recent studies point to the impact of these elements of working time on job quality, work-life balance and worker well-being. Research has found that 'fixed and regular working hours, high predictability of working time, the possibility to take time off and/or job autonomy all increase the likelihood of achieving a balanced work-life situation' (Eurofound 2017, 1). High schedule irregularity can lead to higher work–family conflict (EPI 2015). Similarly, individuals who are requested to work at short notice on a frequent basis are more likely to report a poorer work-life balance (Eurofound 2017). The extent to which employers or workers have discretion or control over the number and scheduling of hours is referred to as employer-led flexibility and worker-led flexibility respectively (Wood 2016). Workers' level of control over the number

and scheduling of hours is critical to their health, well-being, work-life balance (Fagan et al. 2012), perceived stress levels (Hall and Savery 1986) and tolerance of work schedules (Barton et al. 1993). Many workers do not have control of working hours. Within the EU, 64% of employees have their working hours set by their employer with no possibility for changes (Eurofound 2017). In the US, over one-fourth of salaried workers and two-fifths of hourly workers report having no control over starting and quitting times (Golden et al. 2011). The flexible scheduling of working time augments organisations' control of workers. For example, managers can use flexible scheduling as a subtle and ambiguous mechanism of control and workers can feel indebted to managers who facilitate their scheduling requests (Wood 2018). Employers can 'flexibly schedule' workers through zero hours or on-call contracts.

1.4 What Is On-call and Zero Hours Work?

On-call and zero hours work appears to be antithetical to the SER. While it has been argued that the SER was not 'the modal type of work arrangement in any society at any time' (Kalleberg 2018, 14), its development in industrial societies in the twentieth century was an important result of increasingly influential organised labour and interventionist welfare regimes. The object of the SER 'is not only today but also tomorrow' with employees providing labour exclusively to one organisation and employers having obligations in regard to working time duration, scheduling and payment rules (Bosch 2006, 44). SERs are characterised by open-ended contracts with full-time working time schedules. The SER is viewed as socially protected and its basic conditions are regulated to a minimum level by collective agreement, employment law or social security, and therefore it 'offers a degree of protection to workers against the power of the employer' (Deakin 2013, 4). The SER has contributed to decommodifying labour, reducing social inequality and enhancing economic efficiency (Bosch 2006). While SERs are not immune to precariousness (Grimshaw et al. 2016), jobs that deviate strongly from the SER have a higher the risk of precariousness and are associated with lower worker job satisfaction and well-being (Broughton et al. 2016; Eurofound 2013). As Kalleberg (2018) notes, precarious work reflects changing employment relations with a shift in power relations from labour to capital and also a loss of social protections associated with the SER.

There are no universally used definitions of on-call work, also labelled zero hours work, casual work, intermittent work and marginal part-time employment. Some countries have definitions in employment legislation of *contracts* labelled as on-call or zero hours while other legislative systems make no reference to them. With its chameleonic tendencies, it has been argued that on-call or zero hours work do not describe one particular type of employment but are 'no more than a convenient shorthand for masking the explosive growth of precarious work for a highly fragmented workforce' (Adams et al. 2015, 4). Nevertheless, precarious work is a wide concept encompassing an array of forms of employment. This book conceives of

zero hours or on-call work as having a particular set of characteristics which distinguish it from other forms of atypical employment and which contrast starkly with the SER in terms of obligations of employers to workers and in terms of the lived experience of workers. Definitions of on-call/zero hours work from international bodies show some differences but also essential features (Table 1.1). Recent ILO (2016) and OECD (2016) definitions similarly refer to the absence of obligation on employers to provide any number of hours of work while the latter also notes a corresponding absence of obligation on workers to work. An earlier ILO (2004) definition and Eurofound (2015) treat zero hours contracts as a sub-category of on-call work. They define on-call work in terms of employers providing individuals with work as and when they need them, but this might take the form of low hours or 'min-max' contracts with a stipulated minimum and maximum number of hours whereas zero hours contracts have no guaranteed hours. These definitions of zero hours contracts align with academic definitions, such as Deakin and Morris's (2012, 167), that they are cases 'where the employer unequivocally refuses to commit itself in advance to make any given quantum of work available'. While Eurofound states that on-call work involves a continuous relationship between employers and employees, the ILO (2004) definition specifies that on-call workers are casual, which usually infers to an intermittent relationship. There is no suggestion of continuity of employment in relation to zero hours contracts. The definitions listed below tend to focus on the number of working hours and do not explicitly, though it is implied, focus on other important issues such as the scheduling, predictability and control of hours. These issues are crucial to workers' everyday experiences and, for them, may be key benchmarks by which they consider a job to be 'good' or 'bad'. Finally, definitions vary by terminology in referring to individuals or workers or employees or they use no term to describe labour. Such terminology has become central in legal disputes between workers and organisations in establishing employment rights as they are afforded in many countries to an established category of 'employee' and not necessarily to other categories such as 'workers'.

In summary, zero hours or on-call work refers to forms of employment where an employer either guarantees no hours or few hours of work, and all or much of working hours are offered at an employer's discretion. Thus,

(i) workers only work when specifically requested by employers
(ii) workers may over a particular time period work no hours, few hours or full-time hours
(iii) workers have a lack of guaranteed specific predictable hours over the day and week
(iv) workers can have little control over the number and scheduling of hours
(v) workers have insecurity of earnings.

On-call and zero hours work then are forms of employment which intersect two key issues of contestation in the employment relationship—job security and working time structures. Given the varying terminology and employment arrangements which describe on-call work across countries, the individual country studies in the book

Table 1.1 Definitions of zero hours and on-call work

Organisation	Definition
ILO (2016)	Very short hours or no predictable fixed hours, and the employer, thus, has no obligation to provide a specific number of hours of work
ILO (2004)	On-call work—Casual workers are individuals who are called into work only as and when they are needed. The activity of these workers is, therefore, closely dependent on the level of, and fluctuation in, the workload, and they can work for only a few days or for as long as several weeks in a row. The employment contracts of casual workers can stipulate their minimum and maximum hours of work and indicate the notice period that has to be respected for requiring that they work. In contrast, under 'zero hours' contracts, workers are not entitled to any minimum number of hours of work
Eurofound (2015)	On-call work involves a continuous employment relationship maintained between an employer and an employee, but the employer does not continuously provide work for the employee. Rather, the employer has the option of calling the employee in as and when needed. There are employment contracts that indicate the minimum and maximum number of working hours, as well as so-called 'zero hours contract' that specify no minimum number of working hours, and the employer is not obliged to ever call in the worker
OECD (2016)	Zero hours contract—under which the employer has no obligation to provide a minimum number of hours and the worker has no obligation to work a minimum number of hours

provide a picture of the extent to which zero hours and related forms of work are a phenomenon and review the evidence on the prevalence of such work.

1.5 Vulnerable Workers and Employer-Led Flexibility

Non-standard work generally is more likely to be a result of employer-led requirements than a deliberate choice on the part of employees (Fagan et al. 2012). Walsh (1990) found that service sector employers justified less favourable treatment of workers by the fact that part-time hours were less available in other industries and therefore employers considered such work as attractive. Working time configurations differ depending on the type of employment arrangement and occupational level. Non-standard employment is associated with variable and unpredictable hours (Wood 2016; Henly et al. 2006). Managerial and professional employees are more likely to have control of hours (Fagan et al. 2012) whereas low-level occupations are more likely to work under employer-led arrangements and less likely to have access to worker-led flexible arrangements (Lambert and Waxman 2005; Henly et al. 2006; Blyton 1992).

Thus, there are particular segments of the workforce which are more likely to be subjected to employer-led flexibility. Labour market segmentation (LMS) theory

has long pointed to the differential treatment of groups of workers by capitalists. Under LMS, the primary sector consists of workers with firm-specific skills who are incentivised by employers to reduce mobility through stable employment, high-pay and development opportunities, while the secondary sector consists of people with general skills whose stability is not required by employers and so they have low pay and few development opportunities (Doeringer and Piore 1971). Activities within each sector serve to reinforce their continuation, such as through capitalism's ability to increase labour supply by absorbing women and migrants into the labour market (Rubery 1978). Women and migrants constituted 'vulnerable' workers who lacked power resources and employers responded to, and exploited, their vulnerability by offering poor pay and conditions (Rubery 1978). Secondary sector jobs offered significant benefits to employers through a cheap, flexible workforce often with 'sufficient quality of output' (Walsh 1990). Segmentation and flexibility studies have been criticised for neglecting the 'importance of conventional attitudes to sex, status and hours of work in the division of labour an in payment structures' (Walsh 1990, 526). In this regard, Walsh's (1990, 527) study showed that organisations' employment decisions regarding non-standard workers were not the outcome of objective differences in skill or job content, but were based on 'pervasive assumptions about relative income needs, convenience and commitment, and their opportunities for employment elsewhere'. Capitalists helped shape inequalities and low wages such as through 'under-investment in productive structures leading to low-wage, low-skill vicious cycles' (Grimshaw et al. 2017, 3; Rubery 1978). Such employer strategies can be facilitated by poor regulation and can help reinforce regulatory gaps as vulnerable groups can lack labour market power to influence the regulation of work.

1.6 Social Actors and the Regulation of Work

The regulation of employment is a central theme of work and employment (Dunlop 1958; MacKenzie and Martinez Lucio 2014) for important reasons. Employment protections over issues such as working time can help reduce workers' exposure to precarious work (Grimshaw et al. 2016). There is a significant and necessary role for worker agency to seek enhanced rights when protections are absent or to enforce existing protections. However, a domino effect can follow from organisations' segmentation of workers so that they have fewer mechanisms by which they can influence the employment relationship. Organisations' use of flexible scheduling and insecure employment can impede the development of worker solidarity and consequently workers' associational power, undermining workers' resistance to poor conditions (Doellgast et al. 2018; Grimshaw et al. 2017). Workers may also have a scarcity of structural power because they lack of key skills and centrality of location in the production process (Doellgast et al. 2018). With limited bargaining power, workers may have little freedom to make genuine choices over jobs and working hours and may be 'susceptible to being compelled to forgo their employment rights' (Lee and McCann 2006, 86). Of course employment regulations in secondary markets

can vary significantly across countries. In coordinated market economies, unions can use their strength and collective bargaining extension mechanisms to secure improvements for workers with less bargaining power (Grimshaw et al. 2016). In Anglo-Saxon countries, where such mechanisms are much less available, unions may have to place more efforts in organising or alternative strategies for representing precarious workers (Nissen 2004; Campbell 2010; Doellgast et al. 2018). While there are examples of success, and the impact can be difficult to measure, it has been argued that the 'transformative value of organising … has resulted in a quite limited set of outcomes' (Martinez Lucio et al. 2017, 38). The comparative weaknesses of unions in Anglo-Saxon countries, and the shift in power dynamics increasingly in favour of employers (Dundon et al. 2017; Doellgast et al. 2018), means fewer checks on management control of the employment relationship (Marchington and Dundon 2017). This leaves workers further exposed to a range of 'protective gaps' in relation to employment protection, social protection, representation and enforcement of rights (Grimshaw et al. 2016).

However employment regulation is shaped by 'a multiplicity of regulatory sites, spaces and actors' (MacKenzie and Martinez Lucio 2005) and the power of capital and labour is mediated by the state. Studies on work and employment in English-speaking countries have been criticised for a lack of attention on the role of the state, though there has been some renewed attentiveness in recent years (Martinez Lucio and MacKenzie 2017; O'Sullivan et al. 2017). The state intervenes in the labour market to varying degrees through employment law, support for collective bargaining, welfare systems and as an employer itself (Kauppinen 1997; Meardi et al. 2016). State policies in market societies are faced with dilemmas about how to devise mechanisms and processes to ensure the needs of labour and capital are to a degree mutually compatible (Offe 1984). A democratic state in a capitalist market society has two functions: accumulation, with the goal of encouraging economic performance and competitiveness, and legitimation, which involves 'maintaining popular consent by pursuing social equity and fostering citizenship and voice at work' (Hyman 2008, 262). Tensions can arise between the state imperative for accumulation and the need for legitimacy (Hyman 2008). In the labour market, accumulation is perceived from a liberal market perspective to be facilitated by the absence of regulations that inhibit the flexible use of labour (Hyman 2008). Legitimation by contrast is enhanced by the presence in the labour market of 'market-correcting interventions' that protect workers (Hyman 2008, 262). An objective of the state is to provide for an 'orderly operation of the employment relationship' (Treuren 2000: 81). In doing so, some argue that the state secures the legitimacy of the capitalist system or provides 'the de-commodification of labour necessary to maintain economic and political efficiency' (Treuren 2000, 82). State policies in the labour market can lead to contradictions whereby the preconditions for market efficiency are threatened by policies that constrain flexibility, productivity and profitability (Offe 1984).

State actions and industrial relations' institutions have significant effects on employment. Research has found that 'less inclusive welfare state protections, weak labour market protections, and low bargaining coverage and coordination are associated with high or expanding precarity' (Doellgast et al. 2018, 18). There is increasing

pressure on states to support greater labour market flexibility (Howell 2015; Kalleberg 2018). Kalleberg (2018, 41) asserts that countries with different production, industrial relations and welfare state systems have 'liberalised their social protection and labour market institutions in response to economic, social and political pressures for greater flexibility'. There is evidence in the EU that different institutional regimes have reduced employment protections, social protections and government spending 'in part as a response to the heightened pressure for supply-side reform created by a tightening of fiscal discipline in the EU and the further subordination of social policy to economic policy' (Hastings and Heyes 2018, 474). Some argue there has been a 'resurgence of market fundamentalism' in some countries, whereby the market is considered the most appropriate sphere for resolving preferences and requirements for working time (Lee and McCann 2006). This is grounded in the neoclassical economic view that individuals maximise utility subject to a budget constraint and that under perfectly competitive markets, workers actual and preferred hours worked should be the same (Constant and Otterbach 2011). Employment law is an area of state responsibility which has been under significant pressure. While many countries increased employment laws through the twentieth century, such laws have been criticised for protecting insiders at the expense of outsiders based on economic theories that view regulation as leading to barriers in the labour market (Deakin 2013; Vosko 2010). This is evidenced by European Commission arguments that labour market segmentation could be addressed by reducing protections of permanent contracts and increasing protections for people on the margins of the jobs market, labelled a 'flexibility at the margin' approach (De Stefano 2014). A significant problem for workers in countries with less embedded participatory rights is that 'the state can withdraw support for collective bargaining' and 'protective labour market institutions can be easily dismantled' (Grimshaw et al. 2017).

The pressures on, and by, states to deregulate employment protections and welfare regimes result not only in formal policy changes but can also has consequences for how nation states influence the way in which workers think about work and internalise governed behaviours. It has been argued that nation states engage in strategies and discourses which seek to reinforce the view that 'actors can only optimise their capital by embracing free market (enterprise) values of flexibility, risk, creativity, and independence' (Vallas and King 2012, 182). Such a discourse supports the pursuit of neoliberal economic and political goals of privatisation, the liberalisation of markets and more competition (Barnett 2005). In this line of argument drawn from the work of Foucault, states advance 'a rhetoric that celebrates the sovereignty of the enterprising worker' and workers then 'reproduce subjectivities that take the role of the employer and of the market generally towards themselves' (Vallas and King 2012, 186). Such discursive practices are visible in relation to zero hours and on-call work. Some politicians present on-call or zero hours work as a mutual gains solution for all stakeholders in fast-moving, consumer-oriented economies. As Rubery et al. (2016, 235) note 'even zero hours contracts have been categorised by some politicians as a work-life balance policy'. For workers, this means that neoliberal subjectivities become normalised and discourses projecting the freedom and power of the enterprising individual inhibit 'the capacity of workers to resist their subordi-

nation at work' (Vallas and King 2012, 184). The normalisation of neoliberal subjectivities suggests a negative outlook for the resistance of insecure and low-wage work in Anglo-Saxon countries. However this pessimism should be counterbalanced by the fact that state actions and policies can be uncertain and contingent on the political orientation of the government in power, conflicts within political parties, the influence of interest groups and societal actors as well as the influence of supranational bodies (Hyman 2008; Bosch and Weinkopf 2017; Offe 1984). In addition, policies in different spheres of state responsibility such as welfare and employment can have complex and sometimes unintended interactions with each other. These factors mean that the outcomes of state policies can be uncertain and there is no guarantee that Anglo-Saxon countries will always pursue labour market policies which foster accumulation over legitimation (Hall and Soskice 2001). Even where states pursue accumulation through, what some term deregulation, and others refer to as 'a transfer of regulation to another site' (MacKenzie and Martinez Lucio 2005, 501), this can create new risks leading to greater demands for state social support (Rubery 2011).

1.7 Anglo-Saxon Countries in Context

While comparative frameworks are inevitably subject to weaknesses, and have different starting points, they point to cohesion between Anglo-Saxon countries but also differentiation. The varieties of capitalism (VoC) framework identifies various production regimes and is underpinned by a view that 'sector-specific competitive advantages of companies and countries heavily depend on country-specific institutional conditions' (Schneider and Paunescu 2012, 731). The focus of production regime theories like VoC is the role of employers in shaping institutional structures, especially in regard to systems of skill formation (Gallie 2007). Under Hall and Soskice's (2001, 19) VoC framework, the USA, Canada, Ireland, UK, Australia and New Zealand are classified as liberal market economies (LMEs) which 'rely on markets to coordinate endeavours in both financial and industrial relations systems'. LMEs are viewed as having 'high levels of precarity due to employer's reliance on flexible labour markets, short-term capital investment and market-based skill provision' (Doellgast et al. 2018, 3). LMEs contrast with coordinated market economies (CMEs) which have high levels of non-market coordination in financial and industrial relations systems (Hall and Soskice 2001). It has been argued that LMEs have a similar 'institutional bias towards market-driven solutions to investment, growth and pay determination' (Hardiman et al. 2008, 602) in contrast to CMEs, where the state seeks to protect the production system's non-market coordinating institutions (Schmidt 2007). A test of the VoC framework found that the USA, UK and Canada could be categorised as exemplar LMEs while Ireland, New Zealand and Australia were 'LME-like' countries (Schneider and Paunescu 2012). The latter group 'are not as extreme in their values but show the same profile as pure LMEs; they are not fully coherent configurations' (Schneider and Paunescu 2012: 739).

While the VoC framework centred on production regimes, others have paid more attention to the power of social actors. Visser's (2009, 48) model of industrial relations arrangements in the EU focused on the role of unions and employer organisations and the relationships between them and the state. His framework categorised the UK, and for the most part Ireland, in a liberal pluralist 'west' cluster in which state involvement in industrial relations is low and the social partners' involvement in public policy is limited (Visser 2009). This has similarities with Gallie's (2007) framework of employment regimes which identified the UK as a typical market regime in which unions are excluded from decision-making and there is minimal employment regulation. While trade union density is lower in Anglo-Saxon countries in comparison to northern and continental European countries, there is variation within the Anglo-Saxon group. Ireland, the UK and Canada have density rates of over 20% with the remaining countries under 20%; the US being the lowest at just above 10% (OCED statbank). Union density though has been in decline in all Anglo-Saxon countries, particularly in Ireland, New Zealand and Australia since the 1980s (OECD 2016). All the countries have a significant proportion of their union density accounted for by public sector workers, especially Canada, New Zealand and UK (OECD 2016). Only Australia is above the OECD average for the proportion of union density accounted by private sector workers (OECD 2016). Unsurprisingly, the Anglo-Saxon countries have comparatively low collective bargaining coverage (Schneider and Paunescu 2012) and there have been steep decreases in coverage in Australia, New Zealand and the UK since the 1980s, with some recovery in Australia since 2009 (OECD 2016). The bargaining level is inextricably linked to bargaining coverage since coverage 'is high and stable only in countries where multiemployer agreements (mainly sectoral or national) are negotiated' (OECD 2016, 137). In Anglo-Saxon countries, decentralised bargaining prevails and private sector collective agreements are predominantly undertaken at the firm level, especially in the USA, Australia and New Zealand while there is greater evidence of agreements at higher levels in the UK and Ireland (OECD 2016). Data on employer organisation density is patchy but available figures suggest density is lower in Anglo-Saxon countries than CMEs (OECD 2016).

In addition to comparatively weak collective bargaining structures, it has been suggested, there is little substantive distinction between the SER and some non-standard forms of employment in Anglo-Saxcon countries (Bosch 2006; King and Rueda 2008). There are some differences though in the sources of employment regulation across the countries. Individual labour markets can be influenced by external regulation through for example ILO conventions and international framework agreements, but only Ireland and the UK have substantial supranational sources of regulation through their membership of the EU. Their labour markets have been shaped both positively and negatively in terms of the de-commodification of labour, by EU employment law directives, decisions of the European Court of Justice (ECJ), as well as by EU social, fiscal and monetary policies. EU directives and ECJ decisions on equality, fixed-term work, part-time work, agency work and working time, have legitimised non-standard forms of employment and offered some protections to such workers. In terms of working time, EU law stipulates rules on a maximum

weekly number of hours (though the UK opted out of such regulation) as well on rest breaks and annual leave. Importantly though, the EU working time directive does not provide that workers are entitled to a minimum number of working hours or contain rules on the predictability of hours. In the context of the UK leaving the EU, the Government has made no guarantees that EU working time regulations will be retained after Brexit (Dobbins 2017).

Comparative typologies have identified the role of social actors and institutional arrangements in regulating working time (Eurofound 2017; Berg et al. 2004). Eurofound (2016) identifies four regimes in its typology

1. pure mandated regimes where legislation is dominant in regulating working time and collective bargaining is rare;
2. adjusted mandated regimes where legislation is dominant but adjusted through collective bargaining;
3. negotiated regimes where collective bargaining at sectoral level and company level is dominant;
4. unilateral regimes where working time is unilaterally determined by employers (Eurofound 2016).

The UK is categorised as having a unilateral regime and Ireland as having an adjusted mandated regime (Eurofound 2017). Berg et al. (2004, 347) had previously identified the US as a unilateral regime where workers have 'a relatively low level of control, limited flexibility in working time, and an uneven distribution of control over working time across occupations'. Thus Anglo-Saxon working time regimes are reflective of the weaker role of unions in regulation and this is associated with weaker compliance with working time standards (Eurofound 2017; Berg et al. 2004).

Frameworks such as those above that have focused on production regimes or industrial regimes have been criticised for paying insufficient attention to the role of the state and politics, despite their importance to the well-being of workers and interaction with production and employment relations systems. Alternatively, studies on welfare state regimes provide significant insight by focusing on the role of the state in de-commodifying or insulating workers from the pressures of the labour market (O'Connor 1993). Esping-Anderson's (1990) seminal study of ideal types of welfare state identified liberal, conservative and social democratic welfare regimes. Under a liberal regime, 'the de-commodification potential of state benefits is assumed to be low and social stratification high' (Ferragina and Seeleib-Kaiser 2011: 584). Liberal welfare state regimes are based on the notion of market dominance and private provision and therefore have comparatively weak social protection systems, means-tested welfare programmes (Ferragina and Seeleib-Kaiser 2011; O'Connor 1993) and little integration of the social protection and production systems (Rhodes 2005). While the USA is the archetypal liberal state regime, the UK, Canada and Australia have medium to high internal consistency with the liberal regime, and Ireland and New Zealand have medium internal consistency with the liberal regime (Ferragina and Seeleib-Kaiser 2011).

Only a brief overview of Anglo-Saxon countries can be provided here but the general picture is that they are characterised by production systems reliant on flexible

labour markets, comparatively low unionisation and collective bargaining coverage levels, and a greater orientation towards a liberal welfare regimes. However, there are still important differences between the countries in regards to unionisation levels, the extent to which legislation and collective bargaining influences working time regulation and conformity with a 'pure' liberal welfare state regime. This suggests that even with similar production systems, there is room for differences in the nature of responses by social actors and the state on emerging labour market issues. These are important issues given that countries are experiencing similar forces such as increasingly competitive product and labour markets and, in regards to employment, greater diversification by organisations in how they organise labour and working time.

1.8 Structure of the Book

The next section of the book includes country studies of zero hours and on-call work in the UK (Abi Adams, Zoe Adams and Jeremias Prassl), the USA (Peter Fugiel and Susan Lambert), Canada (Gordon Cooke, Firat Sayin, James Chowhan, Sara Mann, and Isik Zeytinoglu), Australia (Iain Campbell, Fiona Macdonald, and Sara Charlesworth), New Zealand (Iain Campbell) and Ireland (Caroline Murphy, Jonathan Lavelle, Thomas Turner, Lorraine Ryan, Juliet McMahon, Michelle O'Sullivan, Mike O'Brien and Patrick Gunnigle). The chapters examine the extent to which zero hours and on-call work are recognised legally and statistically as a form of employment, the prevalence of such work, the exposure of zero hours and on-call workers to gaps in employment protection, and the nature of regulatory responses to such work. The chapters paint a picture of zero hours type work recognising the complexities and differentiation of terminology in national legal systems and in discourse. In some countries such as Ireland, the UK and New Zealand, zero hours work have become recognisable terms in public and policy discourse. While the terms are less familiar in Australia, the USA and Canada, working time uncertainty is a feature of their labour markets. The chapters sketch the extent to which zero hours type work can be described a mutually beneficial employment arrangement, or is an employment arrangement which intensifies inequalities in workplace power relations and maximises employers' capacity to control the labour process. In regards to the role of the state in the labour market, the classification of Anglo-Saxon countries as liberal economies with flexible labour markets suggests that the state prioritises the function of accumulation over legitimation. However, as noted, there can be limits to states pursuing an accumulation agenda and state policy is influenced by a range of factors including the influence of other social actors. It is not inevitable that Anglo-Saxon states will respond to public policy problems in the same way, and in a way which always prioritises accumulation. The chapters discuss the extent to which states impact zero hours type work through labour law and social protection systems as well as the nature of regulatory responses to such work at national and sub-national levels. The actions of individual states may be influenced by external regulation and two chapters consider the regulation, and potential regulation, of zero

hours work by supranational institutions. Agnieszka Piasna examines current proposals for regulation of unpredictable work at the EU level and Keith Ewing reviews the relevance of ILO conventions and recommendations to zero hours work.

The final two chapters examine two contemporary issues regarding zero hours and on-call work. Zero hours or on-call work is synonymous with the platform economy which has attracted much media interest particularly when 'gig' workers have resisted organisational practices antithetical to their interests. In this context, Debra Howcroft, Tony Dundon and Cristina Inversi examine insecure and fragmented work through the rise of the platform economy highlighting that the positive narratives about opportunities for workers ignore and disguise the precariousness of platform work and they note that the platform is a contested employment space. A further chapter raises questions about the significance and salience of zero hours and on-call work from an ethical perspective. Lorraine Ryan, Juliet McMahon and Thomas Turner argue that the prevalence of zero hours work reveals the tensions between the profit imperative of market economies and the states' obligation to citizens in affording them decent work. They consider whether the normalisation of zero hours type work undermines workers as citizens and legitimises the creation of denizens.

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Chapter 2
Zero Hours Work in Ireland

Caroline Murphy, Jonathan Lavelle, Thomas Turner, Lorraine Ryan, Juliet McMahon, Michelle O'Sullivan, Mike O'Brien and Patrick Gunnigle

Abstract This chapter describes the emergence, prevalence and growth of zero hours work in Ireland, providing a profile of workers and sectors most affected by this type of work. We outline gaps in the legislative and regulatory context that have provided for the emergence of a particular form of on-call work in Ireland. The chapter concludes with a discussion of the responses to zero hours type work both at the sectoral and national level.

Keywords Zero hours · If and when · Variable hours · Well-being · Trade unions · Regulation

2.1 Introduction

According to the International Labour Organisation (ILO) (2016), non-standard employment is now a contemporary feature of labour markets globally. Ireland is no exception in this regard. Common forms of non-standard employment include temporary employment (fixed-term contracts, seasonal/casual work, part-time), multi-party employment relationships (temporary agency work, subcontracted labour) and dependent self-employment. In keeping with the theme of this book, this chapter explores one of the more pernicious forms of precarious work, the prevalence of zero hours/on-call work in Ireland. First, we provide the context for the investigation and profiling of zero hours work in Ireland—focusing in particular on the economic, social and regulatory context. The second section identifies the nature and types of zero hours working arrangements in the Irish context. The third section presents the changing patterns of work in Ireland. In doing so it provides a profile of working time patterns and zero hours work in Ireland. The fourth section focuses on the drivers

C. Murphy (✉) · J. Lavelle · T. Turner · L. Ryan · J. McMahon · M. O'Sullivan · M. O'Brien · P. Gunnigle
Department of Work & Employment Studies, Kemmy Business School, University of Limerick, Limerick, Ireland
e-mail: caroline.murphy@ul.ie

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of zero hours work in Ireland. The fifth section focuses on the impact of zero hours work on people including issues such as well-being, financial considerations and voice in the workplace. The final section focuses on the response to the growth of zero hours work—both at the sectoral level (retail, hospitality, education and health) and at the national policy level. A crucial element at the sectoral level is the regulatory environment, particularly relating to the presence or the absence of collective bargaining and tripartite agreements which impact on the existence/prevalence of zero hours work. The policy responses that have emerged to restrict and regulate the use of zero hours type work at the national level are also outlined.

2.2 The Irish Context

Under Hall and Soskice's (2001, 19) VoC framework, Ireland is classified as a liberal market economy (LME), a feature of which is reliance 'on markets to coordinate endeavours in both financial and industrial relations systems'. However, Schneider and Paunescu (2012) point to features which divide LMEs between exemplars, e.g. the UK and those who are LME like, of which Ireland is included. One key way in which Ireland contrasts to other LME countries was through the system of national social partnership between trade unions, employers and government which operated in Ireland between 1987 and 2008. The partnership period is associated as having delivered beneficial outcomes for all social partners in terms of real wages, profits, decreasing unemployment and a substantial increase in employment (D'Art and Turner 2003). However, in spite of the seemingly political power that this arrangement afforded Irish unions, density levels during this period continued to decline at a pace similar to that of other Anglo-Saxon countries. Roche and Teague (2014) further noted that the system failed to disseminate partnership downwards from the national to enterprise level.

In the public sector, density has remained relatively strong at between 67 and 70% in the period 2004–2011, but it declined to 63% in 2014 (Walsh 2015). CSO data estimate union density in education and health and social work to be 70 and 61%, respectively. In contrast, private sector density decline has been more rapid, from a rate of 27% in 2004 to 16% in 2014 (Walsh 2015). While contextual factors may have been conducive to growth, unions instead experienced a period of sharp density decline; the difficulties unions faced in securing recognition from increasingly recalcitrant employers are put forward as a primary reason for this (D'Art and Turner 2006).

Ireland has been noted as 'one of the countries most severely affected by the Great Recession with national income falling by more than 10% between 2007 and 2012' (Callan et al. 2014, 1). Unemployment climbed to a peak of nearly 15%, and emigration rose sharply. The social partnership system was viewed as one of the first casualties of the financial crisis. Regan (2012) points out that 'the policy constraints of EMU and the narrow focus on public sector austerity, in the context of an unprecedented fiscal crisis, have undermined the capacity of the actors to engage in a

strategy of social partnership' in 2009 summoning a return to decentralised collective bargaining in the private sector. From 2009 to about 2011, decentralised firm-level collective bargaining in the private and commercially owned state sectors was dominated by concession bargaining, loosely framed by a 'protocol', agreed by the main employers' confederation, the Irish Business and Employers' Confederation (IBEC) and the Irish Congress of Trade Unions (ICTU), that prioritised job retention, competitiveness and orderly dispute resolution (Roche and Gormley 2017). Meanwhile, public sector reform was introduced through the Financial Emergency Measures in the Public Interest (FEMPI) Bill 2009 where the aim was to achieve stabilisation of public finances, by way of an adjustment of over €1 billion in the public service pay and pensions bill in 2010. Indeed, it has been argued that the demise of social partnership has negatively affected social partners influence regarding negotiation and consultation over legislative issues dealing with working time (Eurofound 2016). In 2012, the Government undertook a review of the Registered Employment Agreements (REAs) and Employment Regulation Orders (EROs) following a constitutional challenge to the role of Joint Labour Committees (JLCs) which determine minimum rates of pay and conditions of work for workers in certain sectors (Eurofound 2013).

2.2.1 The Regulatory Context

In Ireland, the working time regime is best characterised as 'Adjusted Mandate' according to Eurofound's (2016) typology. This means that working time is primarily regulated by legislation, more specifically the Organisation of Working Time Act 1997. However, some adjustments can also take place through collective agreements at company level or by negotiations at individual level, one such example being in the hotel and retail sectors where there is evidence of collectively bargained agreements on short-time working (Eurofound 2016). The statutory maximum working hours per week is 48 h while the collectively agreed weekly normal working hours is on average 39 h. Average weekly usual working time in Ireland also shows an increase since 2010, from the minimum in the period considered of 38.3 h in 2009 up to 39 h in 2014 (Eurofound 2016). The supranational sources of regulation in place through Ireland's membership of the EU have facilitated employment laws transposing EU Directives and ECJ decisions on equality, fixed-term work, part-time work, agency work and working time, which has both legitimised non-standard forms of employment and offered some protections to workers. In terms of working time, EU law stipulates rules on a maximum weekly number of hours as well as on rest breaks and annual leave leaving the issue of minimum working hours largely unregulated.

Legislation is often introduced in Ireland on foot of EU Directives for the purpose of extending employment rights. However, a number of unintended consequences can arise from the operation of the legislation. One such example relates to Section 18 of the Organisation of Working Time Act 1997 which provides for some payment to a zero hours employee for hours not worked. As such, there is no advantage to an employer offering a zero hours contract if they do not know what hours they need

employees for. If an individual is not contractually required to be available for work, i.e. If and When, then they are not covered by Section 18 and are not entitled to receive pay for hours not worked. It is more economically advantageous for an employer to have a panel of people on If and When contracts, who can be called upon when work is available and they are only paid for hours worked. Unintended consequences also appear to have emerged as a result of the introduction of the Protection of Employees (Fixed-Term Work) Act 2003. This Act has led to employers in some sectors being more cautious in their recruitment decisions and, therefore, factors contributing to more temporary positions and indeed If and When working in some sectors.

Under the Terms of Employment Information Act 1994–2012, employees with at least one month's continuous service are entitled to a written statement of terms and conditions within two months of commencing employment. Employer organisations noted that they encourage members to provide a written statement to individuals working If and When hours, and many employer organisations provide template documents for members. Most interviewees believed people on If and When hours do receive a statement of terms and conditions with some exceptions. SIPTU noted that some community care workers do not have contracts; the MRCI stated that migrant workers in some sectors like domestic care do not receive contracts; and ISME stated that there can be difficulties with small firms providing contracts. Workplace Relations Commission Inspection Officer [formerly the National Employment Rights Authority (NERA)] inspects workplaces in all sectors of the economy and while it does not have inspection powers specifically targeted at If and When hours, it stated that poor record keeping on working hours can be an area where issues arise during its inspections. It cited hospitality, retail and construction as 'high-risk areas' in regard to breaches on record keeping but noted that most employers rectify issues when highlighted to them. Interviewees reported that some organisations manage people on If and When contracts as part-time employees with pro-rata entitlements as provided to regular full-time employees, including premium pay, while other organisations provide few entitlements outside of the national minimum wage, annual leave and rest breaks. The WRC noted that while annual leave should be based on hours worked, the calculation of holiday entitlements can be 'problematic' for people working variable hours. For benefits above legal minima, such as sick pay and pensions, many organisations have service requirements for eligibility, and the calculations of continuous service can also be problematic for people working on If and When contracts.

Exclusivity clauses are provisions in employment contracts which stipulate that an employee is contractually prohibited from working for a second employer. Exclusivity clauses are not a feature of employment contracts in Ireland. Indeed, it is arguable that there would be a constitutionality issue if such clauses were used on the basis that the Irish Constitution, Bunreacht na hEireann, (Constitution of Ireland), 1937, provides for a right to work and earn a living and exclusivity clauses could be construed as a denial of that right. However, many of the worker representative bodies note that due to unpredictable work schedules that workers experience, this in effect has the same impact as exclusivity clauses—workers cannot take on a secondary job

as they do not know when they may be available to take on that work in the second job.

A view expressed by Mandate, SIPTU, the National Youth Council of Ireland (NYCI) and INOU was that a cut in employers' PRSI contribution rates between 2011 and 2013 had a detrimental impact on the number of working hours offered to employees. From their perspective, the cut, which applied to the contribution rate for jobs with earnings of less than €352 gross per week, incentivised some organisations to reduce their costs by engaging in 'job splitting' whereby one job was split into two jobs. ISME stated that it does not support the practice of job splitting. In contrast, Chambers Ireland noted that splitting employment between two people could be beneficial where two employees have a preference for part-time hours.

2.2.2 Welfare Context

Trade unions, NGOs and the WRC noted that the number and scheduling of hours is a significant concern for people accessing welfare entitlements. The Family Income Supplement (FIS) is a weekly tax-free payment to families at work on low pay. To qualify, an employee must be in a paid job expected to last at least 3 months, work at least 19 h work per week (or 38 per fortnight), have at least one child and earn under particular income thresholds. To qualify for the Jobseeker's Scheme, a person must be unemployed for 4 days in a 7-day period and must be available for and genuinely seeking work. Statutory Instrument 142/07 sets out the criteria for establishing if a person is available for work. It states that a person shall not be regarded as being available for employment if they impose unreasonable restrictions on the nature of the employment, the hours of work, the rate of remuneration, the duration of the employment, the location of the employment or other conditions of employment he or she is prepared to accept. Employer organisations and trade unions cited instances of organisations facilitating employee requests to schedule hours over certain days while trade unions and NGOs argued that some organisations use employees' dependency on social welfare as a lever of control. Trade unions, NGOs and some employer organisations believed that the day-based system used to assess eligibility to the Jobseeker's Scheme should be replaced with an hour-based system because, at present, less than an hour's work is counted as a day, this being particularly problematic for someone who may have only a small number of hours per day and no guarantee of work. Trade unions and NGOs also stated that people can feel pressured by the social protection system to accept work which they believe is insecure with non-guaranteed hours or low hours. The Department of Social Protection noted that someone cannot refuse an offer of employment 'without just cause', but it must be 'reasonable employment' and a case officer will assess these criteria on a case-by-case basis, offers of 'if and when' work create an ambiguity in this regard for workers who may forego entitlements in order to take up that work.

Some employer organisations argued that providing If and When hours and low hours saves the State money because organisations are employing people that would

otherwise be fully unemployed and require larger social welfare support. Alternatively, trade unions and NGOs maintained that the State is subsidising employment through the FIS and the Jobseeker's Scheme and 'compensating for the increasing erosion of pay and hours' (NWCI). They argued that the social protection system should challenge companies which have large numbers of employees that rely on social welfare. The NWCI and NYCI recommended the State use levers at its disposal to penalise such organisations.

2.3 Defining Zero Hours Work in Ireland

Zero hours work, sometimes also referred to as hourly paid or on-call work, typifies work where there are no guaranteed hours offered by the employer (O'Sullivan et al. 2017). There are three possible types of contracts, which involve non-guaranteed hours in Ireland. A zero hours contract involves no guarantee of any number of hours work for the worker, however the worker is required to be available for work for the period of time which the contract covers. As noted above, this type of contract is regulated in working time legislation, the Organisation of Working Time Act 1997. Under this type of arrangement, workers are entitled to some level of compensation where they do not receive any work. Section 18 of the Act provides for a minimum payment (25% of contracted hours or 15 h) where their employer does not require these employees in a week. This provision for minimum payment can potentially increase employer costs in scenarios where no work may be provided to employees. Not surprisingly it appears that standard zero hours contracts within the meaning of the Organisation of Working Time Act 1997 are not extensively used in Ireland (O'Sullivan et al. 2015).

The second type of contractual arrangement referred to as 'If and When' contracts were found to be more common (O'Sullivan et al. 2015). 'If and When' contracts also involve non-guaranteed hours, but workers are not required to be available for work. Hence, these types of contracts are not regulated under the working time legislation and workers have no entitlement to compensation if work is not provided. A person employed on an If and When basis will be offered work if and when the employer requires them. The employer is under no obligation to offer work to an individual at any time, and the worker is under no obligation to accept the work. Such contracts usually stipulate the rate of pay that will apply when the individual does accept and perform the work but do not guarantee any set number of hours. Effectively, this means that hours can fluctuate and an individual may be called upon for no hours or a number of hours in a given week. The available work can vary from day-to-day, week-to-week and month-to-month. The period between assignments can also vary. It has been established that people on If and When contracts are not normally entitled to the compensation under Section 18 of the Organisation of Working Time Act 1997. The entitlement to claim hinges on whether the employer 'requires' the individual to be available, or if the contract provides for a set number of hours (or a combination of both) (Grogan 2014).

The third type of contract is referred to as a 'hybrid if and when' contract whereby workers get some guaranteed hours, but any additional hours are offered on an 'if and when' basis, as required by the employer. A key feature of If and When arrangements is the variability in working hours on a daily, weekly or monthly basis. While If and When contracts do not require people to be available for work, hybrid contracts require employees to be available for the minimum guaranteed hours but not for additional hours.

It is important to note that a low level of standard zero hours contracts is found in the Irish context given the design of the Irish working time legislation. While a clear definitional distinction exists between standard zero hours contracts, and 'if and when' and hybrid arrangements, the perceptible and material difference in terms of employment security and predictability is negligible from the worker perspective. Essentially, the 'if and when' working arrangement in the Irish context is similar in effect to a zero hours contract in other countries such as the UK. While some workers with no guaranteed hours may earn high pay, zero hours work is precarious because its outcomes, in the main, include low pay, job insecurity and very limited social and employment rights protection (Blanchflower et al. 2017; Broughton et al. 2016; Eurofound 2015). In the Irish context, trade unions and NGOs note that If and When and hybrid contracts may suit a minority of workers but they are universally critical of such arrangements (O'Sullivan et al. 2015). In contrast, the Irish Business and Employers' Confederation (IBEC) argue that there have been few cases taken by employees against employers under Section 18 of the Organisation of Working Time Act 1997 arising from zero hours contracts. Employer organisations also claim there are no significant issues arising from If and When contracts as people can at least theoretically refuse the work, and in any case, such work can provide a stepping stone to other employment (O'Sullivan et al. 2015). However, the absence of cases taken against employers does not necessarily indicate acceptance of zero hours type contracts but may also reflect the vulnerability of the worker and an inability to voice concern regarding their situation. For example, Bales et al. (2018) highlight the lack of agency that exists for many workers in precarious employment. Definitional problems and self-identification with zero hours form of working are also a problem for workers. A lack of awareness exists among lower skilled and younger workers with regard to temporary and zero hours type contracts as these forms of work have increasingly become normalised for young workers (Nevin Economic Research Institute (NERI) 2018). Workers may not realise they are working on If and When hours when commencing their employment given a lack of clarity in the contractual language used (O'Sullivan et al. 2015).

2.4 Changing Patterns of Working Time

Investigating the issue of zero hours contracts involves significant complexity because of the range of terminology used, the variety of workplace practices in operation and challenges regarding data collection. The data reported here are primarily

sourced from the Central Statistics Office's (CSO) QNHS (1998 and 2007), and more recently the Labour Force Survey (LFS) (2017).[1] The QNHS was discontinued in 2017 and was replaced by the LFS, taking into account new population estimates from the 2016 Census. The QNHS/LFS is a large, nation-wide survey which produces labour force data on a quarterly basis. Information is collected continuously throughout the year from households surveyed in each quarter using face-to-face interviewers. The total quarterly sample is designed to be 26,000 households. All usual residents in the responding household are surveyed. The actual achieved sample varies over time depending on the level of response. It provides a wide range of data on those at work including working hours, economic sectors, employment characteristics and demographics. To ensure clarity and visual simplicity, the trends in working hours and other characteristics are given in this chapter for three specific years 1998, 2007 and 2017. The QNHS/LFS at present does not use any measures or questions on employment contracts including zero hours or If and When contracts. While the QNHS provides data on the number of hours usually worked by employees, a significant proportion of employees also report that their hours worked are too irregular and change from week to week to the extent that there is no 'normal' pattern. A key commonality in definitions of zero hours contracts and If and When contracts is that employees work a variable number of hours per week. We, therefore, report on the number of employees in the QNHS (excluding self-employed and unemployed) who work constantly variable hours per week and note changing trends between 1998 and 2017. Overall, the QNHS provides a comprehensive and detailed view of the structure of working hours and working patterns by gender, age and industrial sector in the labour market. We report the number and characteristics of employees who regularly work various categories of hours, the extent of underemployment among part-time employees.

2.4.1 Working Time and Working Hours Variability

The majority of employees in Ireland work in excess of 35 h per week, though the data reveals that this is decreasing marginally over time (from 67% in 1998 to 65% in 2017). Only a small number of workers work less than 8 h per week. The most significant change over time has been in the number of employees working between 19 and 35 h per week, increasing from 19% in 1998 to 23% in 2017. This is in line with international patterns of part-time working. A key feature, however, of 'If and When' arrangements, unlike regular part-time work, is variability in working hours on a daily, weekly or monthly basis which differentiates those on these types of contracts from employees with regular hours or work be that part-time or full-time.

[1]The CSO is the agency that is responsible for the collection, compilation, extraction and dissemination for statistical purposes of information relating to economic, social and general activities and conditions in Ireland—Statistics Act 1993.

Table 2.1 Trends in the pattern of hours worked by employees with varying hours of work (as a % of all employees) 1998–2017

	Patterns of hours worked: percentage of employees in each category			
Usual weekly hours worked	1998 (%)	2007 (%)	2017 (%)	Number of employees in each category based on QNHS 2017 (Q4) (weighted)
Hours vary[a]-full-time	7.4	4.1	3.1	42,304
Hours vary-part-time	8.9	7.3	8.6	32,386
Total	7.7	4.7	4.3	74,690

Source QNHS 1998, 2007 and 2017
[a]Percentage of full-time employees in the labour force who have constantly varying hours of work

In 2017, 4.3% of employees reported working hours that vary to the extent that they cannot indicate a consistent or regular number of weekly hours (Table 2.1). People with constantly variable hours can be employed either full-time or part-time. The proportion of people with constantly variable full-time hours has dropped significantly since 1998. People with constantly variable part-time hours fell slightly from 1998 to 2007 but has risen again between 2007 and 2017. Those working part-time are far more likely to be working variable hours (8.6% as opposed to 3.1% of those working full-time).

Table 2.2 provides the most recent profile of workers who work varying hours by gender, age, nationality and sector in 2017. Men are more likely to report that their hours always vary across both full-time and part-time employment. We also find differences in relation to age, with younger workers more likely to report variable hours across both full-time and part-time employment. We find little differences in terms of variable hours by nationality—Irish and non-nationals report similar levels of variable hours. In general, workers are more likely to be situated in the private sector than the public sector. More specifically, sectors with the highest prevalence of variable hours include agriculture, hotels and restaurants, transport, administration, health and retail.

Almost a third (32%) of all female employees in 2017 work part-time compared to 11% of all male employees. A QNHS data show that in 2017, 28% of part-time employees worked part-time only because they were unable to find full-time employment (part-time involuntary). This proportion decreased substantially between 2007 and 2017. This increase suggests that the lack of opportunity to find full-time employment has been significantly influenced by the economic recession. Comparative data indicate that the proportion working part-time because they could not find full-time work is higher in Ireland (41.4%) than in the EU (28.9% in EU15 and 29.6% in EU28) (Eurostat 2015).

In 2017, 7.1% of all employees are on temporary type contracts with 41% on full-time temporary and 59% on part-time temporary contracts. However, these figures differ quite dramatically depending on the data source used (NERI 2018) and are

Table 2.2 Percentage of the employee labour force who have varying hours of work by gender, age, nationality and sector (QNHS 2017 (Q4))

	Full-time employees	Part-time employees	
	Hours always vary (%)	Hours always vary (%)	Usually work 1–8 h weekly (%)
Men	3.9[a]	12.7[b]	6.4[c]
Women	2.2	7.2	6.6
15–24	4.2	13.6	14.3
25–34	2.6	8.5	4.0
35–49	3.0	7.2	4.7
50–65	3.4	6.8	4.9
Irish nationals	3.0	8.7	6.7
Non-nationals	3.5	8.3	6.0
Private sector	3.2	9.6	7.1
Public sector	2.5	6.4	5.3
Agriculture	9.7	25.8	5.1
Production industries	2.1	11.7	6.7
Construction	2.5	7.5	3.8
Retail trade	2.5	7.6	8.8
Transport	5.2	12.5	1.0
Hotels/rests	6.8	10.7	7.0
Information	2.8	6.5	4.3
Financial services	1.5	3.3	5.0
Prof services	2.0	10.6	7.8
Admin and support	4.5	9.2	5.6
Public admin	3.0	6.7	1.9
Education	1.4	5.6	10.0
Health	3.0	6.7	3.8
Other services	6.1	10.2	9.2

[a]Refers to the percentage of full-time employees in the labour force who have constantly varying hours of work

[b]Refers to the percentage of part-time employees in the labour force who have constantly varying hours of work

[c]Refers to the percentage of part-time employees in the labour force who usually work between 1 and 8 h weekly

largely due to the different definitions used to describe temporary contracts in the survey methodology. The LFS asks respondents if they have a "permanent job or work contract of unlimited duration" or if instead they "have a temporary job/work contract of limited duration". In contrast, the Survey on Income and Living Conditions (SILC) provides respondents with four options to describe their working status including permanent job/contract of unlimited duration, temporary contract/work contract of limited duration, occasional work without a contract and other working arrangements. The 2016 SILC data estimates 9.9% of workers are on temporary contracts, which are higher that LFS estimates. NERI also argue that the differentiation in the data is starker in the 18–30 age cohort where the SILC data show significant growth in temporary contracts for this group from 2006 to 2016 while the LFS reports only a marginal difference. A recommendation made by O'Sullivan et al. (2015) was the inclusion of 'if and when' work as a specific variable in the LFS data in order to establish greater clarity on the numbers of workers on this type of arrangement.

2.5 Drivers of Zero Hours Type Work in Ireland

A number of factors are considered to contribute to the increased prevalence of zero hours type work in Ireland. These include a shift from standard to non-standard employment generally, the increased prevalence of demand-led services, the increased demand for part-time work to facilitate childcare arrangements and finally changing patterns in public sector resourcing.

2.5.1 Shift from Standard to Non-standard Employment

A standard working week is usually taken to mean working an eight-hour day and a regular Monday to Friday week. There has been a move away from the standard working week towards working evenings, Saturdays and Sundays with little change in shift and night work. The proportion of employees regularly working evenings increased from 9% in 2001 to almost 14% in 2014, Saturday work from 19 to 28% and Sunday work from 10% to over 17% (O'Sullivan et al. 2015). These trends essentially began before 2007 but may have been accelerated by high levels of unemployment and the increase in part-time work after 2007. At a sectoral level, there were significant increases in non-standard working between 1998 and 2017 in the wholesale/retail, accommodation/food and health sectors, and to a lesser extent, in education. The employer group IBEC noted that because the business 'week' has lengthened, organisations require the flexibility of staffing. This flexibility requirement is reflected not just in part-time and variable hour's contracts but also in full-time contracts. As the standard working week gives way to the possibility of a seven-day working week, particularly in-service sectors of the economy, employers require a pool of workers whose hours can expand and contract depending on market demand

to facilitate shifts during peak business times. Having a more flexible workforce over a seven-day week also means costs savings in some sectors in terms of overtime payments, which might otherwise be paid.

2.5.2 Demand-Led Services

O'Sullivan et al. (2015) found that If and When hours are more prevalent in demand-led services where either the quantum of work or funding source may be difficult to predict. They found that employer organisations refer to unpredictable demand in retail, hospitality, health and social services and certain parts of education. In 2017, the average percentage of workers with varying hours across all sectors is 4.3%, but within some sectors that are highly demand-led, the rate is significantly higher. For example, in hospitality, the rate of workers with variable hours is 8.1%.

Higher proportions of women than men work part-time hours in retail, accommodation/food, health and education. Interviewees generally agreed that women are more likely to work If and When hours and low hours because of their caring responsibilities and the lack of affordable, accessible childcare. According to the Quarterly National Household Survey (QNHS), in 2014, 17% of employees who work part-time and 8% of employees who work constantly variable hours do so because of caring responsibilities. Employer organisations argued, therefore, that such work arrangements suit the flexibility needs of women. In contrast, trade unions and NGOs claimed that women, particularly lone parents, are 'vulnerable' to working to such arrangements and, while some women may want a low number of hours, they do not want unpredictable hours. Many interviewees noted that women require part-time work to accommodate their caring responsibilities and the lack of an affordable, accessible childcare system contributed to this need. According to the QNHS, 96% of employees who cite caring responsibilities as the reason for working part-time are women. Consequently, working hours and patterns of working time are a vital strategic consideration for the employment and retention of women for a productive economy and a balanced healthy society. An issue, frequently raised by interviewees, is the extent to which employees with caring responsibilities require flexible working hours. Similarly, the Department of Social Protection stated that 'for certain cohorts, childcare costs may be a barrier to moving to full-time hours'. The lack of affordable childcare has resulted in families juggling childcare responsibilities between parents or extended family. The National Women's Council of Ireland (NWCI) argued that the rate of women's participation in the labour market drops significantly once they have children and that a lack of affordable accessible childcare makes women more 'vulnerable to working low hours'. An increase in affordable childcare would be expected to give greater choice to women with regard to their participation in the labour market (women in the labour market discussed further below).

2.5.3 Public Sector Resourcing

In interviews, the Department of Public Expenditure and Reform stated that it has influence over pay policy and the number of employees in the public sector but does not have significant influence over types of employment contracts. Trade unions and NGOs argued that If and When contracts, hybrid contracts and low hours as a growing feature of public sector employment. Increased privatisation, they argued, has led to downward pressure on terms and conditions of employees as tenderers seek to reduce costs. For example, they compare community care jobs in private organisations with more If and When contracts and lower pay (e.g. not being paid for travel time between clients) while the same community care jobs in the HSE have a floor of minimum hours and better conditions. The pressure on costs, combined with the fluctuation in demand for community care services, has contributed to If and When contracts becoming more prevalent, trade unions argued. The public sector moratorium on recruitment was also noted by interviewees in health as restricting the ability of organisations to recruit permanent positions and led to more If and When contracts and agency work. In education, interviewees argued that the resourcing model used by the State means that some occupations in second-level education are not funded as full-time jobs and therefore more likely to have low hours and If and When hours. Third-level employer institutions argue that the delivery of a wide range of programmes can only be delivered through more 'flexible' employment contracts due to fluctuating demand and funding.

2.6 Impact on Workers

While If and When contracts do not require people to be available for work and hybrid contracts only require employees to be available for the minimum guaranteed hours, interviewees relayed different reports about the day-to-day reality of the requirement for employee availability. Trade unions and NGOs stated that many individuals who refuse work would not be offered to work again for a period of time. In their view, this amounted to penalisation for refusing work and claimed therefore that individuals felt they could not refuse work offered. Trade unions also argued that because of the unpredictable nature of If and When hours, individuals have to be available in order to get any work. Conversely, employer organisations stated that an individual with If and When hours can refuse work without negative consequence and that the ability to refuse work is a benefit of If and When hours. As variability in the number of hours worked is a key feature of zero hours work, in our qualitative research we were interested in what factors account for that variability. Interviewees suggest that the number of hours an individual works depends on a range of factors including the employers' requirements to fulfil service demands, whether or not a collective agreement is in place which regulates working hours, and the demands of employees for hours. Interviewees also suggested that social welfare entitlements can influence

employer and employee decisions over the number/scheduling of hours. A further issue regarding 'if and when' contracts is that the reality of hours worked is not reflected in the contract. Written statements of terms and conditions are that they may not reflect the reality of hours worked by employees over time. Interviewees from trade unions and some employer organisations noted instances where individuals on If and When or hybrid contracts can, in reality, work regular hours including full-time work.

Organisations are found to have very varying processes for scheduling hours. For individuals working on If and When and hybrid contracts, some contracts request new hires indicate their availability and desired working hours while other contracts stipulate that the individual could be scheduled at any time during the week. There was agreement among interviewees that there is no standard system in place across organisations regarding the distribution of work to people on If and When hours. In general, the local manager has final discretion of who to offer work to. A number of employer organisations stated that managers cooperate with employees in scheduling hours to suit both parties or that staff manage their own hours. In contrast, trade unions and NGOs argued that employees have little or no input into the scheduling of working hours and they claimed there can often be inequitable distribution of hours. In interviews, trade unions argued that having a pool of people on If and When or hybrid contracts act as a disincentive to some organisations from planning rosters well in advance. Trade unions and NGOs argued that people are offered work at short notice of less than 24 h and expressed concern about people being sent home during shifts. Employer organisations stated that firms try to schedule rosters at least one week in advance, with two weeks or more the normal practice in some sectors, and short notice is provided to employees in instances of emergencies, such as to cover sick absences.

2.6.1 Well-being, Financial and Worker Voice

While employers point to the positives of 'if and when' with regard to suiting employee's needs to flexibility, it was acknowledged that they are particularly suitable for students, older workers who want to transition out of full-time employment and women with caring responsibilities. It was also argued by ISME and Chambers Ireland that such jobs are a stepping stone to full-time employment and help employees get their 'foot in the door' of a preferred industry. The primary negative consequence for individuals on If and When type contracts is the lack of predictability of working hours, both the number of hours and the scheduling of hours in a week.

In contrast, the lack of predictability can also arise after a roster is scheduled when individuals are given short notice when offered work or are sent home during a shift. The lack of predictability of working hours is the basis for other negative consequences of If and When working. If and When hours and low hours work can result in unstable and low earnings and make individuals more reliant on State income sup-

ports. Trade unions and NGOs noted that the lack of minimum or regular contractual hours can prohibit employees from being granted bank loans or mortgages. ICTU argued that many people on If and When hours do not get premiums and contrasted this with other European countries where, it was claimed, employees are entitled to overtime pay after their normal contracted hours.

Trade unions and NGOs argued that the unpredictable nature of If and When hours is not conducive to individuals achieving work/life balance and can be stressful for parents juggling childcare and eldercare responsibilities. Two scenarios were presented by the NWCI to illustrate the challenges in relation to childcare: where women cannot book childcare because they do not know the scheduling of their working or where women book full childcare but may get a low number of hours work so that childcare costs outstrip wages.

Trade unions and NGOs claimed that some employers use the scheduling of hours as a mechanism for controlling employees. The NYCI noted that there is 'not a relationship of equals' between organisations and people on If and When hours. The NWCI argued that people on non-guaranteed hours can become 'trapped in a cycle of poverty which strengthens employers' control'. Trade unions expressed concerns that an employee who refuses work offered at short notice can be reported to social welfare by their employer as being unavailable for work. A number of interviewees claimed that If and When hours inhibited employees' propensity to speak up in the workplace. NERA commented that people working low hours may be unlikely to take a case against an employer 'after appraising the consequences for their continuing employment relationship'. Trade unions also argued that individuals on If and When or low hours do not feel integrated into organisations as they may be excluded from organisational decision-making or training opportunities.

2.7 Sectoral and Policy Responses to Zero Hours Type Work

2.7.1 Sectoral Responses to Zero Hours Type Work

In the absence of legislation curtailing zero hours work, collective bargaining has a significant role in regulating working hours and, in some countries, they can modify legislative minima. On average 62% of employees in the EU are covered by a collective agreement compared to 44% in Ireland (Fulton 2013), though Ireland's figure is likely to have fallen since the collapse of national wage agreements. Collective bargaining has been used in other countries to regulate non-standard work generally by limiting the extent of non-standard contracts and providing for equal pay and treatment for non-standard workers. Sectoral bargaining has the benefits of providing stability of conditions for larger numbers of employees and provides a level playing field for employers, by stabilising costs and preventing unfair competition through undercutting of working conditions. At a sectoral level in Ireland, the

responses to zero hours type work have been nuanced and depend to a large extent on the level of power held by trade unions and representative bodies within each sector. In health, for example, an agreement was concluded between the HSE and two of the largest unions in the health sector (SIPTU and the INMO) stipulating that 'If and When' contracts should only be used to provide short-term cover, e.g. annual leave in 2011. However, while this agreement appears to have curtailed the potential growth in such contracts in HSE-operated establishments, among HSE-funded organisations there is a greater prevalence of 'If and When' and hybrid contracts. The ability of the unions to negotiate an agreement with the HSE largely stems from institutional conditions of high union membership rates and a history of collective bargaining in the wider health sector. However, these features are largely absent in the private and not-for-profit sectors of healthcare, which are now the dominant providers of residential and home care. In contrast, employment relations in the education sector are largely regulated by collective agreements between government, employer bodies and unions. However, despite the strong levels of bargaining in the sector, interviews revealed that 'If and When' working arrangements existed among teachers, third-level lecturers, special needs assistant (SNAs), adult education tutors and ancillary staff (secretaries, caretakers and cleaners). Within secondary teaching, the unions have been quite successful in regulating and restricting this practice to covering leave arrangements.

Retail as a sector was found to have a significant presence of zero hours work. A key strategy used by the main retail union has been to negotiate banded hours arrangements in major retailers where unions have existing collective agreements in place. This places each employee within a set guaranteed 'band' of hours, e.g. 15–19 h. A periodic review takes places on an annual basis, and employees continuously working above the band they are in are automatically elevated to the next band (which becomes their new guaranteed band). In unionised areas those on 'If and When' contracts receive pro-rata terms and conditions (rates of pay, holiday pay, sick pay). However, where unions have limited membership or existing collective agreements in place, the response by the employer to worker or union demands for greater predictability of working hours has been largely negligible. In the hotels and broader hospitality sector, little evidence was found of systematic responses by employers to regularise work or reduce reliance on zero hours type working arrangements.

As noted in the context section earlier, trade unions density and influence in the Irish labour market has declined. Therefore, while sectoral bargaining and worker representative responses to zero hours work have been somewhat successful in other contexts, the need for state-led intervention in the Irish context is required.

2.7.2 Policy Responses to Zero Hours Type Work

The ICTU have attempted to represent the concerns of all the major unions and major NGO groups in voicing their demands in relation to future regulation around zero and low hours work. In contrast to other countries (for example New Zealand),

ICTU have not opted to seek a complete ban on zero hours work. Instead, a number of provisions have been sought including a right to request full-time work and a corresponding obligation on employers to seriously consider the request, allowing for refusals only where the employer can objectively demonstrate the need for zero hours type practices. ICTU have also placed a strong emphasis on the introduction of 'banded hours' arrangements. While ICTU have voiced that they would like to see a limit on the proportion of the workforce working on zero hours type practices, little action has been taken in that regard, unlike for example France, where age limits or proportion of staff have been specified. ICTU have, however, been vocal in relation to the length of time a post can be filled with workers on zero hours type arrangements. They have also sought regulation to provide for an overtime premium for hours worked in excess of the 'normal hours' in the employment contract and a minimum number and notice period of hours of work. In terms of normalising the employment relationship, ICTU have argued that 'normal working hours' be established on the basis of the hours stated in the contract, or an average of those worked over a six month period. At the national level, trade unions and NGO's have actively voiced concern regarding the impact of 'If and When' working on workers. Thus, lobbying politicians for legislation on zero hours work was an ongoing activity. Prior to the general election in 2016, ICTU launched the Charter for Fair Work, part of which focused on restricting unpredictable working hours. The provisions of the charter included a right to request full-time work and a corresponding obligation on employers to seriously consider the request, allowing for refusals only where the employer can objectively demonstrate the need for zero hours type practices.

Political support for ICTU's proposals has been relatively strong with a number of bills including the Protection of Employment (Uncertain Hours) Bill and the Banded Hours Contracts Bill and the Employment (Miscellaneous Provisions) Bill 2017 emerging from government and opposition political parties in 2016 and 2017. It seems likely that some form of legislation will emerge curtailing, though not eliminating, zero hours practices in the near future. The likely effect of any such legislation could provide greater clarity for workers on the nature of their contractual relationship, for example the ability to increase the number of stated hours on their contract over a period of time (likely 18 months) to reflect the reality of the average number of hours worked. The Government's Employment (Miscellaneous Provisions) Bill 2017 has been described by ICTU as a 'step in the right direction' but the General Secretary has also stated that the protections against penalisation for workers who invoke rights to increased hours need to be strengthened and that the guaranteed minimum payment for hours not provided by employers should be paid at the 'appropriate hourly rate rather than the National Minimum Wage' (Industrial Relations News 2017) (Table 2.3).

Table 2.3 Proposed legislation in Ireland to address issues around zero hours work

Bill	Proposer	Summary content
Banded Hours Contract Bill 2016	Sinn Fein (Opposition Party)	Provide that a worker or his or her trade union representative, or a representative acting on his or her behalf, is entitled, after six months of continuous employment with his or her employer, to make a request in writing of the employer to be moved to an increased weekly band of hours, as set out in the legislation. The Bill provides that the employer must comply or set out the reasons whereby such an arrangement is not economically feasible and an obligation on the employer to inform all employees on the overall availability of working hours by displaying this information in a prominent position in the place of employment
Protection of Employment (Uncertain Hours) Bill 2016	Labour (Opposition Party)	Proposed amending existing regulation to provide for: an entitlement to request an employer to correct the employment terms so that the stated particulars of weekly hours of work reflect the actual average number of working hours completed in the previous six months; a Workplace Relations Commission complaints procedure to ensure fair and equitable application of cases under the legislation; an anti-victimisation measure protecting workers from invoking their rights under the legislation; an exemption from the legislation in cases where employers and trade unions have negotiated sectoral employment orders or registered employment agreements, or where an employment regulation order has been signed as a result of a Joint Labour Committee initiative
Employment (Miscellaneous Provisions) Bill 2017	Fine Gael (Government Party)	Employment (Miscellaneous Provisions) Bill 2017 is the most recently published Bill. Unions have expressed concern that the Bill includes exclusions for what employers claim is 'genuinely casual work'

2.8 Conclusion

Ireland experienced a dramatic deterioration in its labour market around the Great Recession with unemployment rising from 4.8% in 2007 to 15% in 2012 (Kelly and Barrett 2017). While the economy has recovered relatively quickly with unemployment falling to 5.6% in August 2018, the extent of the employment quality that accounts for much of that increase is not yet clear. Kelly and Barrett (2017) found that atypical work did increase with the recession and, although moderating, the likelihood of new jobs being atypical persisted into the recovery. Both Kelly and Barrett (2017) and NERI (2018) have raised important questions about whether economic recovery alone will improve job quality, in addition to job numbers. The Irish regulatory framework with regard to working hours generally is currently less prescriptive than in other European countries, many of which regulate hours through social partner dialogue, nor yet have significant legislative changes been passed into law. Therefore, while the issue of zero hours work has received heightened attention on the political agenda in Ireland, as it currently stands the quality of jobs with regard to working hours and predictability remains largely at the behest of employers.

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Chapter 3
Legitimizing Precarity: Zero Hours Contracts in the United Kingdom

Abi Adams, Zoe Adams and Jeremias Prassl

Abstract Zero hours contracts continue to be one of the most controversial topics in the UK labour market. In this chapter, we describe the ongoing growth in zero hours work and subject legal and political narratives surrounding their role in the labour market and implications for individual workers to critical scrutiny. Following a definitional overview, we first set out the most recent empirical evidence on the extent and characteristics of zero hours work. We then turn to the regulatory context, with a particular emphasis on the interaction of tax law and social security provisions with key employment law norms, including both status questions (with particular emphasis on the doctrine of mutuality of obligations) and substantive rights (including the minimum wage and working time protection). We conclude with a discussion of competing explanations and policy positions in recent public debates and offer our own analysis of the problematic implications of a multi-tier workforce in the UK labour market.

Keywords Zero hours · Labour law · Flexibility · Trade unions · Government response

3.1 Introduction

In this chapter, we provide an overview of zero hours work in the UK. We begin by defining zero hours work, emphasising key characteristics as well as overlaps

A. Adams
Department of Economics, New College, Oxford, UK
e-mail: abigail.adams@new.ox.ac.uk

Z. Adams
Faculty of Law, King's College, Cambridge, UK
e-mail: zla20@cam.ac.uk

J. Prassl (✉)
Faculty of Law, Magdalen College, High Street, Oxford OX1 4AU, UK
e-mail: jeremias.prassl@law.ox.ac.uk

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between zero hours work and other casual work arrangements. We then present recent evidence on the prevalence and nature of zero hours work and its evolution over time. In section three, we contextualise this evidence by exploring in more detail the regulatory environment in which zero hours arrangements exist. This analysis will lay the groundwork for exploring some of the benefits and problems associated with zero hours work today, and for assessing the positions of the social partners as well as the approach(es) of the UK Government. We conclude with some brief comments about ongoing challenges.

3.2 Definitions

In the UK, 'zero hours contracts' (ZHCs) is a colloquial term that refers to a spectrum of contractual arrangements 'under which the worker is not guaranteed work and is paid only for work carried out'. (Pyper and Powell 2018, 4) These arrangements can be thought to encompass all cases 'where the employer unequivocally refuses to commit itself in advance to make any given quantum of work available' (Deakin and Morris 2012, 167). Behind this definition, we find a number of diverse working practices, including those variously referred to as 'on-call' work, 'gig-work' or 'short-hours' work (discussed below). It is important to note at the outset that there is no such thing as *the* archetypical zero hours contract: each type, and indeed each individual arrangement, will differ in terms of the degree of employer control, worker integration, as well as in the stated expectations of work availability and the degree of notification given of when work will be available.

The legislative definition, contained in section 27A of the Employment Rights Act of 1996 ('ERA 1996'), adopts a broad formulation:

'[A zero hours contract is] a contract of employment or other worker's contract under which:

(a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and
(b) there is no certainty that any such work or services will be made available to the worker.

The heterogeneity of work arrangements falling within the broad definition of ZHCs poses a particular challenge when it comes to data collection. It is thus extremely important to pay attention to the definition used by different statistical agencies when presenting evidence about the extent of zero hours work. For the purposes of this chapter, we rely on the main official data source on zero hours contracts in the UK, the Labour Force Survey (LFS) and Business Survey (BS), both of which are administered by the Office for National Statistics (ONS). The common element to the definitions used is the lack of a guaranteed minimum number of hours (Pyper and Powell 2018, 6). Because the LFS relies on individual respondents recognising the term zero hours contracts, however, statistical accuracy relies heavily on individuals

being able to apply it to their situation; this definition is only provided to respondents if they explicitly ask for clarification (Adams and Prassl 2018).

Both the definition used in common parlance and that used in the ERA 1996, is sufficiently wide to encompass a number of diverse work arrangements. It follows that the 'zero hours contract' label should not be seen as representing a clear or overarching category or organising principle of precarious work (Adams et al. 2015). Rather, as Adams et al. have argued, the label serves as no more than a convenient shorthand for the growth of precarious work for what is a highly fragmented workforce. Thus, overlapping with 'zero hours' arrangements we might find various terms, such as: 'reservist'; 'on-call' and 'as and when' contracts; 'regular casuals'; 'key-time' workers; and 'mini-max'. More recently, we might also include so-called 'short-hours' or '336-h' contracts. While the latter are not strictly zero hours arrangements, because the employer agrees to provide a minimum number of hours per year (336), the employer still makes no commitment to provide any, or a set amount of, work from week to week (*HuffPost UK* 2017).

One further work arrangement that is worthy of note, and which arguably falls within a broad definition of 'zero hours,' is 'gig-work'. This is a form of work arrangement associated with platforms such as *Uber* and *Deliveroo* and, in public discourse, is often associated with developments in communications technology. While 'gig-workers' are not guaranteed a minimum quantum of work, their working arrangements nonetheless tend to exhibit unique features of their own: the contract will often formally classify the individual as an independent contractor, the work will be task-oriented and paid in accordance with output and the worker will, very often, be required to commit some physical, as well as human, capital to the enterprise (such as a private car or bicycle).

Gig-work has been the subject of considerable debate in the UK, particularly given the assumption that the above features place it close to the boundary between employment and self-employment (Prassl 2018). In a recent string of Employment Tribunal and Employment Appeal Tribunal decisions, however, it has been confirmed that many 'gig-workers' will now be classed as workers working under zero hours contracts.[1] Much of the discussion about gig-work (see below) is thus relevant to the issue of zero hours contracting more generally.

3.3 Context

Contrary to popular belief, neither so-called gig-work, nor zero hours arrangements in general, is a new phenomenon in the UK labour market. In the nineteenth century, in many industries, such as mining and construction, employers hired workers on contracts, known informally as 'minute contracts' that could be terminated at short notice (Deakin and Wilkinson 2005). Others, such as hosiery manufacturing and dock work, operated much like the gig-economy today: workers would be hired by 'middle-men' who would distribute work to them on a task-by-task, or job-by-job basis, without guaranteeing them a minimum amount of work or pay (Bythell 1978).

[1] Note also the recent Court of Appeal decision: *Aslam v Uber BV*, [2018] EWCA Civ 2748.

While casual work never entirely went away in the twentieth century, its significance diminished with the emergence of the standard employment contract and the welfare state in the years following the Second World War (Deakin and Wilkinson 2005). The rise in zero hours work that has come to the public awareness since the 1990s cannot thus be understood independently from the drive towards a more 'flexible' labour market, ushered in by successive governments since at least the 1980s (Adams and Deakin 2014a; Davies and Freedland 2007). In this respect, litigation arising from the use of zero hours contracts to allow employers numerical flexibility and attempt to avoid the application of statutory protection can be traced back nearly forty years (*Mailway (Southern) Ltd versus Willsher* [1978] ICR 511 (EAT)). However, public awareness of zero hours contracts increased in the 1990s, particularly following the exposure in the mid-1990s of Burger King's practice to pay staff only for time spent actually serving customers (Clement 1995). References in *Hansard* during this period echo the critical tenor of public opinion at the time, describing 'zero-working' as 'perhaps the most exploitative work of all',[2] and calling, as early as 1998, for consultation over their use.[3]

Discussions of zero hours contracts during the 1990s focused on the perceived trade-offs workers were having to make in the name of 'flexibility'. In 1998, for example, Margaret Beckett MP argued that: '[zero hours contract work] can provide useful flexibility to both employers and employees, and the Government would not wish to lose that flexibility, but poor employment practices discredit such arrangements and deter people from taking advantage of the flexibilities offered by contract work in other organisations'.[4] Even so, the Government's attitude was extremely ambivalent; in some contexts, such as agency work, it deliberately encouraged the use of such arrangements, in the name of ever more flexibility.[5]

The Government's ambivalence towards employment practices that provide little by way of security, or stability, for workers, continues to this day. This is particularly so given the belief that zero hours contracts have been crucial to the UK's 'employment miracle' since the financial crisis (Pyper and Powell 2018). The premise, it seems, is that while zero hours contracts are not ideal, they are still better than the alternative, unemployment. Banning such arrangements (however, difficult in practice), or making their use less attractive, is thus deemed to be harmful to employers and workers both.

3.4 Empirical Evidence: Extent and Characteristics

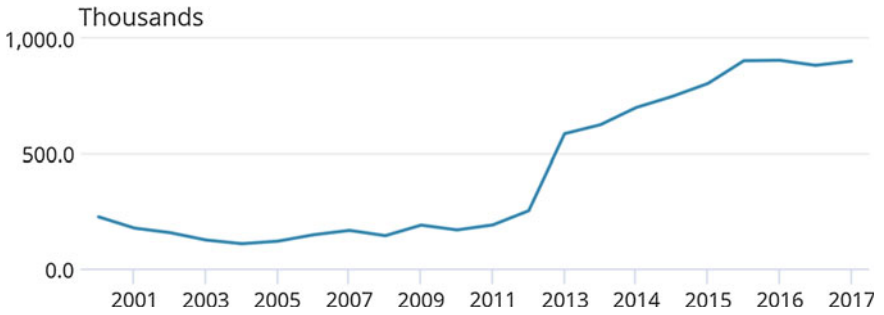
Given the aforementioned definitional issues, it should not be surprising that accurate measurement of zero hours work has been a key challenge. Nonetheless, until 2012

[2] *HL Deb 23 March 1998 vol 587 cc1026-84, 1049* per Baroness Turner of Camden.

[3] *HC Deb 21 May 1998 vol 312 cc1103-17, 1104, per Mrs Beckett.*

[4] *HC Deb 21 May 1998 vol 312 cc1103-17, 1104, per Mrs Beckett.*

[5] *HC Deb 31 March 1999 vol 328 cc1110-53, 1130, per Mr Bruce.*



Source: ONS 2018

Fig. 3.1 Number (in thousands) of people in employment reporting they are on a zero hours contract, October–December 2017 and change since October–December 2016 (LFS). (In 2013, estimates were revised to reflect evidence of levels of zero hours arrangements on a sector-specific basis (which tended to be much higher than that reflected in ONS data) This, alongside rising public awareness of the term, can perhaps explain the substantial increase we see from 2011) *Source* ONS (2018)

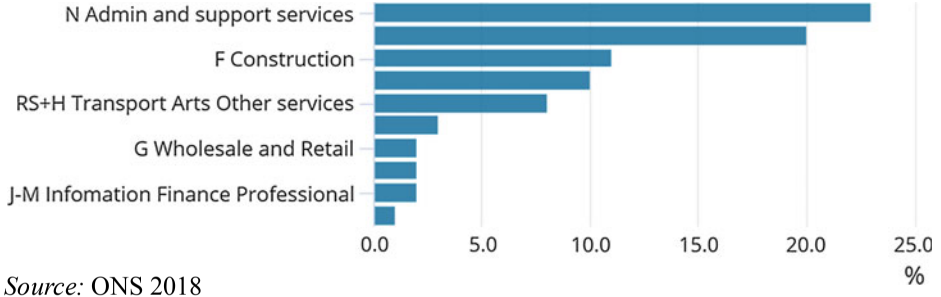
the empirical evidence on ZHCs in the UK did not seem particularly concerning. Statistics concerning the prevalence and characteristics of ZHCs suggested that ZHCs were relatively benign labour market phenomena, with the Department of Education and Employment confirming in 1996 that 'the limited evidence available suggests that zero hours contracts are not widespread'.[6]

The consensus now, however, is that before 2013, LFS methodology, in particular, resulted in a gross underestimate of the prevalence of zero hours contracts. The LFS is the largest survey of its kind in the UK, covering some 90,000 individuals and 40,000 households. Its most recent estimate, for the period between October and December 2017, is that there are 901,000 individuals, or 2.8% of the workforce, employed on a ZHC for their main job. This is not substantially different from the same period a year before but is 12% higher than the figure for the same period in 2015. The estimate in the Business Survey for the period beginning 13 November 2017 was slightly higher, with around 1.8 million contracts recorded as not guaranteeing a minimum number of hours, a figure that reflects around 6% of all employment contracts.[7] This disparity probably reflects differences in the design of each survey, with LFS' methodology relying on self-reporting, and the BS reflecting contracts, rather than people (ONS 2018) (Fig. 3.1).

The LFS data also show that the prevalence of zero hours work arrangements varies markedly across industries. Figure 3.2 shows the percentage of people in each industry employed on a zero hours contract and the distribution of those on zero hours contracts across industries.

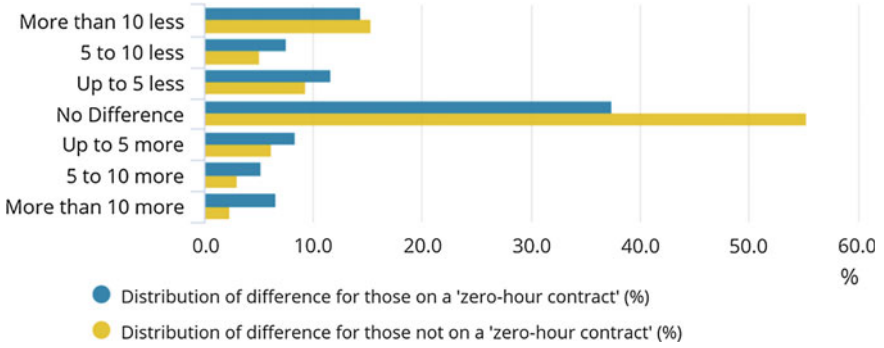
[6] *HC Deb 18 March 1996 vol 274 c32 W, per Mr Forth.*

[7] This total excludes contracts that do not guarantee a minimum number of hours where work was not carried out in the reference period, and so does not count workers engaged on zero hours contracting arrangements who did not work or who were unable to work, in the 2-week period.



Source: ONS 2018

Fig. 3.2 Percentage of all employees on contracts that do not guarantee a minimum number of hours, by industry, ranked highest to lowest, November 2017. *Source* ONS (2018)



Source: ONS, 2018

Fig. 3.3 The difference between actual and usual hours worked for people on ZHCs and other workers for October–December 2017. *Source* ONS (2018)

The LFS and BS provide further evidence of the precarious nature of ZHC working. Between October and December 2017, 66% reported that they were working part-time (as compared with 25% among other contracts). Someone working under a ZHC works an average of 21.8 h per week, compared with 31.6 h for all people in employment. Around 17% reported that they wanted more hours, with most wanting them in their current job, as opposed to a different job that offers more hours.

Data from the Resolution Foundation also suggest that zero hours workers face a considerable pay penalty of 6.6% directly associated with zero hours work for the period between 2011 and 2016 (Pyper and Powell 2018, 6). This figure controls for a wide range of factors such as gender, age, experience, skill level, industry and length of service and so takes into consideration the fact that ZHCs are disproportionately concentrated in low-paying sectors and among younger and less experienced staff—the absolute value is 38%.

In terms of hours variability, the LFS estimates that there were 16% of people on ZHCs who worked no hours in the week before the LFS interview, compared with 11.1% of other workers; 37.5% of people on ZHCs worked their usual hours for the period October–December 2017, as compared with 55.3% of other workers; 33.5% worked less than their usual hours, compared with 29.8% of other workers; 20.1% worked more than their usual hours compared with 11.6% of other workers (ONS 2018) (Fig. 3.3).

LFS data also suggest that zero hours workers are more likely to be in receipt of some state benefits compared to those not on these contracts, are less likely to be a member of a trade union, are more likely to be young, part-time, women or in full-time education when compared with other people in employment, even after controlling for worker characteristics, industry and occupation.[8] Non-native UK workers are also disproportionately employed on ZHCs; 20% of workers on ZHCs were born

[8]Women are more likely to be working under zero hours arrangements, but this is largely because the industries and occupations that women work in are more likely to use zero hours contracts.

outside the UK compared to 15% other types of contract. Those who self-identify with a non-white ethnicity are similarly over-represented among zero hours workers (14–10%) (Adams and Prassl 2018).

Research by the Chartered Institute of Personnel and Development (CIPD) and Resolution Foundation sheds further light on experiences of zero hours work. A CIPD study suggested that 47% of workers were 'very satisfied' or 'satisfied' with having no guaranteed hours (CIPD 2013, 4). Interview responses to a Resolution Foundation study in 2013 also suggested that certain types of workers valued these work arrangements while acknowledging that they would not suit everyone (Resolution Foundation 2013, 14). At the same time, however, the evidence strongly suggests that flexibility is not a universally valued characteristic. In the CIPD study quoted above, 27% reported that they were 'very dissatisfied' or 'dissatisfied' with having no guaranteed hours (CIPD 2013, 4). Recent academic evidence also suggests that the great majority of workers do not value flexible working arrangements; most workers are not willing to pay for flexible scheduling, and traditional Monday–Friday 9–5 p.m. schedules are preferred by most job seekers (Mas and Pallais 2017).

How much genuine flexibility workers enjoy under these arrangements is also a matter of debate. The Advisory, Conciliation and Arbitration Service (ACAS), a non-departmental governmental body charged with promotion of strong industrial relations and practice, suggests that workers are often frightened to turn down work in case their employer starts 'zeroing in' on or reducing their hours. They conclude that these anxieties 'reflect the imbalance of power between the worker and the employer in these contractual arrangements as workers are also fearful of raising queries regarding their rights and entitlements' (ACAS 2014, 7)

The same argument has been aired in tribunal hearings by workers, suggesting that they felt that 'management would not be happy if they [worked] elsewhere' (*Stringfellow Restaurants Ltd versus Quashie [2012] EWCA Civ 1735; [2013] IRLR 99* (CA), [17]). Indeed, the power that schedules flexibility places in the hands of managers is an emerging theme in both academic and media coverage. Giving evidence to a Parliamentary Inquiry into the use of zero hours contracts at a UK retail firm, Steve Turner, the Assistant General Secretary at Unite the Union argues:

> "It is not just about insecurity. It is also about no guarantee on hours, giving absolute control to the employer […] There is no process; there is no access to justice. Even though on paper you may be regarded as an employee and able to access, if indeed you can afford it, the employment tribunal system, the reality is, for most zero-hour workers and short-hour workers, you are simply denied work if you raise a grievance or raise a concern with your employer."[9]

The characterisation of zero hours work arrangements as flexible, casual arrangements is also called into question because many zero hours workers have been in their position for years and describe their job as permanent and full-time. This challenges the notion of zero hours contracts as always corresponding to typical notions

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Controlling for industry and occupation results in the relationship between women and zero hours arrangements becoming insignificant.

[9] 55 Third Report of Session 2016–17, HC 219, 7.

of casual work. Indeed, as ACAS concludes, 'any casualisation may, therefore, say as much about the specific terms of their contract and the way they are being used, rather than the nature of the work itself or hours worked (ACAS 2014, 4)'.

3.5 Regulatory Context

In order to place this data in context, it is necessary to explore in more detail the regulatory environment in which ZHCs exist.

3.5.1 Tax Law

Unlike self-employment, zero hours contracts are not treated preferentially by the UK tax system. Income variation week to week can mean, however, that zero hours workers pay more tax than otherwise identical workers on fixed-hours contracts. In 2018/19, the first £11,850 of income is tax-free. The basic rate of income tax is 20% and paid on income from £11,850 to £34,501. In addition, employed individuals pay (Class 1) National Insurance Contributions (NICs) of 12% on weekly earnings of £162–892. One potential disadvantage for zero hours workers is the fact that NICs contributions depend on weekly pay. Thus, even if a worker earns less than £7500 per year, they must pay 12% NICs in any weeks in which their earnings exceed £162.

This means, for example, that if two workers, A and B, are paid on a weekly basis at the national minimum wage (£7.83 per h) but A is employed on a fixed-hours contract for 20 h a week, while B is employed on a zero hours contract, they can both work the same number of hours per year for the same wage, but worker B might find herself receiving considerably less net pay annually, while being liable to NICs, where worker A is not. To see how this might happen, imagine that B alternately works 30- and 10-h weeks, resulting in a weekly wage of £234.90 and £78.30, respectively, while person A gets paid a consistent £156.60 every week, keeping her below the primary threshold. While both A and B work 1040 h per year for the same wage, person B will find herself receiving £700 net less than person A annually, as she will be liable to NICs due to her sporadic income, while A—with her regular, fixed pay packet—will pay none.

3.5.2 Income Security

Given the financial precarity of zero hours workers, it is not surprising that they are more likely to be in receipt of government benefits. LFS data suggest that 30% of zero hours workers are in receipt of government benefits compared to 25% of workers on other types of contracts. They are approximately 25% more likely to be

claiming tax credits compared to workers employed on other types of contract.[10] Work-related benefit payments to zero hours contract workers typically come in one of three forms: tax credits, income-based jobseekers allowance (JSA) or universal credit. Universal credit (UC) is a single monthly payment for people in and out of work that will eventually replace many of the current benefits that target those with low incomes or who are out of work. As the roll-out of UC is expected to take until at least March 2022, it is necessary to describe the interaction of zero hours work and the benefit system under both the pre-UC and UC regimes.

Under the pre-UC system, zero hours workers can face additional hurdles to claiming benefits because of the lack of guaranteed hours. To claim income-based JSA, an individual must not be in paid employment for more than 16 h per week (*GOV.UK* 2018a, b, c). To claim tax credits, individuals must work between 16 and 30 h a week depending on their circumstances (*GOV.UK* 2018a, b, c). When hours vary week to week, the average hours over the five weeks prior to making a claim are used as the basis for calculating benefit entitlement. Significant variation in hours may therefore require ZHC workers to repeatedly send evidence to the Tax Credit office and perhaps switch between JSA and tax credits or risk-benefit overpayment and the risk of sanctions (Citizens Advice Bureau 2013).

The Universal credit system will replace six different benefits with a single monthly payment. It is designed to be more responsive to changes in earnings, using real-time information from employer payrolls and is not associated with weekly hours worked limits. As UC benefit payments are conditioned on income, some of the difficulties noted with the current Tax Credit system are avoided. However, while there are no hour thresholds with UC, individuals must accept a 'Claimant Commitment'. This commitment is drawn up alongside a 'work coach' at the local job centre. It requires unemployed individuals to set out how they will transition into work, and for low income individuals in work, it must present a plan for them to increase their earnings (*GOV.UK* 2018a, b, c).

UC benefits can be cut, by hundreds of pounds a month for up to three years, if claimants do not meet their responsibilities. This is referred to as a 'sanction'. Unemployed individuals, or those working part-time, can face sanctions for failing to accept zero hours work. This is particularly concerning, as Esther McVey MP, then Minister for Employment, confirmed in 2014 that benefits could be cut for failing to accept zero hours work.

This analysis illustrates the role of deliberate policy choices in fostering the growth and exacerbating the problems associated with ZHCs. Prior to the late 1980s, the social security system had supplied a floor to terms and conditions of employment. National insurance legislation guaranteed that an unemployed person could not be penalised for refusing to work at wages and on terms and conditions below those common to the 'good employers' in the district (Adams and Deakin 2014b). There was thus nothing comparable to the claimant commitment that exists today, nor the requirement that claimants be 'genuinely seeking work', as a condition for claiming

[10] Analysis of the LFS shows that 12% of ZHC workers claimed tax credits compared to 7.9% of workers on other contracts.

benefits, even if there was no full-time employment available. The structure and premises behind the social security framework today not only no longer discourage the casualisation of work, but actively encourage individuals to accept casual or zero hours work, regardless of how poor or exploitative the terms and conditions.

3.5.3 Labour Law

UK labour law ties labour protections to the existence of a particular form of contracting arrangement known as the contract of employment. In order to qualify for employment protection rights such as unfair dismissal, maternity pay, sick pay and redundancy pay, individuals must prove that they are 'employees' in the sense of being employed under a contract whereby they agree to provide their personal service in exchange for remuneration.

Prior to the 1990s, it was possible to speak of a 'binary divide' between those hired to provide their services personally to an employing entity (employees) and those carrying on business on their own account (the self-employed). From the 1990s onwards, Parliament introduced a number of additional categories in response to an increasing heterogeneity of working arrangements, most notably the worker concept as embodied in 230(3) ERA (Prassl 2013, 326ff). Those colloquially known as 'limb(b) workers' are entitled to a smaller set of employment rights, such as minimum wage, working time and health and safety protection than employees, and so are excluded from rights such as unfair dismissal, sickness, maternity and redundancy pay.[11]

There is some disagreement today on whether the worker should be seen as someone who differs only by degree from the employee, or someone who is best seen as a subset of the broader class of the self-employed. Either way, as the leading *dicta* in *Byrne Bros (Formwork) Ltd versus Bard and others* [2002] ICR 667 (EAT) suggests, it seems that:

> Drawing the distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. […] Cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.[12]

Within the wide spectrum of possible factual scenarios, therefore, failure to establish employee status will not prove fatal for all claimants working under ZHCs seeking to rely on their statutory rights because even if they are not found to be working

[11] Workers are there defined as those working (a) under a contract of employment or (b) any other contract […] whereby the individual undertakes to do or perform personally any work or services for another party to the contract […].

[12] *Byrne* [17].

under a contract of employment, they may well be able to claim those rights applicable to those hired under a worker's contract.[13]

When it comes to deciding questions of status, a considerable amount of case law and scholarship has built up over the previous century to develop, adapt and refine a series of common law tests to determine into which of the various categories (employees, workers, self-employed) an individual should fall (Deakin and Morris 2012, 145ff). Relevant factors include the requirement for personal service, the degree of control exercised by the employing entity and the scope of the individual's integration into the employer's business. It is often said that a further relevant criterion insofar as employee status is concerned is a requirement of what is known as 'mutuality of obligation': the employer must be under a duty to offer work, and the worker to accept it, on an ongoing basis. In *Nethermere (St Neots) Ltd versus Gardiner* [1984] ICR 612 (CA) 632F–G, Dillon LJ summarised the requirement as follows:

> 'that there is one *sine qua non* which can firmly be identified as an essential of the existence of a contract of service and that is that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service'.

While in some cases the absence of mutuality of obligation has been sufficient to deny the existence of a contract of employment even during periods of work, in others, mutuality of obligation has only been relevant to the question of continuity of employment, going towards the existence of a 'global' or 'umbrella' contract when it comes to clearing statutory temporal qualification thresholds (Deakin and Morris 2012: 165). That mutuality of obligation may not be a barrier to the status question is clear from the comments made by Langstaff J (as he then was) in *Cotswolds Developments Construction Ltd versus Williams* [2006] IRLR 181 (EAT) [55] where he suggested that Tribunals may:

> 'have misunderstood something further which characterises the application of "mutuality of obligation" in the sense of the wage/work bargain. That is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it'.

In fact, the premise that mutuality of obligation is fatal to the finding of an employment contract can be traced to the decision *O'Kelly versus Trusthouse Forte plc* [1983] ICR 728 which was itself based on a misinterpretation of the earlier decision in *Nethermere*, driven primarily by jurisdictional questions about the reviewability of the industrial tribunal's findings (Collins 2000). The better view, it is submitted, is that expressed in *Airfix Footwear Ltd. versus Cope [1978] ICR 1210* that 'where work is done consistently over a substantial period a tribunal would be entitled to reach

[13] Including notably the Working Time Regulations 1998 (n 110) and the National Minimum Wage Act 1998. This position has been thrown in doubt by some of the most recent cases in this area, as discussed extensively in (Prassl 2017).

the conclusion that a contract of employment *had been created* between the parties', a view confirmed by Slynn J in *Nethermere* (at 628), and more recently endorsed by the EAT in *Addison Lee Ltd versus Gasgoigne* Appeal No. UKEAT/0289/17/LA: 'well-founded expectations of continuing homework [could be] hardened or refined into enforceable contracts by regular giving and taking of work over periods of a year or more' such that even 'outworkers … might become … employees under contracts of service'.

Even through an application of the mutuality of obligation test for employment status, therefore, it is entirely possible that an individual working under a zero hours contract could be classified as an employee under section 230 ERA even if, as *Carmichael versus National Power plc [1999] UKHL 47* makes clear, this might be so only while work is being performed. This would, however, be heavily dependent on the precise facts of the case. Somewhat counter-intuitively, then, it seems that the less stable or secure the arrangement, the higher the chance that it would fail to be classified as a contract of employment, there being no regular pattern of work or mutual expectations of ongoing employment (Freedland 2016).

Given the central role played by mutuality of obligation in the case law, some employers have sought to contract out of the legal framework of worker protection by inserting explicit 'no mutual obligations' clauses into standard form contracts with zero hours workers. Today, however, it may be that this technique will not prove particularly successful. In *Autoclenz Ltd versus Belcher* [2011] UKSC 41, the Supreme Court stressed the importance of looking beyond the express terms of the contract in order to assess the reality of the agreement between the parties, regard being had to the inequality of bargaining power between them. In case of any deviation in practice from a no obligations clause, therefore, effect could be given to the parties' 'actual legal obligations' (at [32]).

This approach has recently been applied by the EAT in *Pulse Healthcare Ltd versus Carewatch Care Services Ltd* [2012] UKEAT 0123/12/BA where a preliminary question as to zero hours contract workers' employment status arose in the context of the transfer of an undertaking. The claimant care workers had provided intensive medical support under a 'zero hours Contract Agreement', which 'the Employment Judge was […] entirely justified in saying […] did not reflect the true agreement between the parties' (at [35]). The work arrangement in question was from the outset or at least had over time become, one in which the parties were subject to some degree of continuing mutual obligation with regard to the provision of work and the doing of work as offered. 'The mere fact that an employee can object to rostered hours [… did] not mean there is no mutuality of employment' (at [38]).

While this line of cases is to be welcomed, its potential should not be overstated. *Pulse* was highly fact-specific, and we can still expect a diversity of potential solutions: the finding of an *Autoclenz*-style sham will be directly dependent on the level of precarity in any one work setting. Significantly, moreover, there seems to be no scope for a tribunal to recognise a contract of employment if the relationship is genuinely as precarious in practice as it seems from the terms of the agreement.

Claiming employee or worker status is, furthermore, only the first hurdle when it comes to claiming employment rights. Many employment protection rights can only

be claimed after a minimum period of continuous service. For those hired under a zero hours arrangement, this can pose a formidable barrier. Either they must prove that there is an umbrella contract linking together each individual period of work, or they must prove that gaps between engagements are caused by a 'temporary cessation of work', a fluctuation in demand for the work of the type in question. Despite this being the reason many employers give for hiring on a ZHC basis, this statutory exception to the continuity rule has not been successfully invoked in many cases and would arguably be difficult to establish if the gaps between shifts or jobs are particularly long, or the reason for the cessation is not so much a drop in demand but a result of the employer's decision to rotate tasks across a large pool of workers. While it is not impossible for a ZHC worker to establish the existence of an umbrella contract, in practice, this is likely to be rare; the absence of any obligation to offer a set amount of work per week means that it will be difficult to identify *any* legal obligations between shifts (Adams and Deakin 2014b). Thus, while each incidence of actual work might be regarded as taking place under the legal form of a miniscule contract of employment (or miniscule 'worker's contract'), in the absence of an over-arching contract to join up those 'spot' contracts the consequence of such a series of contracts from a worker-protective point of view may prove to be minimal.[14]

3.5.3.1 Minimum Wages and Working Time

In the UK, workers have a right to be paid the national minimum (or living) wage for periods of work, however, short. The National Minimum Wage (NMW) Regulations 1998 (as amended) distinguish between different pay arrangements, 'time work', 'salaried hours work', 'output work' and 'unmeasured work' for the purpose of calculating the correct rate of pay. For the purposes of the National Minimum Wage Act 1998, zero hours work will usually be classed as 'time work' because most such workers are paid an hourly rate depending on how much they work.[15] Gaps between engagements can nonetheless be problematic, however, when it comes to claiming rights under the Act of 1998. While the right to the minimum wage is not conditional on a minimum period of continuity of service, the right to be paid attaches only to time spent working. This means time spent waiting for work will not be remunerated if no work materialises. The only exception to this is found in regulations 27 and 32, by virtue of which salaried hours workers and time workers have a right to be paid the minimum wage for periods of 'down-time' when the worker is effectively on-call—when they are 'at or near the place of work for the purposes of working'—but not actually working within the context of the Act. These deeming provisions, however, do not extend to a right to be paid for time spent waiting for work at home (neither 'at or near' the workplace), time when the worker is 'not

[14] Such as for example the annual leave rights in the Working Time Directive: C Barnard, 'The Working Time Regulations 1998' (1999) 28 ILJ 61, 62. Though cf now Case C-173/99 *R v Department of Trade and Industry (ex parte BECTU)* [2001] 3 CML Rev 7.

[15] Section 3 National Minimum Wage Regulations 1999.

awake for the purposes of working', periods of leave that are expressly unpaid, nor periods of industrial action.[16]

While zero hours workers will be remunerated for 'time work' in most cases, it is also possible that some employers will argue that the work should be classed as 'unmeasured work' and that the workers should be remunerated accordingly. Unmeasured work is quantified as 'the total of the number of hours spent […] during the pay reference period in carrying out the contractual duties required'. It is not clear, however, how willing the court will be to defer to the employer's definition of what counts as work when it comes to determining for what the worker should be paid. While the EAT decision in *Focus Care Agency Limited versus Roberts* [2017] UKEAT/0143/16/DM suggested that the tribunal would not readily allow the employer to creatively draft the contract with a view to avoiding his minimum wage obligations, this must not be doubted in light of the decision of the Court of Appeal (*Royal Mencap Society v Tomlinson-Blake* [2018] EWCA Civ 1641, [2018] I.R.L.R. 932).

All periods actually spent working, or time spent waiting for work at the workplace will count as 'working time' under the Working Time Regulations 1998. This means that it is against the law to ask employees to 'clock off' during quiet periods but still remain on the premises. However, time spent travelling to work, to establish whether or not there is work available for example, will not be classed as working time for the purpose of the regulations (nor will it be classed as 'work' for the purposes of claiming the minimum wage).

Time spent travelling *between* locations for the purpose of work *is* within the scope of NMW legislation, however, and this is especially important in the case of social care, in which zero hours workers are often not paid for travel time between clients or 'on-call' hours. A survey by Unison found that only 35% of councils in England make it a contractual condition that domiciliary care providers pay their workers' travel time (Unison 2017). The National Audit Office estimated that as many as 160,000 to 220,000 care workers in England were paid below the NMW because of this (National Audit Office 2014).

It is clear from this brief analysis that the most problematic legal issues facing ZHC workers arise from gaps in the scope of legal protection. In other words, the nature of the contractual arrangements is such that these workers are likely to fall outside the scope of many key statutory employment rights. Instead of focusing on this wide range of issues, however, prior to 2017 the main legal problem identified by the Government was that of so-called exclusivity clauses: contractual terms whereby the worker undertakes to work exclusively for the employer in question. Even so, the Government's own Consultation Document points to exclusivity as an *occasional* problem for zero hours contracting, where a 'small number of individuals on zero hours contracts are prevented from working for another employer', and goes on to

[16]Regulation 34 expressly excludes time travelling between home and workplace. This has harsh implications in certain industries, as can be seen in: *Aslam v Uber BV*, [2017] IRLR. 4. See also: *Thera East v Mr J Valentine* Appeal No. UKEAT/0325/16/DM where the court left it to the contract to decide if travel time was 'work' that earned a right to be paid. On overnight layovers. See: Bax*ter v Titan Aviation Ltd* (unreported) 30 August 2011 (EAT).

assert that it 'is clear that, in some circumstances, exclusivity clauses are useful and justifiable' (Department of Business Innovation and Skills 2013, 13).

The much-vaunted 'regulation' of zero hours contracts that resulted from this consultation process boils down to a brief subsection in the Small Business, Enterprise and Employment Act 2015, section 153 which stipulates that (3) Any provision of a zero hours contract which—prohibits the worker from doing work or performing services under another contract or under any other arrangement, or prohibits the worker from doing so without the employer's consent, is unenforceable against the worker.[17]

The extent to which (if at all) this provision addresses any of the real problems underpinning ZHC work is questionable. First, if there is an umbrella contract, an exclusivity clause would presumably be valid for the duration of the contract, but could only be enforced by injunction if the employer was prepared to pay the worker a salary for the period in question (Adams and Deakin 2014b). But an employer would find it difficult to claim damages as he would struggle to show loss. If there is only a spot contract, by contrast, exclusivity clauses would be operating during periods when there is supposedly no contract in force. On the face of it, therefore, they would be unlawful and in restraint of trade. Alternatively, the existence of such a clause might have a worker-protective effect—implying that there is indeed a contract in existence between engagements.

Relative to the other problems identified hitherto, exclusivity clauses were in any event somewhat of a red herring: a CIPD study suggests that exclusivity clauses only affected 9% of zero hours workers (CIPD 2013). The legislative ban on exclusivity clauses thus seems to have been advanced not least as a way to boost the legitimacy of an employment practice the Government evidently had no intention of putting a stop to. In any event, as a number of commentators have noted, the regulations can be easily avoided by guaranteeing workers a minimal amount of work, e.g. one hour per week. They have also been criticised for failing to address the potential for employers to impose an informal economic sanction for breaches, e.g. a refusal to make future offers to workers who failed to accept hours offered or who accept work elsewhere. An attempt to tackle the latter of these avoidance tactics is found in *The Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015*, which creates rights for zero hours workers not to be subjected to any detriment for failing to comply with an exclusivity requirement. These rights are enforceable through the employment tribunal, which has the power to award the worker compensation, subject to the same limit as that applicable in unfair dismissal claims (Pyper and Powell 2018).

Further evidence of the weakness of the regulation's protection can be seen in the rise of so-called short-hours or 336-h contracts. Short-hours contracts, or '336-h contracts', differ from ZHCs in that they guarantee a minimum number of hours of work (usually 336) per year. This number is significant because it is viewed by HM Revenue and Customs as the minimum employers must guarantee to take advantage of the tax allowance available for employees of umbrella companies (HMRC 2016).

[17] Small Business, Enterprise and Employment Act 2015, Section 153 (the relevant provisions have now become Section 27A(3) of the ERA 1996).

These contractual forms predate the regulations, but there is evidence that some employers are shifting towards using this form of contract in order to exploit a loophole in the law regulating ZHCs (Bowden 2017). Because the legislative ban on exclusivity clauses only applies to contracts in which there is no guaranteed minimum of working hours, employers hiring workers on '336-h contracts' would not fall foul of the regulations if they were to include an exclusivity clause preventing the individual from working elsewhere.

The benefit to employers of these 'short-hours' contracts is that they enable them to have a large pool of workers ready and available to work at any time, without having to provide them any guidance as to how much work they will get per week, or when. The minimum commitment of 336 h is not onerous, and any burden is in any event offset by the associated tax advantages. In the case of Concordant Group at the University of London, for example, the '336-h' contract provides that hours can be allocated randomly throughout the year, that the minimum hours obligation is satisfied provided that 336 h are *offered*, regardless of how many are actually worked and that the worker must be available to work (i) at short notice, and (ii) anywhere in the UK (Bowden 2017).

It is not clear how many employers will shift from ZHCs towards '336-h' arrangements. These may not fall within the scope of the 2014 Regulations, but it is likely that in many cases, exclusivity terms would, in any event, be found in violation of the common law doctrine of restraint of trade, given that there may be substantial periods during which workers are not being paid but are unable to obtain alternative income (paid work or social security benefits) elsewhere. A total of 336-h arrangements may also prove self-defeating from the employer's perspective; provided there are sufficient control and integration, these contracts are perhaps more likely than 'standard' zero hours contracts to be found to have the requisite mutuality of obligation to be classed as a contract of employment. Perhaps aware of this risk, however, in a recent update to their guidance HMRC stated that the inclusion of such a clause in a contract will not, on its own, be enough to make the contract overarching; there must be mutual obligations in the gaps between assignments (HMRC 2016).

3.6 Explanations and Responses

Notwithstanding that many businesses using zero hours contracts (such as Sports Direct, Amazon and Uber) seem to have a relatively stable and predictable demand, employer representatives argue that the main reason employers use ZHCs is to deal with peaks and troughs in demand, something that is precluded when workers are hired full-time (CIPD 2013, 14). This is said to have been particularly important in the aftermath of the financial crisis. John Cridland, former Director General of the Confederation of British Industry ('CBI'), has argued that: 'If we hadn't had this flexible working when the economy contracted, unemployment would have topped 3 m—and it didn't it went to 2.5 m' (Rigby et al. 2013). Similarly, the Institute of Directors (IoD) describe zero hours work as a 'vital tool' in bringing about an

economic recovery: 'Countries with a flexible labour market tend to have lower unemployment and higher employment, and one of the reasons that the UK economy has not gone the way of Southern Europe is because employers have been able to adapt swiftly to changing demand (Hunter 2013)'.

If this were the main reason for using ZHCs, however, it is odd that smaller companies do not make greater use of ZHCs; the major users of ZHCs include Sports Direct, Cineworld, Tesco, Subway, Wetherspoons, McDonalds and Amazon (Standing 2014, 73). This is consistent with the findings of the ONS BS that although only 6% of employers have some employees on zero hours contracts, 28% of employers with at least 250 employees make some use of zero hours contracts as compared with 5% of employers with fewer than 10 employees (ONS 2018).

Whatever the reason for the increased use of ZHCs, a third of all workers and more than half of workers between 16 and 24 years old say that they are on these contracts because they cannot find a job with regular fixed hours (Pickavance 2014: 5). The Government argues, therefore, that not only are ZHCs better than the alternative—unemployment—but that they also provide people with 'opportunities to enter the labour market and a pathway to other forms of employment' (Department of Business Innovation and Skills 2013, 13). This argument has also been taken up by employer representatives. The Head of Communications at the Institute of Directors (IoD), for example, argues that '[t]hose who wish to hold up zero hours contracts as a symptom of an unfair economy will continue to do so—but they must appreciate that, for hundreds of thousands of workers and employers, these contracts represent an extremely attractive proposition. Despite the efforts to portray all those on such contracts as exploited, the truth is that there are plenty of engineers, contractors and professionals whose willingness to be flexible adds significantly to their market value—and, therefore, their earning power' (Molloy 2015). Similarly, Professor Len Shackleton argues that 'zero hours contracts have a place in the labour market, offering opportunities to those who would otherwise "find it difficult to take regular work at fixed times: think of students and single parents" (Groom 2013; Shackleton 2013).

Despite these arguments, it is far from clear that ZHCs necessarily have a positive effect on individuals' future labour market prospects, especially as an entry into more stable employment. Economists David Autor and Susan Houseman found that temporary help placements might even *harm* subsequent employment and earnings outcomes in their study of the Work First programme in Michigan (Autor and Houseman 2010). According to Norman Pickavance, the lack of training and the emergence of a two-tier workforce that can be associated with reliance on zero hours arrangements have 'broken' the ladders that normally allow people to progress through the ranks of an organisation (Pickavance 2014,12).

As economic growth has returned to the economy, the concern is growing about the persistence of low pay and low job quality. In this context, it is interesting that employer representatives are becoming increasingly open to acknowledging that the advantages of zero hours work are not universal. The IoD, in response to McDonald's giving staff the option to move onto a guaranteed-hours contract notes, therefore, that while 'zero hours contracts will continue to be a useful part of a flexible labour market,

… we would encourage firms to engage with staff and look at offering permanent contracts where appropriate' (Ruddick 2016). Indeed, it can be seriously questioned how far ZHCs are being used to create jobs in a context in which guaranteed hours would be economically unviable, as opposed to being the result of poor management practices and a legal framework that provides employers with no incentive to improve them. Many CEOs and HR managers interviewed as part of an independent review on ZHCs in the UK are now arguing that in the current economic climate, reliance on ZHCs is not necessary. Rather, it reflects 'lazy management', an 'unsophisticated way of managing workplace flexibility' and an 'ineffective way of motivating people' (Pickavance 2014, 13).

Employee organisation concede that ZHCs may provide a limited means for combatting unemployment, particularly given evidence that some individuals value the flexibility and opportunity they provide when it comes to taking up secondary employment (Pyper and Powell 2018). However, for the most part, the stance of employee organisations has been critical: contributing to what they see as an 'increasingly insecure, vulnerable workforce'. The Trade Union Congress (TUC) suggests, for example, that too many workers are not able to find enough hours to fund their subsistence, a problem exacerbated by the lack of regularity in their patterns of work (TUC 2013b). Similarly, trade union Unite has argued that ZHCs are unfair, 'creating insecurity and exploitation for many ordinary people struggling to get by. They are one of many forms of underemployment blighting the British economy. Employers use them to cut wages, avoid holiday pay, pensions or other benefits enjoyed by employees and agency staff' (Unite 2013).

UK Trade Unions have been particularly critical of the 2013 Government consultation on zero hours for not doing enough to tackle the problems associated with zero hours work. The focus on exclusivity clauses emerging from the Government consultation (discussed below) is seen as 'a joke. It misses the key point that zero hours confer fear and misery of those forced into them—no security, no protection and little dignity' (Unite 2015). The TUC has similarly argued that the 'policy proposals outlined in the consultation document fail to meet the Government's stated objective of "cracking down on any abuse or exploitation of individuals"' (TUC 2013a, 15).

Employee organisations and the media have also emphasised the barriers ZHC workers face in terms of collective organisation. Data from the LFS in the final quarter of 2016 highlight that only 8% of zero hours workers are members of a union compared to 22% of those on other types of contracts. As *Guardian* columnist Zoe Williams argues: 'You simply cannot mobilise when you don't know how many hours you're going to get each week. A zero hours employer wouldn't even have the decency to victimise you; they just wouldn't call you' (Williams 2016).

Even so, there does seem to be some move towards mobilising zero hours workers. In 2015, for example, The University and College's union launched the 'Campaign Against Casualisation', calling on higher education institutions in the UK to eradicate the use of zero hours contracts (UCU 2015). Unite is asking for feedback on those employed on zero hours contracts in its 'No to Zero' campaign, which aims to pressure the Government to eliminate insecure employment from state contracts as one of its goals (Unite 2018).

That said it is interesting to note how unions differ in their preferred policy agenda. Unite has been pushing for a ban on zero hours contracts (Unite 2018) which they argue is supported by more than 60% of the public (Unite 2016). This has also been endorsed by the Labour Party in its 2017 Manifesto. The common platform put forward by the TUC, by contrast, does not advocate a ban on zero hours contracts, but does seek to ensure that workers receive written terms and conditions setting out hours expectations, are given sufficient notice of work availability and cancellations, and that these workers are compensated for the added flexibility that they offer employers and their increased financial risk (TUC 2013a)—suggestions that have been recently taken up by the Government (discussed below).

Trade Unions have also successfully exerted pressure on particularly notorious users of ZHCs through shareholder activism. The Trade Union Share Owners (TUSO) is a group of investors that represent the financial assets of the TUC, Unison and Unite. In September 2016 they tabled a resolution at the AGM of Sports Direct, a company to be discussed in more detail in due course, calling for the board to commission an independent review of the company's employment practices, including the use of zero hours contracts and agency staff (TUC 2016). The resolution was supported by the majority of independent shareholders despite opposition from Sports Direct management. However, despite this success, there is no evidence that Sports Direct has acted on its pledges to improve working conditions for staff. This has led to a fresh action by TUSO, who have again written to investors urging them to vote against the reappointment of the Sports Direct chairman, Keith Hellawell (BBC 2017).

3.7 Government Responses

Prior to 2017, beyond the Government's half-hearted attempt to regulate ZHCs by banning exclusivity clauses, no serious attempt had been made to regulate, never mind put a stop to, the use of zero hours work arrangements by employers. In 2014, a Private Members' Bill proposing to restrict the use of ZHCs to short-term or season work *in the name of security and stability* was abandoned at its second reading (Pyper and Powell 2018, 23).[18] Things seemed to change in 2016, however, when a Parliamentary Inquiry was launched following reports of some particularly egregious instances of labour standards violations in warehouses operated by major sports conglomerate Sports Direct. This, combined with increased media attention on the exploitative employment practices of 'gig-economy' platforms, such as Uber and Deliveroo, led to a much more comprehensive review of the regulatory environment in 2017.

The 'Taylor Review' is most notable for the attention paid to questions of employment status, as well as the problems of low and irregular pay with which 'new' forms of work are associated. The Review, and the Government's somewhat lacklustre response to it, has been widely criticised, however, because it evidences no real intention to do more than minimise the scope for some of the worst instances of

[18] Result of the Private Members' Bill ballot: Session 2014–15.

abuse (Bales et al. 2017; McGaughey 2017). Even so, Taylor makes three proposals which are of particular interest in the context of ZHCs: (i) to reverse the burden of proof in employment tribunal proceedings, to introduce a 'worker by default' model, (ii) to pilot a 'pay premium' on the National Living Wage for hours that are not guaranteed as part of the contract and (iii) to provide zero hours workers with a right to be offered a permanent contract after 12 weeks (Taylor 2017).

Steps towards implementing something similar to the third recommendation have recently been taken by the Welsh Assembly in its Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017. These Regulations are specific to Wales and are applicable only to workers engaged in domiciliary care, secure accommodation care or other forms of residential care. Nonetheless, Regulation 42 is of particular interest, as it provides that a domiciliary care worker on a zero hours contract must, after three months, be offered a contract of employment (even if they choose to remain on zero hours). While there is no specific reference to enforcement mechanisms, there is no reason that a failure to comply with Regulation 42 could not form the basis for a complaint of unfair (constructive) dismissal.

In its official response to the Taylor Review, the UK Government has indicated that it intends to take steps towards implementing a right for all zero hours workers to request a contract that guarantees hours that reflect those actually worked after 12 months (HM Government 2018). Of course, there is nothing to stop the hirer terminating the contract prior to the 12-month threshold, because zero hours workers will not usually qualify for unfair dismissal protection; nor does there seem to be any intention by the Government to impose an obligation on the hirer to accept those requests that are reasonably made.

The Government has also stated its intention to ask the Low Pay Commission to pilot a pay premium in 'suitable companies' based on workforce size and turnover (HM Government 2018, 76). In relation to the recommendation for default worker status, however, the Government's response is even more tentative:

> 'The Government believes that the work it is doing on looking at clarification of employment status and rights, along with actions to make redress easier and faster, will address the understandable concerns that prompted the Committees to make this recommendation. The Government set out in its response that it would return to the question of the burden of proof in Tribunal hearings at a later date, should this not be the case'. (HM Government 2018, 49)

Thus, while the Government appears to be taking seriously some of the regulatory challenges facing zero hours workers, to date, we are seeing only tentative first steps. Missing from the Government's response is any real commitment to stamping out exploitative practices where a 'convincing' economic case can be made in their favour, nor any willingness to criticise 'flexibility' as a laudable aim. In other words, the Government is committed to making zero hours arrangements more legitimate and viable, by permitting their use, while preventing their 'abuse'.

3.8 Conclusion

This chapter has presented a brief picture of zero hours working in the UK. It has shown that the legal framework does not, at present, provide adequate protection for the majority of those engaged in zero hours work. This is partly due to gaps in the scope of legal protection, but also to deliberate policy choices made by successive governments in the name of flexibility. For this reason, it has been argued that zero hours contracts are best seen as one of the more extreme examples of the growing problem of casualisation in the UK labour market, and the removal of the floor of rights that social security and labour law had once provided.

While the Government's renewed (albeit cautious) commitment to more comprehensive regulation of the use of zero hours contracts is to be welcomed, the risk is a further normalisation and legitimation of what are ultimately unsustainable and regressive, working practices (Adams et al. 2015). Despite growing public criticism of zero hours work, the Government shows no signs of committing itself to a more stable and secure, model of employment *for all*.[19] Rather, the idea of a multi-tier workforce seems to be defended as both necessary and beneficial. Recent reforms to the social security system thus form part of an aggressive supply-side labour market policy designed to encourage the taking up of causal work through financial sanctions, while at the same time providing no incentives to employers to improve management and manpower policies. What seems clear, therefore, is that, however, seriously the Government may take the case for regulation of ZHCs, stability and security will remain elusive unless active steps are taken to put a stop to the trend towards increasing casualisation.

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[19]Most recently, see the Government's 'Good Work Plan' and associated reforms, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766167/goodwork-plan-command-paper.pdf.

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Chapter 4
On-demand Work in Australia

Iain Campbell, Fiona Macdonald and Sara Charlesworth

Abstract This chapter examines on-demand (or 'on-call') work in Australia, understood as work arrangements in which the worker agrees to be available for work and is called into work as and when she/he is needed by the employer. We focus on the two main types of on-demand work: (a) zero hours work arrangements; and (b) minimum-hour work arrangements. Both are highly precarious forms of work, linked to negative consequences for workers. On-demand work has been neglected in much employment relations research in Australia, but it embraces a substantial minority of the workforce and constitutes a significant challenge for research and policy. The chapter outlines the emergence of on-demand work within regulatory gaps associated with casual work and permanent part-time work. It summarizes what is known about on-demand work and on-demand workers, drawing both on secondary labour force statistics and on case-study evidence in selected industries and enterprises. It concludes by noting the surprising lack of effective regulatory responses and by suggesting principles for future reform.

Keywords Casual · On-demand · Part-time · Labour regulation · Fair work commission · Regulatory responses

I. Campbell (✉)
Centre for Employment and Labour Relations Law, Melbourne Law School, 185 Pelham St., Carlton, VIC 3053, Australia
e-mail: campbell.i@unimelb.edu.au

The University of Melbourne, Melbourne, VIC 3010, Australia

F. Macdonald · S. Charlesworth
School of Management, RMIT University, Melbourne, Australia
e-mail: fiona.macdonald@rmit.edu.au

S. Charlesworth
e-mail: sara.charlesworth@rmit.edu.au

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4.1 Introduction

This chapter examines on-demand (or 'on-call') work in Australia, understood as comprising *work arrangements in which the worker agrees to be available for (paid) work for a certain period of the week—ranging from 'anytime' to just one or two blocks of time—and is then called into work, generally within that zone of availability, as and when s/he is needed by the employer*. On-demand work in Australia takes two main forms:

1. ***zero-hours work arrangements***: where the worker agrees to be available for (paid) work, and the employer does not agree to provide any hours of paid work; and
2. ***minimum-hour work arrangements***, where the worker agrees to be available for (paid) work, and the employer guarantees a small number of hours of work each week (perhaps on a regular roster), but with the option of 'flexing up' a large number of extra hours.

This understanding of on-demand work fits with international definitions (Eurofound 2015; ILO 2004, 2016). But it is worth stressing two points. First, the definition is couched in terms of the job as a whole and not in terms of components of the job. In other words, we are interested in work arrangements, where *all or most* of a worker's weekly working hours are on-demand hours in response to business needs, rather than work arrangements where only a small part of a worker's weekly working hours are on-demand hours and most hours are within a regular (part-time or full-time) schedule. Second, our definition is explicitly sociological rather than legal, i.e. it is oriented to the reality of workplace practices rather than the formal content of an employment contract. From a sociological perspective, the definition contains two main elements. The first refers to a specific set of actual working-time patterns—irregular schedules flowing from the irregular demands of employers for labour time. The second element refers to agreement on the part of the worker to be available for such irregular demands. Such agreement, which is pivotal in establishing an employment relationship and in consolidating on-demand work as a distinct form of employment, should also be seen sociologically. Thus, it can be either formal or informal, that is, it can be either formalized in a written contract (or statement of terms of employment) or, alternatively, it can simply be part of a set of informal understandings, which exist either in conjunction with or instead of a written contract.

Though the reality of on-demand work is well-known in Australia, none of the central concepts ('on-demand', 'zero hours' and 'minimum-hour') are common parlance.[1] Partly, as a result, the topic is rarely taken up in employment relations debates. It tends to be considered only in passing, usually in discussing the peculiar Australian phenomenon of casual work (Campbell 2004). It is true that on-demand work is closely associated with casual status (see below). However, subsuming on-demand

[1] 'On-call' is a familiar term, but it is interpreted narrowly to refer just to after-hours availability amongst professional workers such as medical personnel or IT consultants. We therefore prefer to use the less familiar synonym of 'on-demand' to refer to the subject-matter of this chapter.

work under the analysis of casual work deflects the analysis in at least two ways: (a) it tends to blur the implications of on-demand working-time patterns within casual work, since these work-time patterns do not affect all casual employees but only one sub-group; and (b) it overlooks the phenomenon of minimum-hour work arrangements, which are found within permanent or ongoing work as well as casual work. Neglect of minimum-hour arrangements within permanent work is particularly unfortunate, since such work, despite the 'permanent' label, is also precarious and is often associated with the same sort of negative consequences as on-demand casual work. Moreover, as we argue more fully below, these work arrangements appear to be increasing in importance in several sectors, including expanding areas such as home and community care for people with disability (Macdonald et al. 2018).

The chapter is organized as follows. Section 4.2 introduces the Australian labour market context. Section 4.3 examines the way in which zero hours and minimum-hour work arrangements fit within the structure of protective labour regulation. We argue that these working arrangements emerge within 'protective gaps' that create deficits in protection for employees and enhanced discretion for employers (Grimshaw et al. 2016). The two most important gaps concern: (a) casual work, which provides a conducive framework for both zero hours and minimum-hour work arrangements; and (b) permanent part-time work, which is a common setting for minimum-hour work arrangements. Section 4.4 summarizes what is known about the distribution and main characteristics of on-demand work and on-demand workers, drawing both on secondary labour force statistics and on case-study evidence in selected industries and enterprises. Section 4.5 briefly considers the impacts of on-demand work on the workers involved, while Sect. 4.6 identifies several factors that promote the expansion of on-demand work. The chapter concludes by noting the surprising absence of effective regulatory responses in Australia and by suggesting principles for future reform.

4.2 Australia: Labour Market Context

Australia is a prosperous nation with a developed economy. A severe recession in the early 1990s was succeeded by recovery and falling unemployment through the 1990s and much of the 2000s. The country was only lightly affected by the global financial crisis (GFC) of 2008–09. Current unemployment rates are relatively modest (5.3%), but they are joined by high rates of time-related underemployment (8.0%), indicating a persistent problem of labour underutilization (ABS 2018). Average real wages are high and the country is prominent in aggregate measures of job quality (OECD 2014), but recent debates identify persistent problems of insecure work, rising inequality, wage stagnation, low productivity growth and high household debt (Howe et al. 2012; Watson 2016).

The workforce (12.5 million) is characterized by a high proportion of employees, high rates of workforce participation amongst partnered women and students and an increasing proportion of part-time employment. Employment in secondary

industry has declined, but this has been balanced by rising employment in the service sector, encompassing both professional/managerial and routine service sector jobs (Watson et al. 2003). It is a country of immigration, but the traditional pattern of permanent settler migration has been displaced in recent years by an increasing flow of temporary labour migration under four main visa programmes: two dedicated schemes, encompassing either skilled workers (throughout the economy) or lower-skilled workers (predominantly in horticulture), and two de facto schemes, embracing working holiday-makers and international students (Mares 2016; Wright and Clibborn 2017).

Australia was an early pioneer of the welfare state, but it took a distinctive path in which occupational welfare was stressed and state benefits were highly targeted and funded through general taxation (Whiteford and Heron 2018). Benefits for people of workforce age are currently low and increasingly difficult to access in the wake of workfare initiatives for the unemployed and tightened eligibility for single-parent and disability benefits (Wilson et al. 2013). However, social expenditure has increased in recent years, with particular emphasis on income transfers to families with children. At the same time, the targeted nature of the system has been diffused through the rise of benefits delivered, often to wealthier groups, via social tax expenditures (Spies-Butcher 2014).

4.3 Protective Labour Regulation

Protective labour regulation for workers in Australia is spread through a complex and layered system that includes common law, statute (e.g. ten National Employment Standards [NES]), a network of 122 'Modern Awards' and a narrow segment of collective agreements (Bray and Stewart 2013). Awards have been retained, albeit in a residualized form,[2] but the overall system has been transformed by a slow and stuttering programme of labour market deregulation in the 1990s, with a further radical spurt under the 'Work Choices' regime in 2005–2007, before settling into its current form under the federal *Fair Work Act 2009*. Consistent with neoliberal philosophies (Baccaro and Howell 2011), deregulation removed many award protections, restricted trade union activities, narrowed collective bargaining to enterprise level and enhanced management discretion, thereby helping to depress both union

[2] Awards are legally-binding documents specifying job classifications, minimum rates of pay and minimum conditions of employment for employees at industry or sector level. They are set down by permanent, independent quasi-judicial tribunals, such as the federal Fair Work Commission (FWC), generally in response to applications from interested parties, including trade unions and employer associations. In their heyday, awards were a vehicle for generalising gains, mainly achieved through collective bargaining by strongly organised workers, throughout the workforce. This dynamic was eliminated by reforms in the early 1990s, which reinterpreted awards as a safety net that was distinct from a new stream of 'enterprise bargaining'. The residualization of awards offers a good example of 'institutional conversion' in the process of neoliberal change (Baccaro and Howell 2011; Buchanan and Oliver 2016). Differences amongst awards remain important and contribute to uneven protection for employees (Bray and Underhill 2011; Charlesworth and Heron 2012).

density and collective bargaining coverage (Bray and Rasmussen 2018; Wright and Lansbury 2016). On the other hand, partly as compensation, policymakers introduced a small set of general protections and consolidated a minimum hourly wage, which, when calculated net of tax and social contributions, was ranked in 2013 as the highest amongst OECD countries (OECD 2015; Wilson 2017).

Formal working-time regulation is patchy and relatively weak, lacking standard features such as effective rules for maximum daily and weekly working hours, and it has been fragmented and weakened in the course of neoliberal reforms (Charlesworth and Heron 2012). One result is a marked polarization of working hours, with many full-time employees working very long weekly hours while many part-time employees are on very short hours (Charlesworth et al. 2011). The current working-time regime has a hybrid character. It is best characterized as a unilateral regime, in which the most important level for the determination of working-time patterns is at the workplace (Eurofound 2016, 7–8). Nevertheless, protective regulation retains some purchase on working-time patterns through provisions, especially in awards, for matters such as breaks, penalty rates for work in non-standard times, and minimum engagement periods. Moreover, working-time continues to be the subject of broad contestation and debate, and some regulatory advances for employees have been achieved, generally through statutory provision, most notably paid parental leave and a (limited) right to request flexible work (Pocock et al. 2013).

The continued influence of protective regulation, backed up by social norms of 'fairness', inhibits the growth of on-demand working-time patterns within the mainstream of full-time, permanent waged work. However, on-demand work, in either zero hours or minimum-hour versions, has been able to emerge and flourish in Australia within certain gaps in the system of protective regulation. On-demand work is strongly associated with two forms of employment that are only *partially protected* compared to the standard, primarily because of the operation of special rules and exemptions: (a) casual employment; and (b) permanent part-time employment. Because of their importance for on-demand work, we discuss each in turn, before briefly considering two additional gaps that influence the extent and content of on-demand work arrangements—bogus self-employment and employer non-compliance.

4.3.1 Casual Employment

The most comprehensive and significant regulatory gap in Australia concerns *casual employment*, an officially sanctioned form of employment which was preserved and institutionalized in the first half of the twentieth century as the main alternative to standard full-time permanent waged work (O'Donnell 2004). Casual employees, broadly defined in casual clauses in awards as employees who are 'engaged as such' or 'paid as such' (Stewart 2015, 66), are excluded from many of the rights and entitlements—such as paid leave entitlements—that were developed for permanent employees. Instead, their employment rights and entitlements are largely limited to

a right to an hourly wage (together with a 'casual loading', currently set at 25% of the hourly wage specified in regulation for a permanent employee) in return for each hour of labour at the workplace.

The principle of exemption from rights and entitlements, together with the casual loading, is spelled out in casual clauses in awards and enterprise agreements. Casual clauses are found in almost all of the 122 modern awards and in over 90% of federal collective agreements (DoE 2015, 8). The principle of exempting casual employees from rights and entitlements is also evident in statutory regulation such as the NES, which, though often misrepresented as a safety net of statutory rights for all national system employees, explicitly excludes casual employees from its key provisions (Charlesworth and Heron 2012, 171–172).

The casual loading is sometimes interpreted as a 'wage premium' for workers, which should make casual work more expensive to employers. This is a misunderstanding (Campbell 2004). In recent times, the casual loading has been carefully calculated, generally by judicial tribunals, as a monetary equivalent for some, though not all, missing benefits such as paid annual leave, payment for public holidays and paid sick leave. In principle, payment of the loading is supposed to mean that the financial cost to the employer of one hour's labour at the workplace, or, conversely, the financial benefit to the employee of one hour's labour at the workplace, is roughly the same, whether the labour is casual or permanent. But this principle of monetary equivalence is a formal notion, or less politely a fig leaf, which screens the many financial advantages—quite apart from all other advantages—that employers can obtain from casual employees (Campbell 2004; Markey and McIvor 2018). In practice, casual workers tend to be cheaper, often dramatically cheaper, for employers, compared to other forms of employment. Far from earning a wage premium, most casual workers suffer a 'wage penalty' (Lass and Wooden 2017; Watson 2005). The cost advantage for employers is shaped by different factors, which vary from sector to sector and firm to firm, but the three major factors are: (a) the relative ease with which employers can avoid complying with minimum standards for casual workers; (b) the opportunities to use a low formal comparator, such as an award instead of an enterprise agreement, when calculating the hourly wage due to the casual employee; and (c) the marked advantages of casual work in terms of working-time flexibility, which mean *inter alia* that employers only need to pay for small fragments of intense labour rather than the longer blocks of labour time in more conventional schedules. The existence of this multi-pronged cost advantage helps to explain both the high proportion of casual employees in the Australian workforce and the pattern of their distribution across the employment structure. Casual employees (in the main job) have become a substantial part of the workforce, constituting more than one in four employees (and more than one-fifth of the total workforce) (ABS 2017). Most casual employees are directly employed, but a small minority are organized via temporary work agencies ('labour hire') (ABS 2010).

Working-time flexibility is a crucial feature of casual work. Because of the broad definition of casual, the wide-ranging exclusion from most protective regulations in awards, agreements and statute, and the removal in the course of labour market deregulation of regulatory limits such as bans and quotas, casual employees have

been readily available to employers as a strikingly versatile ('flexible') working-time resource. They can be full-time or part-time, though most are part-time. They can build up long periods of tenure in one enterprise or they can be turned over rapidly and left to circulate through a succession of casual jobs. Most important for this chapter, they can be given regular schedules ('regular casuals'), similar to the regular schedules of many permanent employees, or they can be subject to on-demand working-time patterns. Members of the latter group, which we call 'on-demand casuals', are generally on zero hours work arrangements, but they can also be organized through minimum-hour work arrangements.

Labour regulation does not leave casual employees completely unprotected. They are covered by statutory protections such as occupational health and safety (OH&S) regulation, rights to workers' compensation in case of injury or illness caused by work, and freedom of association and collective bargaining rights (O'Donnell 2004). Depending on the specific award, casual employees are generally entitled to breaks during lengthy shifts and some may have other entitlements such as penalty rates of pay for work during non-standard times of the day or week. In addition, casual employees may acquire certain rights and entitlements, such as protection against unfair dismissal, if they fulfil a qualifying period of tenure and are in a job that is 'regular and systematic and … [with] a reasonable expectation of continuing employment'. Finally, they have been granted two *special protections* that, at least in principle, constrain employer use of their working-time:

1. Casual employees have the special protection of a *minimum shift engagement* when called in for work, and designed to ensure that the time and money expenses of activities such as transport to work and organisation of childcare are balanced by a reasonable period of paid work (or payment in lieu).[3] Under the terms of this protection, specified in awards, workers are entitled to payment for the minimum engagement period, even if the shift is cancelled or shortened after arrival at the workplace. Traditionally, the level of the minimum has varied amongst the different awards, and a few awards have not specified any minimum, while others range from one hour (in female-dominated areas such as homecare) up to four hours (in male-dominated areas such as manufacturing) (Charlesworth and Heron 2012, 173–175). A decision of the Fair Work Commission (FWC) in 2017 introduced a minimum shift engagement of two hours for casual employees into the 34 modern awards that previously lacked a minimum (FWC 2017; Markey and McIvor 2018).
2. A second special protection was introduced in a minority of awards (and collective agreements) in the wake of a major industrial case in 2000. This entails a *right to request conversion*, whereby casual employees, other than 'irregular casual

[3] 'Minimum shift engagements' constitute an important working-time protection but they should not be confused with guaranteed minimum hours. They only provide a guarantee of minimum payment *once the worker has been called in and commences work*. Moreover, a provision for minimum shift payments does not resolve problems of short notice of changes, including cancellation of shifts, which are communicated *before* the worker arrives at the workplace. Protection in this respect will depend on the rules concerning notice of changes to rosters that are specified in the award (or agreement).

employees', after a certain qualifying period of tenure (generally six months), acquire a right to ask their employer to convert their contract of employment to standard full-time or part-time employment. Employers are required to give a casual employee notice of the right at five month's service but they are not obliged to grant the request and can refuse it (though not unreasonably) (Charlesworth and Heron 2012, 177; Stewart 2015, 68–69). Until recently, the right to request conversion only appeared in a minority of awards. However, a 2017 decision of the FWC has developed a model conversion provision for insertion into a further 85 modern awards. The qualifying period is set at 12 months, and the casual employee must have worked on a regular basis and with the prospect of ongoing employment (FWC 2017; Markey and McIvor 2018).

4.3.2 Permanent Part-Time Employment

Permanent part-time employment can also be usefully discussed as a regulatory gap. In the past, many awards defined standard employment as full-time and failed to make provision for part-time jobs with full rights and entitlements, thereby pushing employees who wanted part-time hours, often women seeking to reconcile paid work and family responsibilities, into casual status. This was slowly remedied, and in 1996 all federal awards were required to provide for permanent part-time employment, defined as *regular part-time* work (Stewart 2015, 66–67). The relevant provisions in awards and agreements have, however, generally been developed along the same lines as casual work, i.e. through special clauses tacked on to the main text of the regulation. A common template starts with a definition of a regular part-time employee as an employee who works less than 38 h per week and has 'reasonably predictable hours of work', and it generally goes on to specify that such employees are entitled to the same benefits as permanent full-time employees on a *pro-rata* basis. Beyond this, it is common to require, at commencement of the job, written agreement on a regular roster (number of weekly hours, days of the week and starting and finishing times), backed up by provisions requiring written agreement for variations in the regular pattern of work (FWC 2017). Most, though not all, permanent part-time employees are, like casual employees, entitled to minimum shift engagements, which are usually set at the same level as for casuals in the relevant award.

Regulation of permanent part-time jobs was inspired by a principle of *equal treatment* for full-time and part-time workers, and such jobs have been conventionally regarded as a better-quality alternative to casual part-time jobs. The regulatory rules around 'regular part-time work' are valuable and have sometimes succeeded in stimulating or consolidating improvements in the quality of part-time jobs. Unfortunately, it is increasingly clear that they fall short of what would be needed to guarantee 'good-quality' or 'integrative' part-time work in the full sense (Chalmers et al. 2005; Fagan and O'Reilly 1998). In particular, we can note that the rules around regular part-time work do not prevent the subordination of workers to on-demand work arrangements. They inhibit zero hours work arrangements, but they do not prevent

a 'regular roster' being supplemented by a requirement for additional hours. This creates room for employers to design *minimum-hour work arrangements*, in which the regular roster is limited to just a few hours, which are then 'flexed up' by a large number of on-demand hours (Charlesworth and Heron 2012, 170). As a result, the notion of a 'regular roster' is preserved but drained of much of its meaning.

Though casual part-time work remains dominant, the number of permanent part-time employees has expanded rapidly in recent years, and they currently represent 15.2% of all employees (ABS 2017). This is a development that demands careful scrutiny. Recent years have witnessed a drift away from the principle of equal treatment, as employers have begun to take advantage of the shortfall in protection for permanent part-time employees in order to increase the on-demand component of the jobs. Employers in industries such as aged care and disability services and hospitality have, moreover, pursued new opportunities for on-demand hours by pressing for relaxation of the current award rules defining a regular roster and requiring employee agreement on changes (FWC 2017). For many employers, on-demand hours from permanent part-time employees are an attractive alternative to paid overtime from permanent full-time workers, given that the flexed-up hours are generally paid at ordinary time rates, and they can even appear preferable to casual work, given that the flexed-up hours are paid at a flat hourly wage rate without any obligation to pay a casual loading. Employer pressure for relaxation of the rules has already achieved some success. The FWC in 2017 introduced a new part-time clause in the award for the care sectors, which makes explicit that part-time employees can be offered and accept additional hours of work over their 'regular' shifts and also that a 'regular' roster does not necessarily mean the same guaranteed number of hours each week. The biggest change, however, was in the awards for hospitality and licensed clubs, where the regular part-time clause was amended by the FWC in 2017 so that it only requires written agreement on a guaranteed number of hours over the roster cycle (with the minimum equivalent to eight hours per week), which can now be rostered at the employer's discretion (so long as the worker has at least two days off each week and so long as the guaranteed minimum fits within the time period for which the worker has declared his or her availability). It was clarified that a roster can specify additional hours on top of the guaranteed minimum under the same conditions, but with the proviso that when the employee 'has over a period of at least 12 months regularly worked a number of ordinary hours that is in excess of the guaranteed hours, the employee may request in writing that the employer agree to increase the guaranteed hours' (FWC 2017, paras 528–534). In this new form, the notion of 'regular part-time work' appears almost completely hollowed out, reduced to little more than a guarantee of a few paid hours each week.

In short, the division between casual and permanent part-time jobs is not as wide as it might appear at first glance, and it is narrowing, as working-time protections for permanent part-time employees are revised. As a result, casualized work practices are no longer confined to casual status, and at least some permanent part-time employees are turning into 'quasi casuals'. Employers in sectors such as hospitality argue that relaxing rules for permanent part-time would be a weapon against casualization in their sector (FWC 2017, para 414), but it could be argued more plausibly that

such relaxation contributes to the spread of casualized work practices, albeit under a different label.

4.3.3 Bogus Self-Employment

A blurred boundary between employee and non-employee status in labour law has long been a feature of the Australian system. The issue has continued to attract attention in recent years as a result of the growth of fissured arrangements, such as labour hire, outsourcing, subcontracting and long supply chains (Johnstone and Stewart 2015) The opaqueness of the boundary offers incentives for employers to encourage their employees to take up status as an independent contractor, with an Australian Business Number (ABN), so that the employer can sidestep costly obligations regarding tax and employment rights (Stewart 2015). Though an offence of 'sham contracting' has been introduced into labour law, successful prosecutions have so far been few (Johnstone and Stewart 2015).

We refer to employees who are placed in this gap as the 'bogus self-employed'. Though most work regular rosters, some are involved in on-demand working-time schedules. The link is highlighted in the emerging discussion of the 'gig economy' (Healy et al. 2017), which points to prominent forms of 'gig work', such as food delivery work, that are examples of both bogus self-employment and on-demand working-time patterns. Nevertheless, such forms remain relatively small in numbers, and it is important to note that most on-demand workers in Australia are organized within the framework of employee status, whether as casual employees or as permanent part-time employees (Stanford 2017).

4.3.4 Employer Non-Compliance

The discussion so far is largely confined to *lawful* work practices, but if we are to understand the full extent and nature of on-demand work, it is necessary to examine the *unlawful* work practices that are linked to employer non-compliance and limited enforcement of labour regulation. The available evidence is sparse, but it suggests that employer non-compliance in Australia is not only 'significant and sustained' but also increasing in prevalence (Maconachie and Goodwin 2010, 419–420; see Clibborn and Wright 2018).

Employer non-compliance is relevant to this discussion because of its effect on the terms and conditions of on-demand workers. The main impact is on casual employees, who are particularly susceptible to non-compliance because they generally lack the capacity to claim even the few rights and entitlements that they are granted under labour law. Because the employer is under no obligation to offer work, she/he holds the whip hand in dealings with casual employees, who are exposed to a constant threat of loss of shifts or loss of the job as a whole if they challenge employer practices,

lawful or unlawful. Moreover, employment conditions for casual employees are often opaque, when they lack a written contract and find themselves in undeclared work, without a pay slip. The main effect is in relation to wages. An emerging body of evidence suggests that underpayments of casual workers are widespread and systematic, especially amongst vulnerable groups such as temporary migrant workers and young workers (Clibborn and Wright 2018; Pocock et al. 2004), depriving casual employees not only of a casual loading but also of a substantial part of their base hourly wage.[4] The risk for on-demand casuals also extends to the meagre protections listed above, including the two special protections of a minimum shift engagement and a right to be informed of the opportunity to request conversion (Markey and McIvor 2018).

4.4 Extent and Characteristics

Assessing the extent and characteristics of on-demand work and workers in Australia is difficult. Some qualitative evidence, often from industry case studies, is available, and this is useful for sketching out the distribution of on-demand work across the economy, the varied forms of on-demand work, the diversity of the workforce and the impacts on workers (see below). Robust quantitative evidence is, however, missing. Most surveys, including official labour force surveys from the Australian Bureau of Statistics (ABS), tend to be framed in terms of aggregate categories of employment such as 'casual' and 'permanent' and rarely drill down into the detail of working-time patterns within each category.[5]

Some limited data concerning casual employees and working-time patterns have been produced by the ABS (Table 4.1). One question concerns whether casual employees are guaranteed a minimum number of hours of work, with 58% in 2016 answering 'no'. But perhaps the most relevant question concerns whether casual

[4]The extent of non-compliance in relation to casual employees is reflected in ABS data on the casual loading. Although a casual loading is prescribed in labour regulation, only half (49.1%) of all casual employees say that they receive a casual loading, while 34.3% say that they do not receive a casual loading and 16.5% say that they do not know if they receive it or not (ABS 2012; see also Pocock et al. 2004, 130).

[5]Official statistics in Australia generally distinguish, within the category of employees, two groups: 'permanent' and 'casual' employees. The distinction, drawing on important aspects of the practice of casual employment (Campbell and Brosnan 2005, 4), is framed in terms of access to paid leave entitlements, which is measured by means of survey questions on whether the employee is entitled in their job to paid annual leave and paid sick leave (where those who answered 'no' to both questions are classified as casual). The two categories have been re-labelled by the Australian Bureau of Statistics (ABS) as 'employees with leave entitlements' and 'employees without paid leave entitlements', but the categories are regarded as proxies for 'permanent' and 'casual' (ABS 2013), and we continue to use the latter terms when referring to ABS data. In this bipartite framework, fixed-term employees, understood as employees with an employment contract that terminates on a specified date or on completion of a set task, are swallowed up in either one of the two main categories (mostly within the category of 'employees with leave entitlements').

Table 4.1 Casual employees, selected working-time conditions and selected years (thousands and percentages)

Selected working-time conditions	Year	Casual employees		
		'000	%	Total casual ('000)
Did not usually work the same number of hours each week in main job	2007	736.0	34.9	2109.0
	2014	866.0	37.6	2305.6
	2016	961.0	39.1	2460.9
Earnings (excluding overtime) varied from one pay period to the next	2007	994.7	47.1	2109.0
	2009	1040.4	52.9	1966.7
	2012	1103.9	54.7	2019.4
	2014	1213.1	52.6	2305.6
	2016	1309.4	53.2	2460.9
Not guaranteed a minimum number of hours of work	2009	1083.2	55.1	1966.7
	2012	1166.0	57.7	2019.4
	2014	1345.4	58.4	2305.6
	2016	1426.2	58.0	2460.9
Days of the week usually worked in all jobs varied	2015	658.1	28.3	2326.3
	2017	694.6	27.3	2542.1

Source ABS 2009, 2012, 2014, 2015, 2016, 2017

employees usually work the same number of hours each week. Given that irregular hours for casual employees are likely to be mainly in response to business needs, answers to this question could be taken as a basis for a rough estimate of the number of on-demand casuals in Australia. If we accept this argument, the data suggest that in August 2016 almost one million employees were on-demand casuals. This represents almost 40% of all casuals and just over 10% of all employees in Australia. The data suggest that the proportion of casual employees who could be regarded as on-demand casuals has increased slightly (from 34.9 to 39.1%) over the past ten years.

Determining the extent of on-demand work within permanent employment is even more difficult. One pointer is the estimated 202,000 employees in August 2016—amounting to just over 2% of all employees—who were classified as permanent employees ('employees with leave entitlements') but identified themselves as casuals (ABS 2016). Another pointer comes from an interview-based study in regional areas, which uncovered a group of 'permanent irregular' workers, who had paid leave entitlements and therefore did not fit the main ABS category of casual but who saw themselves as casual because they 'had highly uncertain work schedules and their income and shifts varied substantially from week to week' (McGann et al. 2016, 771).

As suggested in Sect. 4.3, some on-demand workers can be found within the ranks of permanent part-time employees. We know from qualitative case-studies that sec-

tors such as supermarkets (Campbell and Chalmers 2008) and accommodation (Knox 2006) as well as expanding sectors such as home and community care for people with disabilities (Macdonald et al. 2018) contain many permanent part-time workers with a strong component of on-demand hours in their schedules. However, it is difficult to distinguish the group that experiences minimum-hour work arrangements from the group that has no or just a small component of on-demand working hours in their schedules. It is also difficult to determine whether the group with minimum-hour work arrangements is increasing relative to other groups (Charlesworth and Heron 2012, 168). However, at least in the aged and disability care sectors, it seems likely that on-demand (minimum hour) work will increase given that—as outlined above—the FWC has responded positively to employer demands for new regulatory rules governing permanent part-time work in these sectors.

The uneven but surprisingly widespread distribution of on-demand workers across different industry sectors can be inferred from the rich body of qualitative research. Experiences of on-demand working-time patterns in varied industries are cited in programmes of in-depth interviews (McGann et al. 2016; Pocock et al. 2004; Smith and Ewer 1999) and in rare first-hand accounts (Sidoti 2015). Several case studies detail on-demand working-time patterns in sectors such as accommodation (hotels) (Bohle et al. 2004; McNamara et al. 2011; Oxenbridge and Moensted 2011), licensed clubs (Lowry 2001), a theme park (Townsend et al. 2003), retail (Campbell and Chalmers 2008; Campbell and Price 2016; Price 2016; Whitehouse et al. 1997), relief teaching in secondary schools (Bamberry 2011), hospital nursing (Allan 1998, 2000), domiciliary aged care (Clarke 2015), domiciliary disability care (Macdonald et al. 2018) and manufacturing (Brosnan and Thornthwaite 1998). Most qualitative studies are concerned with casual employment, where on-demand work surfaces in both small and large enterprises, predominantly in the private sector. Small firms may be attracted by the administrative convenience of casual work, while larger firms are often better equipped to manage on-demand rostering systems. A few qualitative studies cite examples of on-demand schedules within permanent part-time work, again mainly in the private sector. In the latter case, on-demand employment appears more characteristic of large firms, which can better manage the complex requirements of balancing the regular roster required by labour regulation and the additional on-demand hours.

One achievement of the industry case-studies is to show the diversity of on-demand schedules in practice. This diversity goes well beyond a basic division between zero hours and minimum-hour work arrangements. Temporal patterns differ in terms of aspects such as the extent of variability, the extent of unpredictability (i.e. the length of notice), the usual duration of shifts, the usual duration of weekly hours, the timing of the hours, the extent of employee control and the tenure of jobs or engagements. Diversity in working-time patterns is strongly influenced by sector. On-demand work can include lengthy shifts approximate to a full-time day for groups such as casual nurses (Allan 1998) or emergency teachers (Bamberry 2011), whose schedules are adapted to the hours of other professionals in hospitals and schools. Shorter shifts apply for waiting staff and kitchen hands, whose hours are matched to peak periods of customer demand (Campbell et al. 2016). Shifts can be very short for home care

workers, who must accommodate the needs of individual clients and the constraints of marketized funding models (Macdonald and Charlesworth 2016). In some sectors, the length of shifts is uncertain, and unpaid time can stretch out beyond paid time, as in the case of room attendants, when employers impose workload quotas (number of rooms to be cleaned per hour) (Knox 2011; Oxenbridge and Moensted 2011), and in the case of home care workers, when employers set notional times for allocated care tasks, which disregard the time necessary to undertake those tasks, to perform administration and reporting duties, and to travel between assignments (Charlesworth and Malone 2017, 289; Macdonald et al. 2018). Some industry sectors such as retail host a diversity of on-demand shift lengths and shift times, which range from very long days to short fragmented shifts.

On-demand workers come from all social groups, but young workers, women with caring responsibilities and temporary migrant workers are disproportionately represented. Demographic composition is often influenced by industry. Some sectors such as fast food (Limbrey 2015) and to a lesser extent supermarkets (Campbell and Price 2016), rely strongly on full-time secondary students, who are engaged in on-demand casual work and paid at junior rates of pay. On-demand casual work in cafes, restaurants and bars, especially in the lesser skilled jobs as waiting staff and kitchen hands, draws heavily on full-time tertiary students, young workers looking for full-time work and an increasing number of young international students and working holiday-makers (Campbell et al. 2016). On the other hand, on-demand jobs as room attendants in hotels and as care workers in residential facilities and private homes, reflecting the influence of gender norms, are almost exclusively taken up by older women, often women with caring responsibilities (Knox 2011; Mavromaras et al. 2017).

4.5 Impacts

The impacts of on-demand work arrangements on workers are contingent. They are partly dependent on the nature of the work itself and the dimensions of precariousness in the job, for example, the temporal pattern and the levels of wages and employment conditions.[6] The impacts are also partly dependent on factors outside the workplace, which can mediate, either by cushioning or amplifying, the effects of precariousness within the job. For example, access to alternative income (through household transfers, access to social security and savings) can *cushion* the impact of low and irregular income, while large burdens of financial responsibility and debt can *amplify* this impact (Campbell and Price 2016).

[6]It is necessary to keep in mind that any job is a bundle of different elements, some of which may well be appreciated by the workers, even if the on-demand aspects and wage levels are resented. For example, care workers in disability services are often intensely committed to their job and appreciate the opportunity to make a difference to the lives of those who require care (Macdonald et al. 2018).

The impacts of on-demand work arrangements in Australia are diverse. Nevertheless, the overall evidence points to significant negative impacts. On-demand jobs tend to constitute a package of poor-quality working conditions, which is markedly more precarious than most other forms of work. The central effect is working-time insecurity, which includes features such as dislocation of daily life, too few hours (underemployment), an increase of unpaid work and quasi-work time, and lack of control over schedules. These features are in turn associated with other labour insecurities such as earnings insecurity and employment insecurity.

Positive impacts are difficult to find. Workers may tolerate or acquiesce to precarious jobs (Campbell et al. 2016), but this is not the same as welcoming or indeed choosing elements of precariousness. It is true that on-demand workers may be able to impose a degree of schedule control in the initial negotiation of the timing of their availability. In addition, they may develop informal understandings with sympathetic supervisors, perhaps taking advantages of elements of reciprocity in the employment relationship, and in this way they may acquire more control over the terms and conditions of the on-demand job. But such understandings are generally only at the margins and are often fragile.

The one example in Australia of positive experiences in association with on-demand work arrangements arises from studies of nurses working either through a temporary work agency or a 'casual bank' maintained by a hospital (Allan 1998, 2000; Underhill 2005). The studies suggest that nurses were often able to achieve a significant degree of working-time control, choosing their shifts and their planned and unplanned leave, earning higher pay (in the case of agency nurses) and accruing less stress. They constituted a group of casual employees who could and did reject offers of shifts without suffering sanctions from the employer. The crucial background factor in this case was favourable labour market conditions, which increased demand for the professional skills of nurses and boosted their individual bargaining power (to supplement the collective support that nurses enjoyed as union members). The fact that these labour market conditions are rare and are absent for most on-demand workers, who are generally less skilled, whose skills are less in demand, who have less individual or collective bargaining power and who appear markedly more disposable, helps to explain why the example of casual nurses is unusual.

On-demand work, judged in terms of both job characteristics and impacts on workers, is one example of a growing problem of insecure (or precarious) employment in Australia (Carney and Stanford 2018; Howe et al. 2012). Especially in the form of zero hours work arrangements, it is reminiscent of the highly commodified forms of work ('casual work', 'daily hire') prevalent in the nineteenth and early twentieth centuries, when a marked imbalance of power determined relations between employers and workers. Though in principle modern labour regulation should have corrected this imbalance of power and hindered the re-emergence of on-demand work, such work is clearly now widespread in different industry sectors in Australia.

4.6 Factors that Drive On-demand Work

Section 4.3 identifies gaps in formal labour regulation, either widened or newly opened up in the course of labour market deregulation, as a major factor in defining the opportunities for on-demand work in Australia. This points to the importance of state policy, which can have an effect in many ways. Because on-demand workers are only a small minority within government employment, the state appears to be only a minor player as direct employer, but it can be highly influential as a 'lead employer' in complex supply chains produced by the privatization and marketization of services such as child care, education, and aged and disability care. The importance of state funding regimes in consolidating on-demand work in the care sectors is evident in current changes to home care for people with disabilities (Macdonald and Charlesworth 2016; Macdonald et al. 2018).

State policies in areas such as immigration, education and social welfare also indirectly shape the extent and nature of precarious work (Peck and Theodore 2010). Taxation in Australia has only weak effects, but changes in the welfare system, which increasingly push workers into precarious work while directing funds to wage subsidies for employers, have been significant in promoting varied forms of insecure work. Unemployment support lacks a social insurance component, and the level of the unemployment benefit is amongst the lowest in the OECD. Moreover, workfare reforms such as onerous requirements for detailed job records, frequent sanctions for breaches and long mandatory waiting periods, which make it difficult to combine benefits with irregular incomes, have amplified the negative impacts of on-demand schedules and enhanced the power of employers. Also important are state policies that weaken the capacity for collective action to challenge on-demand work through collective bargaining and other trade union action. At the same time, individual bargaining power, especially for less skilled workers, has been eroded, as labour markets remain characterized by extensive labour over-supply, reflected both in the unemployment rate and in the extremely high underemployment rate. Weak bargaining power is compounded by an increased supply of vulnerable workers, including young local workers (both debt-ridden students and non-students), persons pushed off state benefits under workfare reforms and the rapidly expanding supply of temporary migrant workers, including those who are in Australia as international students and working holiday-makers (McDonald 2017; Mares 2016).

Contextual factors shape the opportunities for the emergence and flourishing of on-demand work. But it is important not to lose sight of the central role of human agents. On-demand work, defined here in terms of irregular schedules in response to business needs, signals the crucial role of individual employers, rather than labour regulation or worker choice, in determining working-time patterns. It is true that employer agency must be situated in the context of structural constraints such as product market competition, but even in highly competitive circumstances individual firms continue to enjoy a margin of discretion that allows them to choose from amongst different employment practices (see Oxenbridge and Moensted 2011).

Unit costs are central to any analysis of employer practices, in both private and public sector organisations. Particularly, important for on-demand work is the opportunity for 'lower wages and reduced benefits' (ILO 2016). A lower aggregate wage bill can be based on lower hourly rates, for example when on-demand workers are used instead of overtime hours for full-time workers or when workers are paid less than other workers as a result of non-compliance or clever use of alternative regulatory instruments. But the major labour cost advantage for employers derives from the opportunity for fragmented and variable scheduling, which allows close matching of the hours of on-call workers to demand patterns, ensuring that workers are paid only 'as and when required' and thereby reducing the aggregate wage bill (Allan 2000, 189).

4.7 Regulatory Responses

On-demand work is a large and significant problem in Australia. Yet adequate regulatory responses have been either missing or misdirected. Protections inherited from the past, such as minimum shifts engagements, the right to request conversion from casual to permanent and requirements for a regular roster for permanent part-time employees, have failed to prevent the spread of on-demand work. However, there is a little sign of any comprehensive debate, which could generate new ideas and new initiatives to limit on-demand work and combat its negative impacts.

Why is there so little discussion and active response? Certainly, there is little appetite for legislative action from governments, which have traditionally relied on industrial tribunals to set employment standards. Employment regulation after 2005 was shifted largely into the federal system, where the FWC is now the key institution. In addition to the inherited tradition of dependence on tribunals, federal governments of all political complexions have been heavily influenced by neoliberalism and have been guided by the consistent hostility of employer associations to any new regulation.

A crucial condition for state inaction is the absence of pressure from trade unions and other social actors around problems of on-demand work. This is harder to explain, but it appears to be the product of several factors. Like governments, trade unions have been accustomed to pursuing claims before industrial tribunals. An added consideration is the difficult situation of trade unions, who have been weakened not only by structural changes in the economy but also by deregulation, the growth of insecure work and employer anti-union strategies (Bowden 2011; see also Peetz and Bailey 2012). Trade union density has steadily fallen to 14.5% (OECD 2018), shrinking to sectors where few on-demand workers are present, and many individual unions prioritize short-term survival, focusing on meeting the demands of single-employer collective bargaining and trying to achieve or preserve gains for their members in surviving sectors of strength.

The trade union federation, the Australian Council of Trade Unions (ACTU), seeks to articulate and pursue long-term common interests. It led the 'Your Rights at Work'

campaign that helped to defeat the conservative government in 2007, but it was unable to build on this success with the incoming Labor government (Peetz and Bailey 2012). The growing threat of insecure work was identified, and the ACTU helped to publicize the issue by sponsoring an independent inquiry, which produced an important report with several proposals for action (Howe et al. 2012). But much union discussion of insecure work tends to focus on bogus self-employment, while discussion of casual work is less prominent, and permanent part-time employment attracts almost no attention at all. Moreover, the analysis of casual work is dominated by concern with so-called permanent casuals, who have regular rosters and extended job tenure and who are used by employers in much the same way as permanent employees, though without standard rights and entitlements. Special attention to this latter group is certainly justifiable, and indeed action to rectify the injustice of their employment conditions needs to go beyond the tentative and ineffective efforts that have been mounted in the past (Markey and McIvor 2018). But one unfortunate consequence of the emphasis on 'permanent casuals' is that the topic of on-demand work, both within casual work and within permanent part-time employment, is overshadowed and obscured.

A puzzling absence, in contrast to several other countries, is independent mobilization by workers or other social groups. This may be partly attributed to the fact that many individual workers see the precariousness of their work as natural or immutable (Tweedie 2013). Young workers in particular often view on-demand casualized work as a necessary stage or a rite of passage (Sidoti 2015). Even though the appeal of such 'narratives' readily fades as workers become trapped in precarious work and find that poor wages and conditions are increasingly difficult to balance with adult needs, the very diversity of on-demand schedules means that labour insecurity tends to interpreted as an individual problem that requires individual solutions (Sidoti 2015).

The question remains: what is the best path forward? We can make a few brief comments. It would be helpful if the state as the lead employer in supply chains took action to help improve poor wages and conditions for workers at the end of the chain. Similarly, the current ACTU campaign to 'Change the Rules', which demands removal of the most severe constraints on trade union action and collective bargaining, is appropriate and its success would be helpful for many low-wage workers. In the context of new pressures from employers for on-demand work, particularly in the rapidly growing care sectors, the strengthening of working-time protections will be difficult without some strengthening of workers' collective rights.

Consistent with the analysis in this chapter, we argue that action to close the key regulatory gaps is needed. This involves reducing opportunities for bogus self-employment and lessening employer non-compliance (perhaps via provisions for trade unions to resume some of their enforcement functions). The main challenge, however, concerns the gaps associated with casual status and permanent part-time status.

With respect to permanent part-time status, the challenge is straightforward. Provisions for 'regular rosters' in awards need to be strengthened not weakened. In place of the drift towards casualized work practices, based on inserting on-demand hours as

a substantial component of rosters for permanent part-time employees, the principle of equal treatment with full-time permanent employees needs to be reaffirmed and more vigorously pursued.

With respect to casual status, the challenge of any new regulatory initiative is twofold, corresponding to the division between regular and on-demand casual employees. First, as long argued by the trade union movement and academic commentators, the existence of casuals on regular rosters with long periods of tenure is anomalous and represents a loophole that threatens standard rights and entitlements for employees. The remedy should address two main points of leverage. On the one hand, as argued by the ACTU in the recent FWC case, regular casuals who have built up tenure in their job should be converted to a more secure status in a practicable way that does not disadvantage the worker (Markey and McIvor 2018). On the other hand, new regulation is needed to limit and indeed eliminate regular casual work at the commencement of a job. At the commencement of a job, a regular roster should imply either permanent or fixed-term status (with appropriate periods of probation). One mechanism would be introduction of a definition of casual status in legislation and awards that restricts the use of casual employment to irregular rosters which are justified by an objective need for work that is short-term and irregular. This could be supplemented by imposing greater transparency and accountability at the point of recruitment through requirement for a written statement of terms and conditions, including the roster for the job and the conditions governing overtime.

Second is the question of on-demand casual workers. As we argue in this chapter, this is a large group that tends to be neglected in current discussion, but they too need a floor of protective regulation to limit the negative impacts of irregular schedules and to restrict the incidence of poor-quality schedules that lack an appropriate balance between the needs of employers and employees. As implied above, we accept that employment with casual status should be permissible in circumstances in which there is a justifiable objective need for work that is short term and irregular; for example, when enterprises experience unpredictable variations in demand that cannot be met through standard measures such as overtime. But even in this case there is a need for regulatory parameters that balance the needs of employer and employee. Zero hours work arrangements, in which the worker agrees to be available but the employer does not guarantee any hours of paid work, fail the test of balance and should be proscribed. Regulatory controls on irregular schedules need to start with guaranteed minimum hours but then to supplement this principle with attention to issues such as the extent of irregularity, the timing of working hours and the extent of employee control. Also important, if employment persists into the medium term, is acquisition of rights and entitlements by the employee, so that the employer is encouraged to monitor and respond to changes in economic circumstances and so that the negative impacts of irregular schedules for the employee are not allowed to compound.

Discussion of on-demand work in Australia has been insular and could benefit from consideration of international standards and international debates. One regulatory option would be to use International Labour Organization (ILO) conventions as a way of mobilizing around worker rights (see chapter 10 for discussion of ILO instruments). In 2011, Australia ratified *ILO Convention 175 Concerning Part-time*

Work (1994), which elevates a principle of equal treatment of full-time and part-time work. The convention has been criticized for its weakness and for its exemption of casual work (Murray 1999). Nevertheless, in the Australian context, comparisons can still be made between the conditions of permanent full-time and part-time workers engaged in similar work. For example, almost all permanent full-time workers in retail, hospitality and social care have fixed rosters and are entitled to overtime rates when they work over 38 h a week. Permanent part-time workers in similar work in the same sectors may have rosters that are more flexible or likely to be changed and are required to work up to 38 h a week before they are entitled to overtime. Such situations suggest that Australia may be in breach of its obligations under ILO 175 to ensure and enforce part-time workers' entitlement to pro-rata full-time working-time conditions. While the effective pursuit of action under conventions is limited in practice, ratifying member states are held accountable by the Committee of Experts, and Australian obligations could be used by parties in matters before the FWC and by sector unions as a basis for mobilization.

On-demand work centres on irregular, often fragmented, hours at the workplace, but it also implies hours spent within a zone of availability, when the worker has agreed to be available for work but is not actually clocked in for paid work. These hours, which readily appear to workers as labour or quasi-labour, though they are unpaid, are an important challenge for protective regulation. Scholars argue that time spent being available for work is indeed a form of work, since it is 'time out of life', when employees are unable to devote time to their own lives, including taking up other employment or caring responsibilities (McCann and Murray 2010, 29–30; see also 2014, 325). McCann and Murray develop this principle in their Model Working Time Law for domestic workers, which formed part of the discussion associated with the introduction in 2011 of ILO Convention 189 (*Decent Work for Domestic Workers*). To improve the working-time conditions of domestic workers, they advocate a 'framed flexibility' model of working-time regulation, which combines 'framing standards' and 'flexibility standards'. Framing standards, which are fixed non-negotiable standards, include written agreement to hours and, importantly, to changes to hours, premium payments for night work, work on rest days and public holidays, payment for travel time, a two-hour minimum engagement and an absolute prohibition on employment on a casual or 'as and when required' basis (McCann and Murray 2010, 44–54). The 'flexibility standards' are intended to recognize and facilitate unpredictable demands while ensuring protection for workers (McCann and Murray 2010, 28). For example, one of these standards provides that where a worker is required to be available for work but is not called out to work, she/he must be paid at least 25% of the hourly wage (McCann and Murray 2010, 51). This discussion of 'framed flexibility' is highly relevant to a wide range of modern employment situations, including those of on-demand workers in Australia (Charlesworth and Malone 2017).

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Chapter 5
Zero Hours Work Arrangements in New Zealand: Union Action, Public Controversy and Two Regulatory Initiatives

Iain Campbell

Abstract This chapter focuses on the intriguing story of a campaign in New Zealand against zero hours contracts, which began with trade union action in the fast food industry and spread quickly to the national parliament, where legislation aimed at prohibiting zero hours contracts was unanimously passed in 2016. It outlines the socio-economic context, pointing to the legacy of radical neoliberal reforms in the 1990s, which removed working-time protection for many employees and led to a proliferation of casualised work practices, including zero hours work arrangements. It reviews evidence concerning the extent and profile of zero hours work arrangements, the negative impacts on precariousness or insecurity and the causes of growth. The chapter suggests that the recent regulatory initiatives, centred on a principle of guaranteed minimum hours, fall short of abolition of zero hours work arrangements, but they nevertheless represent a valuable step forward for New Zealand workers and they offer important lessons for similar campaigns in other countries.

Keywords Zero hours · Casual · On-demand · Permanent · Collective bargaining · Fast food · Legislation

5.1 Introduction

This chapter focuses on two regulatory initiatives aimed at pushing back zero hours work arrangements in New Zealand. A union campaign in 2014 and 2015 drew attention to the prevalence of zero hours contracts in the major fast food chains and introduced the term into public discussion. The campaign led to an intense public debate, which revealed widespread distaste for the implications of casualised work arrangements in which the employer enjoyed extensive power to vary work schedules,

I. Campbell (✉)
Centre for Employment and Labour Relations Law, Melbourne Law School, 185 Pelham St., Carlton, VIC 3053, Australia
e-mail: campbell.i@unimelb.edu.au

The University of Melbourne, Carlton, VIC 3010, Australia

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irrespective of the needs and wishes of the individual worker. As a result, two major regulatory initiatives were implemented: one through collective agreements with fast food employers, and the other through national legislation sponsored by a centre-right government and adopted unanimously in the parliament in 2016.

The New Zealand experience offers important lessons. First, it indicates that—even in an unfavourable context of weak regulation, weak union organisation and unsympathetic governments—real reforms can be achieved through collective bargaining, social campaigning and social dialogue. Second, the substance of the regulatory initiatives, which centres on a principle of guaranteed minimum hours, reveals both the potential and the limits of this principle. The national legislation was touted in international media reports as 'banning' zero hours contracts (e.g. Roy 2016). This assessment, as argued below, is exaggerated. Although the final outcome achieves a ban on a narrowly defined range of zero hours practices, it leaves largely untouched both zero hours work arrangements in a wider sense and the related phenomenon of 'minimum-hour', or what is called in New Zealand 'low-hour', work arrangements. Nevertheless, the two initiatives represent important steps forward for New Zealand workers, which also contribute to the ongoing international discussion of how to develop minimum standards appropriate for 'flexible' or casualised work situations in which working time is highly fragmented (De Stefano 2016; ILO 2016, 258–261; McCann and Murray 2014; Rubery 2015).

The chapter is organised as follows. The next section presents background information on the New Zealand political economy and labour regulation. Section 5.3 outlines the evolution of a wide range of casualised work practices that span different forms of employment. Section 5.4 defines zero hours work arrangements and summarises what is known about their extent and profile. Section 5.5 refers to the negative impact on workers, while Sect. 5.6 considers the dynamics underlying the emergence and growth of zero hours work arrangements. Section 5.7 then turns to the most intriguing aspect of the New Zealand experience—the two regulatory initiatives aimed at pushing back zero hours work arrangements.

5.2 New Zealand

New Zealand is a prosperous, developed society, which is conventionally included within the category of 'liberal market economies' (Hall and Soskice 2001). The country is often bracketed with its larger trans-Tasman neighbour, Australia, but the New Zealand political and economic structure has distinct features and the employment relations system has diverged from Australia in recent decades, in particular as a result of the more extensive dismantling of protective regulation in the course of a radical neoliberal experiment in the 1990s (Bray and Rasmussen 2018).

Though industrialised, New Zealand relies heavily on primary industries, especially agriculture, forestry and fishing, for the bulk of exports. The country experienced a severe recession in the early 1990s and was further buffeted in 2008–09 by the global financial crisis (GFC), which generated substantial increases in unemploy-

ment. Employment growth in the subsequent period has been strong, but it has been largely absorbed in rising workforce participation and high levels of net migration. Labour underutilisation remains substantial, taking into account both the unemployment rate (4.7% in 2017) and the time-related underemployment rate (4.2% in 2017) (calculated from Statistics New Zealand 2018a[1]; see 2018b). Youth unemployment, particularly elevated amongst Maori and Pacific Islander youth, remains a major issue. In addition, increased inequality in wages and working conditions, including a spread of insecure work, has begun to attract attention (NZCTU 2013; Ongley 2013), joining concerns about chronic labour market weaknesses such as low productivity growth and slow real wage growth (Foster and Rasmussen 2017).

The workforce is small (2.57 million in 2017—Statistics New Zealand 2018a), but it displays a familiar modern structure. Tertiarisation has produced an increased proportion of routine service sector jobs. As in the case of Australia, the traditional pattern of permanent settler migration has been displaced in recent years by an increasing flow of temporary labour migration. The impact of temporary migrant workers is substantial, rising from 1% of months worked for wages and salaries in 2001 to 4.3% in 2011 (McLeod and Mare 2013, 10). As net overseas migration has expanded after 2011, it is likely that the influence of temporary migration has further deepened, particularly in low-wage sectors such as agriculture, forestry and fishing, accommodation and food services (McLeod and Mare 2013, 18–21; Opara 2018).

New Zealand has a deserved reputation as an early pioneer of social protection. High wages and innovative welfare measures were anchored in a distinctive system of compulsory conciliation and arbitration developed around the turn of the twentieth century (Barry and Wailes 2004; Castles 1985). In this system, shared with Australia, common law was supplemented not only by statute and collective bargaining agreements but also by legally binding awards set down by judicial tribunals (Anderson and Quinlan 2008). Beginning in the 1980s, however, intensifying economic pressures, backed up by campaigns from employer bodies for more 'flexibility', encouraged policy makers to experiment with a programme of economic and financial liberalisation, inspired by philosophies of neoliberalism (Bray and Rasmussen 2018; McLaughlin and Wright 2018; Rosenberg 2011). A crucial turning point occurred when an incoming government, led by the National Party, introduced the *Employment Contracts Act 1991* (ECA), which abolished the award system, imposed restrictions on trade union action and initiated a turn to a system based on individual contracts, though with some space for a small component of collective bargaining, generally at single-employer level (Anderson and Quinlan 2008; Wailes 2011). Reductions in labour protection were accompanied by cuts in social welfare expenditure, except the aged pension, and moves towards 'workfare' reforms for the unemployed and recipients of other benefits (Wilson et al. 2013).

[1]Official figures from Statistics New Zealand calculate an underemployment rate by expressing the number of persons in time-related underemployment as a percentage of total employed. In order to conform to more familiar international practice, it is re-calculated here with the labour force rather than total employed as the denominator, thereby producing a slightly lower estimate (4.2% instead of 4.4%).

The ECA initiated a thoroughgoing programme of labour market deregulation, often characterised as the most radical in the developed world (McLaughlin and Wright 2018). Many employment rights and benefits that had been in awards disappeared, leaving only basic statutory protections, such as a minimum wage, paid leave provisions (three weeks' annual leave and five days' sick leave) and personal grievance rights. In particular, many working-time protections such as specified rest and meal breaks and premium payments (penalty rates) for overtime and work in non-standard times of the day were lost (Anderson et al. 2011–12, 150–152). Collective bargaining coverage and union density shrank suddenly and dramatically, leaving many low-paid workers exposed to reduced wages and working conditions. Employer-oriented flexibility was dramatically enhanced.

The post-1991 evolution of regulatory policy has been unsteady, influenced by the political complexion of successive governments, but the overall picture is one of relative continuity within a framework of hollowed-out protection (Wilson et al. 2013). Minimum wages have grown in importance as a policy theme (Wilson 2017). Governments of all complexions have encouraged increases in the minimum (adult) hourly rate, with the result that the New Zealand minimum wage is consistently ranked high in international comparison (OECD 2015). Nevertheless, it appears inadequate to stave off poverty in many households, and pressure to raise it further persists. Following the USA and UK example, a coalition of trade unions, church groups, secular community organisations, progressive employers and activists have campaigned in recent years in favour of a voluntary 'living wage', framed in terms of an hourly wage rate, which—when earned by two earners, one working full-time and the other part-time—would be sufficient to meet the reasonable consumption needs of a household comprising the two earners and two dependent children (King 2016). In contrast to minimum wages, standards for working-time have, however, been neglected.

The National Government (1991–1999) was succeeded by a Labour-led Government (1999–2008), which improved the statutory 'minimum code' by increasing minimum wages and improving annual leave entitlements (now four weeks). In addition, it introduced a paid parental leave scheme and legislated for specified rest and meal breaks. Work-life balance and flexible working arrangements received attention, and family payments were boosted, but the efforts in relation to working-time protection were confined to a restoration of rest and meal breaks and the introduction of a limited individual right to request flexible work (Donnelly et al. 2012, 185–188). The government's *Employment Relations Act 2000* (ERA), which replaced the ECA, introduced regulation of fixed-term work to ensure that it is 'used for genuine reasons based on reasonable grounds' (Anderson and Hughes 2014), but it failed to reverse the negative effects of labour deregulation on collective bargaining coverage and union density (Foster and Rasmussen 2017).

The subsequent National-led Government (2008–2017) retained the ERA but continued to champion neoliberal priorities, including a need for more employer-oriented flexibility. It reversed some of the previous government's initiatives, such as the specification of rest and meal breaks, and introduced new elements of deregulation, such as a 90-day trial/probation period before new employees could access

personal grievance mechanisms to challenge dismissal (Foster and Rasmussen 2017). In addition, it introduced tighter workfare measures (Wilson et al. 2013). Most spectacularly, in 2010 it intervened in a dispute in the film industry, boosting subsidies for production of 'The Hobbit' and rushing through legislation that summarily excluded members of film crews from the definition of an employee, thereby excluding them from union rights and most employment protections (McAndrew and Risak 2012). Nevertheless, a recent assessment by Foster and Rasmussen identifies a tentative break with neoliberal 'trickle-down' theories, exemplified by government responses to the controversy over zero hours contracts (see below), to the victory of low-paid workers in a major pay equity case in the aged-care sector, and to the demand for better occupational health and safety regulation in the wake of the 2010 Pike River disaster (Foster and Rasmussen 2017). Another example might be the legislation introduced with the aim of cleaning up unlawful abuses of workers in the deep-sea fishing industry (Stringer et al. 2016).

A new Labour Government (in alliance with the Greens and the New Zealand First parties) took office in October 2017. So far its initiatives on employment rights and benefits largely echo those taken by the preceding Labour-led Government in the early 2000s. Thus, it has announced increases in paid parental leave and action on the minimum wage, which has been raised to NZD16.50 per hour for adults since 1 April 2018 (with NZD13.20 as the 'starting out' and 'training' rate). In addition, it has promised to restore specified rest and meal breaks for employees.

The current working-time regime is aptly described as a 'unilateral' regime, in which the most important level for the determination of working-time patterns is at the workplace, where working-time standards for most employees are set by individual employers (Eurofound 2016, 7–8). Trade union density is low (18.3% in 2016), and collective bargaining coverage is very low in international comparison (15.9% in 2016—OECD 2018). Custom and practice often protect the working-time patterns of full-time employees, who are conventionally placed on a regular roster framed in terms of 40 h per week, but part-time employees are especially vulnerable to risks of working-time insecurity. Their schedules, differentiated in terms of the duration and timing of weekly working hours and in terms of stability of the roster, can be markedly diverse, largely in conformity with employer preferences.

5.3 Casualised Work Practices

Employment practice and statistical measurement in New Zealand use a broad distinction between permanent and temporary waged work. A permanent employee is 'an employee who is guaranteed continuing work. They can stay in their job until they decide to leave or their employer makes them redundant'. A temporary employee, on the other hand, is 'an employee whose job only lasts for a limited time or until the completion of a project'. Temporary employees are in turn subdivided into five subcategories: (1) casual worker; (2) temporary agency worker; (3) fixed-term workers; (4) seasonal worker (not further defined); or (5) other temporary worker (Statistics

New Zealand 2012). Official data indicate long-term stability in the distribution of employees amongst these categories. The proportion of New Zealand employees who are permanent has remained relatively stable at around 90% for decades, while casual employees account for around 5%, and the other categories of temporary employees account for the remaining 5% (Statistics New Zealand 2018b).

This classification reflects historical legacies (Campbell and Brosnan 2005). In the current context, it is, however, less and less adequate as a framework for understanding key divisions in the workforce. In particular, it misses the fact that what can be understood as casualised work practices are by no means confined to the category of casual employment. On the contrary, a wide range of casualised work practices now spill over the boundaries of the conventional workforce categories, surfacing within permanent work as well as temporary work and indeed also within the ranks of those formally classified as self-employed.[2]

One indication of the spread of casualised work practices is found in descriptive accounts of insecure or precarious work (NZCTU 2013; Wilson 2014). A revealing report from the central trade union confederation, the New Zealand Council of Trade Unions (NZCTU) (2013) points to a diversity of casualised work practices, concentrated in low-wage sectors of the economy and spanning all forms of employment and both full-time and part-time schedules. These casualised work practices are sometimes lawful, but in the case of especially vulnerable workers such as temporary migrants they easily spill over into underpayments and other unlawful employer practices (Stringer 2016). The report suggests that at least 30% of the New Zealand workforce can be defined as insecure workers.

The initial discussion of zero hours work arrangements, an extreme form of casualised work practices, was sparked by evidence of their presence within the framework of the standard form of employment—permanent employment (see below). The discussion effectively underlined, to the surprise of many New Zealanders, the argument that casualised work practices were not confined to casual or temporary work. The discussion suggested that standards of protection for permanent employees no longer functioned as an effective barrier against casualised work practices.

5.4 Zero Hours Work Arrangements in New Zealand

Zero hours work arrangements can be understood as a type of on-demand (or on-call) work in which the worker agrees to be available for paid work for a certain period of the week and is then called into work as and when s/he is needed by the employer. Zero

[2] In comparing the experience of New Zealand and Australia, Campbell and Brosnan (2005) note that only 5% of employees in New Zealand are casual, compared to 25% in Australia, while permanent employment is a more important category in New Zealand. They warn, however, that this should not be interpreted as an employee-friendly feature of New Zealand labour markets, since it reflects the fact that many advantages for employers, especially in connection with working-time flexibility, are available within the category of permanent employment, given the deterioration of working-time conditions for permanent employees in the changes of the early 1990s.

hours work arrangements are distinguished from other types of on-demand work by the fact that the employer does not agree to provide any hours of paid work, while in other types, e.g. 'low-hour' work arrangements, the employer may guarantee a small number of hours each week (perhaps on a regular roster), which can then be 'flexed up' according to the needs of the employer. Thus, in zero hours work arrangements, *all* the actual hours of labour supplied by the worker are on-demand working hours, while in low-hour working arrangements *most* of the actual hours supplied by the worker are on-demand working hours. As these definitions indicate, both types of on-demand work involve casualised work practices, in which the employer enjoys extensive control over the number and timing of a worker's hours.

The understanding of zero hours work arrangements used in this chapter is broad, oriented to the economic and social reality of workplace practice. A narrower understanding is adopted by some New Zealand commentators, who suggest that a zero hours worker's agreement to be available must involve a formal agreement spelled out in a legally valid employment contract. They argue *inter alia* that zero hours work arrangements cannot exist within casual work itself since a casual employee possesses by definition a right to refuse any offer of work and therefore cannot be capable of agreeing to be available for work without undermining their legal status as a casual. This is a formalistic legal argument, based on an understanding of the category of casual that refers back to the unfortunate doctrine of mutual obligation, imported from the UK (Anderson and Hughes 2014; NZCTU 2013, 52–54, 2015, 8–9). If we instead prioritise the level of employment practice, it is clear that informal agreements about availability are common for many employees, including casual employees. In particular, it is clear that any theoretical right to refuse offers of work is irrelevant for most casual employees, who can easily lose their shifts and indeed their job if they reject an offer of work or otherwise fall into dispute with their managers or supervisors. In circumstances of a marked imbalance of power between employer and employee, both employees and employers are conscious that, whatever might or might not be stated in a written employment contract, and whatever might or might not be specified in the law, many low-wage employees are powerless to refuse even unreasonable and short-notice requests from their employers if they wish to retain their job (NZCTU 2013; King 2016a, b).

The concept of zero hours work arrangements is not used in legal or statistical schemas in New Zealand and rarely appears in the rather sparse set of scholarly studies. Precarious work was lightly researched in the early 2000s (e.g. Burgess et al. 2005; Hannif and Lamm 2005; Tucker 2002; WEB Research 2004). Though the term itself is not specifically mentioned, zero hours practices are often presented in these studies. For example, in a case study of two call centres (Hannif and Lamm 2005), the description of the working-time conditions of most employees in the two organisations, who were classified as casual, reveals that they were zero hours workers. Thus, they were subject to variable and uncertain hours (and wages) and sporadic periods of no work at all. Notice periods for shifts were short in the call centre staffed entirely with casuals, but they could be as long as three weeks for casuals in the other centre. Casuals in the first centre were vulnerable to disciplinary use of shift offers, which extended to a drying-up of all offers and the effective

termination of employment. In both centres, the shifts could extend to nights and weekends. The one group outside the definition of zero hours work was a small group of permanent part-time employees in the second centre, who were guaranteed a minimum number of shifts (4), but they still had an on-demand component in their job since they were expected to be available for extra shifts as required.

The term 'zero hours contracts' seems to have appeared in New Zealand around 2013. The NZCTU report on insecure work mentions zero hours contracts as 'a particularly pernicious type of agreement that appears to be increasingly prevalent in New Zealand', and it goes on to summarise stories from workers in sectors such as meat processing, hotel housekeeping and cinema attendants, who testify to on-demand work practices that could be recognised as zero hours arrangements (NZCTU 2013, 52 and *passim*; see also Stringer 2016). The report also points to the related phenomenon of what are called 'low-hour' arrangements, especially in supermarket retail, where 'workers in some big retail chains … have a base level of hours, and then their hours are "flexed up", or not, from week to week' (NZCTU 2013, 33; see McLaughlin and Rasmussen 1998).

The term 'zero hours contracts' became a familiar everyday term in 2014–15, when it was taken up at the start of a vigorous collective bargaining campaign aimed at the major chains in fast food (Treen 2015, 5). The UNITE union, concerned at the working-time insecurity suffered by its members in fast food, pointed to the written contracts provided to employees. The contracts were for 'permanent' rather than 'temporary' employment, but they commonly contained clauses that required the employee to be widely available for employer-led rostering, at irregular times and without any right of refusal, according to the needs of the business. For example, one pre-2015 contract from fast food stated (NZCTU 2015, 7):

- Your hours of work will be displayed on a roster. As the business may be open up to 365 days per year you may be rostered on any day of the year.
- It is your responsibility to find out in advance the contents of the roster. You consent to work on the days and times rostered.
- Your remuneration [$14.75 per hour] recognises that you may be required to work additional hours or outside of usual hours.
- You acknowledge that flexibility is essential to providing staff to cover variable demands and accordingly your times and days may be varied by the employer.

While requiring the worker to be available, the contracts made no mention of any employer commitment to provide any hours of paid work. UNITE pointed out that such contracts clearly fitted a definition of 'zero hours contracts', familiar from press reports of UK debates, and they gave the term a prominent place in the collective bargaining campaign.

Because of conceptual and data difficulties, the incidence of zero hours work arrangements is difficult to estimate. However, there seems to be general agreement that by 2015, they were a 'large and growing problem' (NZCTU 2015, 7; MBIE 2015, 2; O'Meara 2014; Treen 2015). One account suggests that:

Table 5.1 Hours change from week to week to suit employer's needs, temporary employees, New Zealand, 2008 and 2012[a]

Type of temporary employment (main job)	2008	2012
(i) Casual ('000)	58.0	74.1
(ii) Fixed-term ('000)	15.0	Na
(iii) Temporary agency worker ('000)	6.9	Na
(iv) Seasonal worker not further defined ('000)	15.0	Na
Total: all temporary employees ('000)	96.5	118.1
Total (as % of all NZ employees)	5.5	6.4

[a]Persons who answered 'yes' or 'sometimes'
Source 2008 figures are calculated from Dixon (2009), 68; 2012 figures are from Statistics New Zealand (2012)

> They became entrenched in the 1990s during the dark days of the Employment Contracts Act. They affect literally hundreds of thousands of workers in fast food, cinemas, hotels, home care, security, cleaning, hospitality and retail. (Treen 2015, 3)

Similarly, a consultation process, together with a review of clauses in selected agreements, in connection with the 2016 legislation found that '… zero hours contracts were being widely used in the Quick Service Restaurant (QSR) industry, as well as some food and beverage businesses, convenience stores and residential care businesses. Low-hours contracts were also found in supermarkets' (MBIE 2015, 19).

One clue to incidence is provided by questions on working-time patterns in the Survey of Working Life (SoWL), conducted in 2008 and 2012 (Dixon 2009; Statistics New Zealand 2012). Unfortunately, no question addresses the central issue of whether or not employees are guaranteed a minimum number of hours. The most relevant questions refer simply to irregular hours. One question, directed just at temporary employees, asks whether working hours vary according to employer needs. In 2012 the majority (118,100) of temporary employees, including over 80% (74,100) of all casual employees, answered 'yes' or 'sometimes'. Those who answered positively to this question represented 6.4% of all New Zealand employees in 2012, up from 5.5% in 2008 (see Table 5.1).

A further question in SoWL 2012 uncovered 66,400 permanent employees, i.e. 3.6% of all employees, who reported that they had 'no usual working-time' (SoWL 2012). If we put the answers to both questions together, we reach an estimate of 10% for all employees who had irregular working-time schedules in 2012, primarily as a result of variation according to employer needs. The two questions are likely to sweep up some low-hour workers as well as many zero hours workers, so that 10% is best seen as an estimate of on-demand workers in aggregate. However, zero hours workers are likely to constitute the majority of the group. This suggests that zero hours work, or on-demand work in general, is a substantial issue in New Zealand labour markets, within a broader environment of extensive insecure work.

The UNITE fast food campaign focused on zero hours workers with a permanent contract. However, both the SoWL data and the limited qualitative evidence (NZCTU

2013, see also King 2016b) suggest that zero hours work arrangements, broadly understood, can be found not only amongst permanent employees but also amongst temporary, and in particular casual, employees. Indeed, as suggested above, the SoWL evidence indicates that irregular working-time is particularly concentrated in casual work.

Lack of data and academic research makes it difficult to develop a descriptive profile of zero hours and other on-demand workers. However, from the little information available, the profile seems to be similar to that cited in other countries. zero hours workers are predominantly low-wage, lower-skilled workers who are concentrated in service sector industries. They are overwhelmingly engaged in part-time work, often short part-time work (less than 20 h per week), and many are young workers or women with caring responsibilities who do not want full-time work. Temporary migrant workers, employed primarily in sectors such as food services, horticulture, retail and cleaning, are likely to be concentrated in zero hours and low-hour jobs.

5.5 Impact on Workers

Zero hours work arrangements are riddled with various dimensions of precariousness for workers and can be aptly labelled as 'precarious work' (Campbell and Price 2016). They are characterised most immediately by high levels of *hours insecurity*, expressed in terms of the variability and unpredictability of working time, *earnings insecurity*, leading to chronic problems of low wages, and *employment insecurity*, expressed in fear either of losing hours (and income) or of losing the entire job. In particular, zero hours work arrangements imply extensive employer control over working time, which constricts the ability of workers to exercise control or choice over aspects of their lives (King 2016a, 73–75).

The lives of zero hours workers in New Zealand are particularly affected by low wages and earnings insecurity. This is sometimes cushioned by access to alternative sources of income, but it is increasingly difficult to combine earnings with the tight conditions of welfare benefits, and few zero hours workers have savings, though some have family support from partners or parents. It is worth noting here that the earnings problem is tightly bound up with the basic working-time conditions of the job, whereby workers cannot rely on achieving an adequate number of hours in order to produce the desired level of aggregate income. They continually confront underemployment, whether as a current state or as the future prospect. This throws a new light on the general issue of low-wage work. For zero hours workers and indeed many part-time workers in low-wage jobs, *discussion of inadequate wages cannot be separated from discussion of inadequate working-time conditions*. Measures that would raise the hourly wage rate, as in the current New Zealand campaign for a 'living wage', may be helpful, but they are clearly insufficient; the more fundamental policy challenge for such workers concerns the low number and the irregularity of hours. As forcefully described by one worker with twelve years' experience in hospitality and other service sector jobs:

> higher wages don't mean anything if your employer cannot – or outright refuses – to guarantee you consistent hours. I have never had one employer in the service sector guarantee me even one hour of work a week. I once earned New Zealand's living wage of $19.25 an hour… at a [hospitality] job… My shifts at my 'living wage' job ranged from one hour of work to five. It cost me $12 just to get to this job on public transport, so sometimes I'd come away from work at the end of the day having made almost no money at all. (King 2016b)

Thus, the achievement of a living wage for many workers may depend first of all on the achievement of 'living hours' (Ilsøe 2016; Ilsøe et al. 2017).

Apart from earnings insecurity, the qualitative literature in New Zealand refers to aspects of precariousness such as the inability to plan ahead as a result of the irregularity and unpredictability of paid work, dislocation of daily life, the disruption of family time, the uncertainty of long hours of waiting for a call, and the fear of losing shifts. Several on-demand workers, both permanent and casual, reported on the use of shift allocation as a disciplinary device by employers. A cinema attendant, who was on a permanent contract but without any assurance of paid work, explained that 'everyone knows that if you call in sick too often or get offside with the manager, they will slowly cut your shifts. They silently fire you'(NZCTU 2013, 37).

5.6 Factors Driving the Growth of Zero Hours Work Arrangements

Much of the current literature identifies employer decisions as the key factor in explaining the incidence and growth of zero hours work arrangements in New Zealand. Employee choices play little role. An official document from the Ministry of Business, Innovation and Employment (MBIE) describes zero hours contracts as the result of employer decisions, particularly in industries with intense price competition, fluctuating customer demand and lower-skilled workers, to 'drive down costs for employers by shifting it [sic] towards their employees' (MBIE 2015, 7; see Tucker 2002, 41–42). It argues that a root cause of the problem is the inherent power imbalance between parties to the employment agreement, with young and inexperienced or low-qualified workers 'less able to negotiate out of this risk being placed upon them' (MBIE 2015, 5).

As the MBIE notes, contextual factors can promote one set of employer choices over other alternative choices. Industry factors are important. In sectors such as food services, retail and care work, characterised by frontline service sector work, labour time must be delivered in the right quantities at just the right time, in line with fluctuations in the demand for the services. Firms are able to realise powerful labour cost savings if they can standardise labour and match labour time as close as possible to fluctuations in demand. Such matching is easier for large firms, which can track and predict fluctuations in demand and can develop employment systems in which the work is standardised and simplified and made amenable to careful just-in-time scheduling. This draws attention to the important role of large firms, which seek to use on-demand work in a strategic way, often in the context of trends to longer

operating hours. It also draws attention to the role of technologies, such as new technologies that allow businesses to monitor labour demand by the minute. Other new technologies such as scheduling software can be used for recording worker availability and then in setting and communicating rosters. On-demand work today rarely requires the available worker to be physically present for shift allocation as in the 'shape-up' or 'bull system' for casual workers on the docks in the first half of the twentieth century (Ahlquist and Levi 2013); instead, employer decisions can now be communicated by telephone, text message or smartphone app.

Amongst the contextual factors are poor labour market conditions, which render a greater proportion of workers vulnerable to employer demands. Also important is the role of the state in designing and amending protective regulation. Though, as argued above, labour regulation is notably weak in the New Zealand case, it has some purchase, and employers and employer associations continue to identify labour regulation as a barrier to 'flexibility' (Rasmussen et al. 2016). The state does not exert a major influence on low-paid work through taxation and social insurance incentives, but low benefits buttressed by tighter conditions and increased sanctions have had an important effect in pushing people into precarious work.

Contextual factors are influential, but it is also necessary to keep in mind the margin of discretion that continues to reside with individual firms. Faced by similar structural constraints, employers may use zero hours work arrangements and other forms of on-demand work to differing degrees and in different ways. This is well exemplified in the New Zealand study of two call centres. Both were intensive users of on-demand workers, but the study reveals important inter-firm differences in labour-use practices and the quality of the on-demand jobs on offer (Hannif and Lamm 2005). The margin of discretion is perhaps even wider where the state is either the direct employer or the 'lead employer' in a supply chain. The potential for positive impacts on working-time arrangements is exemplified by the actions of the National-led Government in aged care, where many workers had worked irregular on-demand hours, being paid per client visit. A Human Rights Commission inquiry into aged care (NZHRC 2012) and ensuring community concern about workers' pay and conditions led to significant mobilisation by sector unions and advocacy groups around the unpaid time spent by aged-care workers travelling between clients. In 2014, the government agreed that such travel time was indeed work time and, moreover, funded the additional cost of providing for travel time of some NZ$38 million (McGregor 2017, 190). This agreement and the additional government funding attached to its realisation provided the impetus for a consent settlement between unions, employers and the government on 'regularising' the hours of the social care workforce. The deal was consolidated in 2017 when the government agreed to a pay equity settlement for 55,000 health care workers in the aged-care sector (Foster and Rasmussen 2017, 100–101).

5.7 Two Regulatory Initiatives

New Zealand offers an interesting case for the study of zero hours work arrangements because of its recent experience with two regulatory initiatives aimed at pushing back such work arrangements.

(i) Collective bargaining in fast food

The starting point for the debate on zero hours work in New Zealand was a trade union collective bargaining round in the major fast food chains. The UNITE union had been organizing workers in fast food chains since 2005–06, using a skilful mix of traditional and new forms of campaigning to recruit and represent a high turnover workforce, which was overwhelmingly composed of young workers, including many temporary migrants (Treen 2014). Fast food workers were classified as permanent employees, but the union picked up problems of hours insecurity and took 'secure hours' as one of the central themes in its organising. Echoing similar complaints in other sectors, workers cited problems to do with irregular hours and schedules, short notice of changes, lack of control over schedules and insufficient hours (Treen 2015). They referred to the use of shift allocation by supervisors as a disciplinary mechanism, with loss of shifts following on if workers called in sick or had an argument with the supervisor. One widely resented feature of the work was the employer practice of hiring large numbers of workers, who were given just a few hours of paid work per week, generally well below what the individual workers needed and wanted. This ensured that employers had an abundant supply of labour conveniently to hand to cover absences, unexpected fluctuations in demand and mistakes in scheduling, but the effect on employees was detrimental. It was a form of organised underemployment, which served to discipline workers and ensure that they offered 'passive flexibility'. From the worker point of view, the main problem in actual hours was not zero hours but rather too few hours. A UNITE official argues that '… over employing and under rostering is the essence of the zero hours regime. It keeps workers willing to jump at offers of more hours' (Treen 2015, 10).

Initially, the union focused on inserting new clauses in collective agreements that required employers to offer shifts to existing employees before hiring new staff, backed up by requirements to give notice before hiring new staff (Treen 2014). But this regulatory solution proved difficult to monitor and enforce, and in the 2015 bargaining round the union moved to a new notion of 'guaranteed minimum hours', aimed at specifying both more hours and more security in the hours (Treen 2014, 23). To assist the campaign, it drew on the UK debates and framed the problem as one of 'zero hours contracts', drawing attention to the contracts that required fast food workers to be available but did not guarantee them any work.

The union campaign was able to mobilise many workers in fast food outlets, to build up the extensive community and media support and eventually to secure collective agreements that provided for guaranteed minimum hours. The precise outcome varied, but a common element was a formula of guaranteeing to current workers 80% of hours worked over the previous three months (with the calculation

repeated every three months). New employees would be given an initial guarantee that would be reviewed after working through a three-month block (Treen 2015, 10). This still left questions around the precise definition of 'guaranteed minimum hours' (see below), but it constituted a significant step away from the previous system. It pushed back employer control over schedules and asserted at least an element of employee control.

(ii) Legislation

The union collective bargaining campaign achieved a good result for fast food workers, moving them away from zero hours work arrangements, but it left untouched the similar arrangements in other industries. The campaign had aroused widespread public concern about the unfairness of zero hours work, with its stark redistribution of risk onto the shoulders of employees, and pressure mounted for remedial action at national level.

Attention shifted to the national parliament, where the National Party, leading a minority government supported by three smaller parties, announced that it would restrict abuse of zero hours work arrangements by means of amendments to existing employment legislation, contained in an omnibus *Employment Standards Legislation Bill*. The government outlined proposals to deal with zero hours contracts, as well as other matters such as cancellation of shifts at short notice, restraint of trade provisions (exclusivity clauses) and unreasonable deductions from wages. In addition, it proposed a general ban on unconscionable conduct. Many of the government's proposals were welcomed, but the response to zero hours contracts proved contentious. The government conceded that the zero hours contract involved an imbalance of risk, but instead of moving towards a notion of guaranteed minimum hours, as pursued in the union campaign, it suggested that the imbalance could be remedied by requiring employers who incorporated an availability clause in employment contracts, in the context of either zero hours or low-hour work arrangements, to *compensate* employees for their agreement to be available. In effect, the government proposed that employers and employees should negotiate to introduce some sort of on-call allowance. The proposal for unspecified 'compensation' was described by one academic commentator as an element of 'largely cosmetic changes which did not address the basic issue' (Nuttall 2016).

A chorus of public criticism, which swept up the other parties in parliament, suggested that the government proposals failed to rectify the imbalance of risk between employer and employee and could have the effect of entrenching zero hours work arrangements (NZCTU 2015). As it became clear that the minority National Government would not be able to pass the legislation in this form, the Labour Party offered support in return for amendments, and the government agreed to accept the amendments. The amendments had the effect of requiring all employment contracts with an availability clause to be accompanied by a guarantee of minimum hours, although, in contrast to the formula in the fast food collective agreements, there was no clear specification of the level of the minimum. The legislation preserved the requirement for an employer to pay compensation for the worker agreeing to be available above the guaranteed minimum, but it added new requirements that the employer must have

genuine reasons based on reasonable grounds for including this kind of availability clause and that the compensation must be 'reasonable'. The legislation was passed unanimously and the relevant amendments to the *Employment Relations Act 2000* came into operation on 1 April 2016.

(iii) Assessment

The two regulatory initiatives produced significant outcomes at the level of practice. The collective bargaining agreements signed by UNITE led to substantial—though still contested—changes in rostering practices in fast food. At first glance, the legislative amendments, applying to a broader group of workers, appear even more consequential, and indeed several commentators interpreted them as signalling a complete ban on zero hours work arrangements (Roy 2016). Though this interpretation is incorrect (see below), the legislation did have a significant practical effect, prompting many employers who used written contracts with an availability clause to review and in some cases amend the contracts, generally by ensuring that the contracts contained a provision for guaranteed minimum hours.[3] It has been described as a 'major improvement in the position of precarious workers' (Nuttall 2016). Both regulatory initiatives can be seen to have reduced the number of zero hours workers in New Zealand and to have pushed back precariousness in employment for one part of the workforce.

The New Zealand experience is highly relevant to the international discussion of the political and policy challenge of zero hours work. Perhaps the strongest positive contribution of the New Zealand case is in relation to the process of change. The process, centred on a union campaign, stimulated an informed discussion and succeeded in shining a spotlight on one form of casualised work practices, which quickly lost legitimacy as its unfairness was exposed. As such the process was crucial to the outcomes, which unfolded with surprisingly little overt opposition. Though equipped with new elements, the reform process resembled the campaigns used in earlier historical periods to combat casualised work; it was based on union mobilisation and bargaining in one industry, media backing, community support and activism within a broad range of political parties. The New Zealand case suggests that even under difficult circumstances for labour movements, traditional campaigning tools can still be effective. It suggests that collective bargaining and social dialogue remain powerful tools for reform.

It is true that several contingent elements, which would be difficult to reproduce, also contributed to the success of the campaign. The union focus on working-time issues was linked to the fact that there was little pressure for large hourly wage rises. This could be partly attributed to the fact that minimum hourly wages had held

[3]We do not consider the impact of the other elements of the legislation. The provisions concerning unreasonable deductions and exclusivity clauses are reasonably straightforward. The provisions aimed at regulating cancellation of shifts are potentially important for on-demand workers and address the working-time insecurity that is caused by cancellation either at very short notice or indeed after workers have turned up for work. The provisions require a clause in the employment agreement specifying a reasonable notice period for cancellation of shifts and reasonable compensation if the right notice is not given.

up well under the National-led Government, but perhaps more important was the recognition that lifting earnings for zero hours workers relied on securing more and regular working hours rather than higher hourly rates. At the same time, the union was adept and experienced in its organising strategies. The campaign was able to rely on sympathetic voices in the media to sustain its message. Moreover, the choice to use the term 'zero hours contract' was a useful 'framing' device that contributed to building public support. As the campaign moved to the legislative level, it was able to draw on sentiment that the employer practices were not only unfair but also anomalous. Many observers felt that the existence of zero hours work arrangements within the framework of a permanent employment contract was at odds with current case law and therefore needed to be tidied up. Also, relevant was the distinctive structure of political institutions in New Zealand. On the one hand, the power of the government of the day to effect reforms is relatively large, because New Zealand is a unitary system with only one chamber in the national parliament; on the other hand, this power is weakened by the mixed-member proportional voting system, which replaced first-past-the-post voting after a 1993 referendum and has promoted coalition or minority governments. The lack of a parliamentary majority for the National Party proved crucial. The government, which initially seemed to be aiming at little more than an impression of action, eventually stumbled into legislation that was more comprehensive because it lacked support from its supporting parties and because the omnibus bill was subject to a pressing timetable (Nuttall 2016).

The political process leading to the regulatory initiatives was an unqualified success. But the content of the initiatives remains more open to question. At least two problems are apparent.

One problem concerns the mechanism of 'guaranteed minimum hours', which was offered as the solution to zero hours work arrangements in both collective bargaining and legislation. The underlying principle is relevant and apt, and it is often cited in international literature as an answer to zero hours work arrangements (e.g. Ilsøe et al. 2017). It reflects a judgment that zero hours work arrangements are an unacceptable form of work (Fudge and McCann 2015) which should be replaced by other work arrangements that offer better temporal standards for workers. In both New Zealand initiatives, however, the mechanism proposed revealed limitations. As it was defined in both initiatives, the notion of guaranteed minimum hours lacked adequate detail on crucial aspects such as the level of the minimum, whether the minimum hours were integrated into a regular roster, whether this minimum was adequate from the worker's point of view, and who would determine the guaranteed minimum (and future adjustments in the minimum). In addition, the regulatory initiatives failed to confront the problems within the zone of availability that accompanies the minimum. How much notice is there for a call-in? How short or long are individual shifts? Is there a maximum that goes with the minimum? Partly as a result of the perceived limitations of the simple mechanism of guaranteed minimum hours, the union has indicated that it may move from guaranteed minimum hours to *guaranteed shifts* in the next collective bargaining round (Treen, personal interview 20 April 2017). Workers would be given a regular roster for the major part of their schedules and would only be available for on-demand work for a limited period over and above the

regular roster. If this were successful, workers would still be subject to an on-demand component for a small proportion of their actual hours, but they would be shifted out of the category of zero hours and indeed even out of the category of low-hour workers.

The New Zealand experience suggests that policy needs to move beyond guaranteed minimum hours towards a broader principle of *guaranteed hours*. In the latter case, the substance of the minimum would be defined and supplemented with measures that confront the other features of problematic working-time schedules. The idea of minimum hours was usefully paired in the fast food agreements with a periodic re-evaluation of the level of the minimum. This picks up the principle of acquisition of additional rights and benefits with tenure, which is used in the regulation of on-demand contracts in the Netherlands. But other useful ideas such as minimum shift payments and minimum notice periods appear to be missing from the New Zealand discussion. One central problem concerns how to redress the imbalance of power that seems fundamental to zero hours work arrangements and indeed casualised work practices in general. This is not so critical for workers in fast food, while they have access to collective representation through an active trade union, but it is a pressing problem for many other low-wage workers. Without individual or collective voice, workers are not able to claim or enforce employment rights, no matter how well designed.

The second problem concerns the reach and impact of the legislative amendments. Though widely heralded as banning zero hours work, the legislation was not as far-reaching and effective as might appear at first glance. The amendments undoubtedly succeed in prohibiting some zero hours work arrangements, i.e. those which involve a written contract in which the worker formally agrees to be available to the employer without any guarantee of paid work. This corresponds to a narrow formalistic understanding of zero hours work arrangements. However:

- The legislation leaves untouched other cases of zero hours work arrangements which are not linked to a formal written agreement for the worker to be available. These other cases involve *informal* understandings of worker availability (including informal understandings that the worker may not receive any further offers if they refuse an employer's offer of work, no matter how unreasonable). Such informal agreements, common amongst casual employees, are just as effective—perhaps even more effective—in promoting on-demand working-time patterns and pervasive insecurity. Because of the failure to dig down to the level of informal agreements, the legislation cannot be interpreted as a full ban on zero hours work arrangements.
- The legislation successfully shifts some permanent part-time employees away from zero hours work arrangements. But many of these workers have merely been pushed into a different version of an on-demand work arrangement, i.e. a low-hour work arrangement. Though the number of zero hours workers has been reduced, the overall total of on-demand workers remains the same. From the worker point of view, the shift to a low-hour arrangement is likely to represent an improvement in their situation, but they are still likely to suffer a range of negative impacts.

At the worst, workers now have an assurance that they will be given at least a small number of hours of paid work each week, but all their actual working hours may still be governed by on-demand work arrangements. This might be of limited significance in mitigating the negative impacts of on-demand practices.

These cautionary remarks suggest that the recent regulatory initiatives in New Zealand are best seen as a useful first step rather than a comprehensive answer to the challenge posed by zero hours work arrangements and on-demand work in general. More thought needs to be given to the pivotal issue of working-time (Wilson 2014). Much remains to be done in terms of refining and supplementing the notion of 'guaranteed minimum hours' and developing measures to tackle the broader environment of casualised work practices in New Zealand.

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Chapter 6
On-call and On-demand Work in the USA: Adversarial Regulation in a Context of Unilateral Control

Peter J. Fugiel and Susan J. Lambert

Abstract On-call and on-demand work is more common in the USA than official statistics suggest. Conventional measures treat on-call work and irregular schedules as forms of employment that are categorically distinct from standard employment with regular hours. But this categorical approach confounds multiple dimensions of working time and fails to provide clear criteria for classification. A categorical approach is particularly inadequate in the US case, where the line between standard and non-standard employment is blurred by fragmented labour market institutions and unilateral employer control over working time. This chapter presents an alternative approach that analyses schedules as constellations of control, advance notice, and consistency with distinct functions for employers and effects on employees. Within the broader constellation of unstable schedules—defined by a lack of employee control over variable hours or timing—on-call work is characterised by very short notice and on-demand work by considerable volatility in the number of hours. Using data from several recent national surveys, the authors show that at least 6% of employees work on-call and as many as 23% work on-demand. On-call work and on-demand work are most prevalent among employees with non-standard arrangements such as part-time, temporary agency, or shift work. However, employees with full-time, day shift, and other standard arrangements account for a substantial share of on-demand and on-call workers. This analysis helps explain the targeted nature of recent responses to on-demand and on-call work, highlighting the strengths and limitations of predictive scheduling legislation.

Keywords Work schedules · On-call work · Non-standard employment · Labour standards

P. J. Fugiel
Department of Sociology, University of Chicago, Chicago, USA
e-mail: pfugiel@uchicago.edu

S. J. Lambert (✉)
School of Social Service Administration, University of Chicago, Chicago, USA
e-mail: slambert@uchicago.edu

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6.1 Introduction

Work schedules are the subject of growing scholarly and public scrutiny in the USA. The reasons for this scrutiny are both structural and idiosyncratic. As in many service-based economies, workers increasingly find themselves straining to keep up with 24/7 operations at work and without a dedicated caretaker at home. Tension between contemporary work and family norms is exacerbated in the USA by an exceptionally low level of welfare state spending and labour protections (Berg et al. 2014; Kalleberg 2018). Employers enjoy tremendous discretion over the working time of their employees and, especially in large service industries such as retail and food service, often employ 'just-in-time scheduling' practices that result in instability and unpredictability for hourly workers (Henly and Lambert 2005, 2014). Responding to concerns about work–life conflict in general and just-in-time scheduling in particular, new research and reporting are bringing work schedules into sharper focus as state and civil society actors seek to limit problematic employer scheduling practices.

In this chapter, we discuss the functions, prevalence, and governance of several types of work schedules—mainly on-call and on-demand work—that in recent years have attracted significant research and regulatory attention in the USA. We begin by identifying features of the institutional context that allow employers unilateral control over working time, emphasising how the adversarial and fragmented structure of labour relations contributes to weak and uneven labour standards in the contemporary period. In this context, employers do not need to designate jobs as 'on-call' or 'zero hours' to schedule workers in unpredictable or erratic ways. While workers with non-standard arrangements are at greater risk of on-call and on-demand work, we show that workers in standard employment also experience significant unpredictability and instability. These features of the US labour market help explain why relatively few workers identify as having on-call or irregular schedules despite widespread use of 'lean' and 'flexible' staffing strategies by employers (Houseman 2001; Cappelli and Keller 2013).

Our account of on-call and on-demand work in the USA is premised on a critical interrogation of the categories used to measure work schedules. We critique conventional measures of on-call work and other irregular work schedules for confounding multiple dimensions of schedule variation and for failing to specify clear criteria for classification. We present an alternative approach that analyses schedules as constellations of control, advance notice, and consistency with distinct functions for employers and characteristic effects on employees. In particular, we identify a broad constellation of unstable schedules defined by variation in the timing or number of hours which the worker does not control. Within this constellation, we define on-call work as the subset of unstable schedules with short notice and on-demand work as the subset with considerable volatility in the number of hours. This multidimensional approach emphasises functional differences between employer- and employee-driven variation while revealing that many employees effectively work on-demand or on-call, although they may not classify their job as 'zero hours' or 'on-call'.

This analysis of the functions and prevalence of on-call and on-demand work informs our discussion of recent voluntary, contentious, and legislative responses to scheduling issues. In the US context of unilateral employer control, an attractive strategy for would-be reformers is to incentivise employers to voluntarily reduce practices that result in on-call and on-demand work. But many employers resist doing away with familiar scheduling practices, even when presented with a compelling business case for doing so (Lambert 2014; Ton 2014). This resistance elicits more contentious responses from social movement actors and their allies who seek to push individual firms to change certain practices through public pressure campaigns. Yet the ultimate goal of many advocates is encompassing legislation that sets standards for 'predictive scheduling' backed up by state enforcement. Legislative responses are currently stymied at the federal level, but gaining traction in states and cities where progressive coalitions and entrepreneurial politicians have taken up scheduling as part of a series of pro-labour reforms. Given the adversarial and decentralised system of labour regulation in the USA, scheduling legislation is resulting in complicated administrative rules that may be challenging for employers to implement and for officials to enforce.

6.2 Institutional Context

The USA is widely regarded as the quintessential liberal market economy, exhibiting in stark relief features common to wealthy countries of the former British Empire (Esping-Anderson 1990; Hall and Soskice 2001). Populated by diverse groups of natives, settlers, slaves, and immigrants; laying claim to a vast territory abounding in resources; and governed from an early date by a majoritarian, federal constitution laden with veto points, the USA did not develop a labour party or welfare state on the model of other industrialising democracies. Instead, it developed a more antagonistic and decentralised political economy in which employers exert tremendous control over their workforce and yet rely on competitive mechanisms to coordinate activities beyond the boundaries of the firm. Even in comparison with other liberal market economies, the USA is distinguished by fragmented labour market institutions, minimal employment protections, and private provision of care, training, and insurance (Huber and Stephens 2001; Kalleberg 2018).

With respect to working time, the institutional configuration of the USA can be characterised as a regime of unilateral employer control (Berg et al. 2014). Employers are generally free to offer or withhold work in the pursuit of business objectives. But the power of employers is not absolute. Individual employers face competitive pressures to satisfy employees' schedule preferences, particularly in markets where qualified labour is scarce or costly to replace. Employers also operate in an adversarial legal and regulatory system where countervailing forces, however episodic and uneven, can impose punitive and uncompromising terms on employers (Prasad 2012). Although federal labour standards and enforcement have generally weakened since the heyday of the labour-liberal Democratic coalition in the mid-twentieth cen-

tury, labour groups and their political allies continue to shape working time through protective legislation, lawsuits, and public pressure campaigns—particularly at the state and local levels—in which employers figure more often as opponents than as partners. In this fragmented and adversarial context, we contend that scheduling practices are best understood in terms of their functions and effects rather than their form.

6.2.1 From Adversarial Regulation to New Federalism

Given the substantial discretion that employers enjoy over many aspects of working time, it is tempting to view US regulation as inherently market-oriented or *laissez-faire*. However, recent scholarship in comparative law and political economy challenges this view, arguing that US regulation is defined more by its adversarial character than its limited scope (Kagan 2001; Prasad 2012). This adversarial character stems from the common law tradition transplanted from England, but is also shaped by the belated development of an administrative state tasked with addressing problems of domestic overproduction specific to the US political economy. The most striking examples of adversarialism in labour regulation are federal agencies such as the National Labor Relations Board and the Equal Employment Opportunity Commission. These agencies were created by reform-oriented governments, mostly Democrats, as part of legislation to establish labour, consumer, or civil rights demanded by social movements. Although subject to legislative, executive, and judicial constraints, these agencies are empowered to set, enforce, and interpret their own rules governing various aspects of employment relations.

The bureaucratic and relatively autonomous power of federal agencies has ironically made them an arena for partisan political battles. In an era of heightened party polarisation and Congressional deadlock, battles over regulation are increasingly fought between the executive and judicial branches, resulting in alternating expansion and retrenchment of labour standards. For example, the Department of Labor under the Obama administration issued a change to the administrative rules of the Fair Labor Standards Act that would have expanded eligibility for overtime premiums to over 4 million employees with annual salaries below $47,476 (McCrate 2018, p. 20). This rule change was opposed by employer associations and Republican State Attorneys General who obtained a federal injunction halting its implementation in December 2016. Now under the Trump administration, the Labor Department is moving to revise the salary threshold for overtime exemption, possibly restoring it to its previous lower level. Federal labour enforcement exhibits similar partisan dynamics—expanding mostly under Democrats and shrinking mostly under Republicans (Weil 2010, 6–7).

The adversarial character of US regulation makes labour standards highly dependent not only on partisan control of government but also on the power of labour unions, further amplifying cyclical dynamics. In the postwar period of tight labour markets, powerful unions bolstered wage and hour standards not only for their mem-

bers and but also for non-members in their industry or region, as non-unionised employers sought to avoid unionisation and attract qualified employees. But this virtuous cycle turned viciously against labour with the economic crisis and employer mobilisation of the 1970s, leaving weakened unions struggling to maintain even lowered standards (Kalleberg 2018). While some unions maintain contractual schedule protections such as a minimum hour guarantee (Crocker and Clawson 2012), many now include 'two-tier' arrangements that provide inferior terms for contingent, part-time, or less senior workers (Weil 2014). The contemporary regime of unilateral employer control over working time reflects this dual movement of deregulation in the political sphere and de-unionisation or fissuring of the workplace.

As unions and their Democratic allies have lost power nationally, they have reoriented regulatory efforts towards more local levels, contributing to what some commentators call a 'new federalism' (Nathan 2006; Takahashi 2003). In cities and states with large Democratic majorities, measures to improve 'bad jobs' have emerged as winning issues for entrepreneurial politicians and a broader labour movement comprising not just unions but also worker centres, advocacy organisations, and community groups. Among the major developments related to working time are laws requiring employers to provide paid leave, to which tens of millions of mostly non-union workers are now entitled. Regulation of the scheduling process itself is more limited, but has grown significantly in recent years. We discuss the content and prospects of new scheduling legislation later in this chapter. For now, we merely underscore that the decentralised and adversarial character of US labour regulation shapes working time in ways that undermine formal classification of employment arrangements and potentially resist the prevailing regime of unilateral employer control.

6.2.2 Functions and Consequences of Unilateral Control of Working Time

The dominance of employers and fragmentation of labour standards have important implications for the study of on-call and on-demand work. The more discretion that employers have over employee schedules, the less plausible it is to assume a strict correspondence between the form and function of scheduling arrangements. Employers in search of labour flexibility need not rely on formal on-call or zero hours contracts when they can vary the hours of workers even in standard employment. In retail, for example, it is common for employers to maintain a large pool of workers with part-time or reduced full-time hours (less than 40 per week) whose hours can be increased on a weekly or daily basis without incurring overtime pay (Carré and Tilly 2017). To be sure, many retailers *also* hire workers on seasonal contracts or schedule on-call shifts with the expectation that these arrangements entail more volatile and unpredictable hours. But even when employment contracts stipulate regular work hours, these provisions seldom function as guarantees.

A review of relevant case law and union contracts reveals that scheduling provisions in the USA typically concern *how* employers allocate hours, not the *number* of hours offered (Alexander et al. 2015; Crocker and Clawson 2012). Employers are prohibited by law from discriminating on the basis of race, sex, or another protected class in scheduling employees. Conversely, many union contracts specify 'fair' criteria (e.g. seniority) for allocating work hours. But so long as employers respect these procedural limitations, they may offer as many or as few hours as they wish. Even in rare cases where employment contracts explicitly prohibit unilateral furloughs, employees have at best mixed success mounting legal challenges to reductions in work hours (Merola 2010). In a context of unilateral employer control, there are no guaranteed hours; every employee has a zero hours contract.

If employers are not bound by formal scheduling arrangements, then researchers may benefit from a more flexible analytic approach. Rather than simply categorising contracts and shifts, we propose to define types of schedules in the light of their functions for employers and effects on employees. Both on-call work and on-demand work allow employers to vary the timing or number of hours in order to meet business needs.[1] This employer-driven variation results in unstable schedules for employees. On-call work is characterised not only by instability but also short notice of employer scheduling decisions. Short notice allows employers to incorporate more recent information into scheduling decisions, yet in combination with instability it results in unpredictability for employees. On-demand work is characterised by considerable volatility in work hours, which facilitates short-term adjustments in staffing levels but is likely to exacerbate instability for employees. Zero hours contracts represent an extreme form of on-demand work in which employer-driven volatility is not constrained by a minimum number of guaranteed hours. By reconceptualising zero hours contracts in terms of extreme volatility, however, we can analyse functionally similar types of on-demand work without relying on the notion of 'guaranteed hours', which is dubious in the absence of enforceable contractual or statutory minimum hours. We offer more precise definitions of 'short notice' and 'considerable volatility' below in our discussion of recent evidence from national surveys.

6.3 Evidence from National Surveys

National surveys of the US labour force have traditionally captured little detail about work schedules. The Current Population Survey (CPS), conducted by the US Census Bureau, has long been the primary source of official statistics on work hours and occasionally includes supplementary questions on scheduling arrangements such as shift work. However, the conventional approach to working time has been to treat it as

[1]Note that our focus is on the proximate function of scheduling practices rather than the ultimate goal. We recognise that employers may adopt different scheduling practices depending on whether they aim to externalise, discipline, or efficiently allocate labour. But whatever the goal, scheduling practices are functionally similar for our purposes to the extent that they involve similar combinations of (short) advance notice, (in)consistency, and (lack of) control.

a form of economic activity organised according to discrete and generally recognised categories. We argue that this categorical approach neglects the multidimensional nature of working time and requires workers to classify themselves without clear criteria. Fortunately, recently available data from alternative national surveys make it possible to compare estimates of on-demand and on-call work using traditional measures as well as the multidimensional measures we propose.

6.3.1 Categorical Approaches to Estimating On-call and On-demand Work

Our analysis begins with the premise that working time has multiple features, including advance notice, time of day, number of hours, and control over the scheduling process itself. Any analysis of work schedules must conceptualise and measure at least some of these features. Conventional measures, however, tend to collapse or neglect key dimensions of schedule variation, yielding results that are either difficult to interpret or too restricted to capture functionally similar scheduling practices across different forms of employment.

The CPS exemplifies the conventional approach to work schedules. Its primary measure of working time is the number of weekly work hours. This measure is used to categorise workers' schedules as full-time or part-time and also serves as an indicator of aggregate economic activity, analogous to the number of people employed. The CPS asks workers about their usual hours per week as well as the number of hours worked in the past week. But it is difficult to interpret the difference between these numbers as a measure of hour variation, since questions about the reason for this difference are only asked of those who report fewer than 35 hours per week, the conventional threshold for defining full-time employment. It is also difficult to interpret the responses of workers who, in lieu of a number, volunteer that their hours vary. Because the main CPS questionnaire does not include a measure of schedule control, researchers cannot distinguish between workers offered unstable hours by their employer and workers who set variable hours for themselves.

Supplements to the CPS provide additional information on the timing and regularity of work schedules, but still suffer from the limitations of a categorical approach. The Work Schedules Supplement (WSS), last fielded in 2004, includes a question on 'flexible work hours', which can be interpreted as a measure of employee control over start and end times (McCrate 2012). The other questions about timing are designed to capture regular arrangements rather than schedule variation. Workers are prompted to specify the time they begin and end work 'most days', although they can volunteer that the timing varies. Workers are then asked whether or not they work a daytime schedule or some other schedule. If not, they are asked which of the following 'best describes the hours [they] usually work': an evening shift, a night shift, a rotating shift, a split shift, or an irregular schedule. Because workers are only given the option to report an irregular schedule if they first report they do not *usually*

work a daytime schedule, this measure is likely to underestimate the prevalence of irregular timing (McCrate 2012, 2018).

The Contingent Worker Supplement (CWS) is designed to measure alternative work arrangements such as temporary and on-call work that deviate from the standard of ongoing, dependent employment (Polivka 1996). To measure on-call work, the CWS relies on a distinction between 'regular hours', assumed to be typical of standard employment, and on-call hours offered only as needed. The full text of the question reads:

> Some people are in a pool of workers who are ONLY called to work as needed, although they can be scheduled to work for several days or weeks in a row, for example, substitute teachers and construction workers supplied by a union hiring hall. These people are sometimes referred to as ON-CALL workers. Were you an ON-CALL worker last week?

According to our correspondence with the Bureau of Labor Statistics (BLS), the emphasis on 'only' in this question is meant to exclude arrangements where at least some hours are regularly scheduled. Beginning with the 1997 CWS, this restriction was made explicit by the addition of a follow-up question that asks whether any hours are 'regularly scheduled'. Nevertheless, the follow-up question is unclear as to whether regularity refers to the timing or number of work hours, or perhaps both. Moreover, the CWS neglects the length of advance notice, which we suggest is a salient and consequential feature of on-call work.

The top rows of Table 6.1 present estimates of the prevalence of on-call work among the US population of current civilian employees aged eighteen and older,[2] using the categorical measures of on-call work from the 2017 CWS. Unlike previously published analyses of these data, we distinguish between the official and conventional measures of on-call work. Officially, the BLS defines on-call as an alternative work arrangement in which work is offered only as needed *and* there are no regularly scheduled hours. This official definition of on-call work is akin to what is called a 'zero hours contract' in the UK, although that term is seldom used in the USA. Only 0.8% of employees meet this stringent definition of on-call work. However, conventionally the BLS and most US scholars measure on-call work using the 'only work as needed' criterion, disregarding the follow-up question about regularly scheduled hours, which was not included in the initial (1995) round of the CWS. This less restrictive measure puts the prevalence of on-call work at 1.9% of employees. While on-call work seems rare by either measure, it is striking that *more than half* of the workers conventionally counted as on-call *also* report regular hours, contrary to the official definition. The discrepancy between these measures of on-call work further illustrates the limitations of an analytic approach to working time that relies on underspecified categories such as 'regular hours'. It also suggests that workers may experience functionally similar types of work schedules in a variety of employment arrangements.

[2]We define the population in this way to improve comparability with estimates based on other data sources discussed below. The official BLS estimates of on-call work differ slightly from those reported here because they include the self-employed and workers aged sixteen or seventeen.

Table 6.1 Schedule prevalence by type and data source

	Current Population Survey, Work Schedules Supplement (WSS)	National Longitudinal Survey of Youth, 1997 Cohort (NLSY97)	General Social Survey, Work Schedules Module (GSS)	Current Population Survey, Contingent Worker Supplement (CWS)	Survey of Household Economics and Decisionmaking (SHED)
Year(s)	2004	2015–2016	2016	2017	2017
Effective N	52,279	4359	493	41,722	5120
Categorical measures					
On-call work Only work as needed (%)				1.9	
No regular hours (zero hours contract) (%)				0.8	
Multidimensional constellations					
Schedule instability (variation in hours or timing without worker control) (%)		31.6	38.7		
Unstable hours only (%)		30.9	33.5		
Unstable timing only (%)	13.6	5.1	10.7		14.9
On-demand work (unstable schedules with considerable volatility in weekly hours)					
Volatility ≥ 0.25 usual hours (%)		19.7	22.7		
Volatility > 0.50 usual hours (%)		8.0	10.1		
On-call work (unstable schedules with short notice)					
Notice ≤ 7 days (%)		10.4	14.9		14.9
Notice ≤ 3 days (%)			11.0		13.5
Notice ≤ 1 day (%)			6.4		5.1

Note Percentages represent weighted estimates of the proportion of current civilian employees aged eighteen and older (except for the NLSY97 which represents the 1980–1984 birth cohort). NLSY97 volatility calculated as ratio of range of weekly hours in past month to usual hours for main job only. GSS volatility based on total hours for all jobs. SHED scale of advance notice has cut point at 6 days rather than 7 days

6.3.2 A Multidimensional Approach to Schedule Constellations

Our approach to on-call and on-demand work addresses the limitations of conventional accounts through a multidimensional analysis of more detailed data on work schedules. Rather than equating on-call and on-demand work with discrete forms of employment, we analyse unstable, on-call, and on-demand work as constellations of three dimensions of working time: control, advance notice, and consistency. We follow McCrate (2012) in defining unstable schedules as a combination of inconsistency with a lack of employee control over paid working time. However, we broaden our analysis of inconsistency to include workers who classify their schedule as 'irregular' or who report variation in the number of hours, as well as those who report varying start or end times. Within this broad constellation of unstable schedules, we distinguish on-demand and on-call work by the type of unpredictability that results from employer-driven instability. In the case of on-demand work, unpredictable schedules result from considerable volatility in weekly work hours, whereas in the case of on-call work, unpredictability is a function of short notice. New items in national surveys allow us to compare estimates of the prevalence of on-call and on-demand work using this multidimensional approach with various thresholds for what constitutes 'considerable volatility' and 'short notice'.

In recent years, several national surveys have introduced new schedule questions that attempt to distinguish multiple dimensions of scheduling and to measure variation in a continuous or at least ordinal manner. Advance notice is a dimension of scheduling that is absent from the CPS but has been measured since 2016 by the Survey of Household Economics and Decisionmaking (SHED) and since 2011 by the National Longitudinal Survey of Youth, 1997 Cohort[3] (NLSY97). The NLSY97 also asks about the most and fewest hours worked per week in the past month at the main job, allowing us to measure the extent of volatility in relative terms as the ratio of the range to the usual hours per week. Since 2014, the General Social Survey (GSS) has asked a subset of respondents detailed questions about work schedules, including advance notice, control, and instability in the number and timing of hours for all jobs. The available national data differ in their relative strengths and weaknesses, with more detailed measures of work schedules available in surveys with relatively small or targeted samples and larger, more representative data available from surveys containing less nuanced measures. In this section, we take advantage of the relative strengths of recent national surveys to estimate the prevalence and distribution of unstable, on-demand, and on-call work schedules.

Table 6.1 presents estimates of the overall prevalence of unstable, on-demand, and on-call work schedules among the US labour force based on the best available data. The population of interest is current civilian employees aged eighteen and older residing in the USA, except for the NLSY97 which represents a cohort born

[3]The '1997 cohort' refers to the population of people born in the USA between 1980 and 1984 who were first interviewed for the NLSY97 in 1997. By contrast, the NLSY79 began in 1979 and so far has not included questions on work schedules beyond usual hours and type of shift.

in the USA between 1980 and 1984 (30–36 years old at the time of the interview). The year(s) listed correspond(s) to the field period for the survey. The effective N is the unweighted number of respondents with non-missing data on at least one of the measures included in this table. The other rows of the table are organised around distinct schedule types or constellations, from broadest (schedule instability) to narrowest (on-call work).

6.3.3 Schedule Instability

As discussed above, we define schedule instability broadly as variable hours or timing without employee control. Where it is possible to distinguish between instability in number of hours and instability in timing, unstable hours appear more common. According to the GSS, one in three employees (33.5%) have unstable hours, as compared with one in ten (10.7%) who have unstable timing. Nearly two in five (38.7%) experience one or the other types of schedule instability in their current job(s). The NLSY97 does not ask directly about control over hours and only asks about timing using the conventional shift-type approach, which is likely to underestimate variation. However, if we use control over start and end times as a proxy for control over hours, the data suggest that schedule instability is widespread among this cohort of early-career employees, affecting nearly one in three (31.6%) in their main job. The WSS lacks a comparable measure of variable hours, but we can combine the items on usual shift type, start and end times, and employee-driven flexibility to estimate unstable timing. Using the most recent WSS data from 2004, we estimate that 13.6% of employees experience unstable timing. The NLSY97, GSS, and SHED all include measures of control over timing, although with more or less nuanced questions and response options. The GSS asks separately about variation and control over timing, yielding an estimate of 10.7% of employees with unstable timing. The SHED uses a simplified measure of variation in timing 'primarily based on my employer's needs', which results in a higher estimate of unstable timing (14.9%). The NLSY97 uses a categorical measure of shift timing, yet also draws fine-grained distinctions between levels of employee control, yielding the lowest estimate (5.1%) of unstable timing.

6.3.4 On-demand Work

We define on-demand work as a subset of unstable schedules with considerable volatility in the number of weekly hours. This schedule constellation is comparable to the 'if and when' contracts described elsewhere in this volume. The NLSY97 and GSS include continuous measures of greatest, fewest, and usual work hours which allow us to estimate the prevalence of on-demand work using different thresholds

of volatility.[4] At the 25% volatility threshold, the prevalence of on-demand work is 22.7% of employees using the GSS data and 19.7% of early-career employees using the NLSY97. Above the 50% threshold, the estimated prevalence of on-demand work is 10.1% in the GSS and 8% in the NLSY97. In other words, about one in ten employees do not control the number of hours they work and in the past month experienced major volatility equivalent in magnitude to most of their usual weekly hours.

6.3.5 On-call Work

In contrast to the official categorical measure, we define on-call work as a constellation of short advance notice, unstable work hours, and lack of employee control. Both the SHED and GSS measure advance notice with an ordered series of response options, allowing us to compare the prevalence of on-call work using different thresholds.[5] In the SHED questionnaire, respondents are asked how far in advance their employer usually tells them the hours they need to work, for which the minimum option is 'one day in advance or less (including on call)'. Using the SHED data, we estimate that 5.1% of employees work on-call with very short notice and unstable timing. For the GSS, our estimate is somewhat higher (6.4%), which may reflect the inclusion of employees with very short notice and unstable hours, a constellation not captured by the SHED. When the threshold for short notice is three days or less advance notice, we estimate that more than one in ten employees (11% in the GSS, 13.5% in the SHED) work on-call. If we extend the threshold to a week or less advance notice, the prevalence increases to 14.9% of employees. As with on-demand work, the NLSY97 yields a somewhat lower estimate of on-call work (10.4%), since the underlying measure of schedule instability is more conservative.

These estimates all suggest a much higher prevalence of on-call work than estimates based on commonly used categorical measures. Recall that the BLS conventionally counts 1.9% of employees eighteen and older as on-call workers, although only 0.8% satisfy the official criterion of 'no regular hours' in the CWS (see top two rows of Table 6.1). By contrast, we estimate that 6.4% of employees experience the combination of schedule instability with a day or less notice—our preferred measure of 'on-call work' from the GSS. Put differently, less than 1 in 50 employees work only when needed, but more than 1 in 16 work on-call.

[4]We calculate volatility as the range of weekly work hours in the past month divided by usual weekly hours. We treat volatility of less than 5% of usual weekly hours as insignificant, i.e. not a source of instability. We qualify volatility of 25% or greater as considerable; volatility of more than 50% we qualify as both considerable and major.

[5]The SHED and GSS response categories mostly align, except that there is a cut point at six days in the SHED and at one week in the GSS. The GSS also offers two response categories at three weeks or higher and includes an explicit 'my schedule never changes' option.

6.3.6 Variation Across Categories of Standard and Non-Standard Employment

Table 6.2 provides further evidence that conventional categories of employment arrangements underestimate the prevalence of work schedules that function to create unstable, on-demand, or on-call work. We use the NLSY97 for these analyses because it includes both the new items that capture the magnitude of work hour fluctuations and length of advance notice as well as conventional questions about the type of schedule and employment arrangement. For ease of presentation, we have dichotomised the measure of control, combined several of the advance notice options, and categorised the continuous measure of volatility using three convenient cut points. Columns A through C group respondents according to their usual shift type (regular day, regular evening or night, and irregular or rotating), whereas columns D and E contrast respondents with a standard (ongoing, dependent) employment contract to those with non-standard (temporary, on-call, and third-party) employment contracts in their main job. For each schedule dimension, the percentages represent the estimated share of the cohort population (aged 30–36) conditional on the shift or contract type of the column. Within each column and schedule dimension (i.e. control, volatility, notice), the percentages sum to 100. The last two rows, however, represent the estimated prevalence of particular schedule constellations: on-demand work (considerable volatility without worker control) and on-call work (instability with a week or less advance notice).

Given the relatively small sample sizes of non-standard jobs in Table 6.2, we are less concerned with describing the distribution of each schedule dimension (across rows) than we are with identifying patterns of similarity and difference between categories of workers (across columns). Two basic patterns emerge from this comparison: first, unstable and unpredictable schedules are more prevalent among workers with non-standard forms of employment; second, standard employment does not guarantee stability or predictability.

On the dimension of schedule control, we find that workers without regular day shifts or standard contracts are significantly[6] less likely to control their starting and ending times (e.g. 45% of non-standard workers vs. 57% of standard workers). The exception is workers with irregular or rotating shifts, who are about as likely as regular day shift workers to report having schedule input or control. On the volatility dimension, the most striking contrasts are in the prevalence of major volatility (more than 50% of usual weekly hours). Such volatility is more prevalent among workers with a rotating or irregular shift than among those with a regular evening or night shift (38 vs. 28%), and least prevalent among workers with a regular day shift (14%). Workers with a temporary, third-party, or on-call contract are nearly twice as likely as those with standard contracts to report major volatility (35 vs. 18%). However, a similar proportion of workers with standard and non-standard contracts report minimal volatility in the past month (26 vs. 20%, difference not significant). On the

[6] All contrasts reported in the text are significant at the $p < 0.01$ level unless otherwise noted.

Table 6.2 Schedule distribution by dimension and employment category, 2015–2016 National Longitudinal Survey of Youth 1997 Cohort (NLSY97)

Schedule dimension or constellation	Value or range	Usual shift type			Contract type	
		(A)	(B)	(C)	(D)	(E)
		Regular day (%)	Regular evening or night (%)	Irregular or rotating (%)	Standard (%)	Non-standard (temp, on-call, third-party) (%)
Estimated share of cohort pop		72	14	14	96	4
Actual N in sample		2650	574	517	4241	195
Control over timing	Employee input or control	59	42	61	57	45
	Outside employee control	41	58	39	43	55
Volatility in weekly hours (range/usual)	$0.00 \leq v < 0.05$	29	19	14	26	20
	$0.05 \leq v \leq 0.25$	35	29	23	33	24
	$0.25 < v \leq 0.50$	22	25	25	23	21
	$0.50 < v$	14	28	38	18	35
Advance notice	4 or more weeks	68	44	36	61	46
	Between 1 and 3	13	25	24	16	16
	1 week or less	19	31	40	23	38
On-demand work	Volatility ≥ 0.25 without control	15	33	23	18	37
On-call work	Notice $\leq$ 1 week without control	7	15	16	9	21

Note NLSY97 schedule questions refer only to the 'main job', defined as the current job in which the respondent works the most usual hours. In the case of multiple jobs with the same usual hours, the job with the earliest start date is treated as the main job. Due to errors in the survey instrument, 747 cases that reported overtime pay were not asked detailed work schedule questions. Separate analyses using multiple imputation of missing schedule data suggest that the volatility estimates above are conservative

advance notice dimension, schedule notice of a week or less is reported by two in five workers with rotating or irregular shifts and nearly as large a proportion (38%) of workers in temporary, on-call, or third-party employment. Such short notice is less prevalent among regular evening or night shift workers (31%) and still less among workers with regular day shifts (19%). Nevertheless, some 23% of early-career workers with standard employment arrangements receive their schedules with a week or less advance notice.

The final rows of Table 6.2 reveal a similar pattern in constellations of on-demand and on-call work. On-demand work is widespread among workers with non-standard contracts (37%) and those with regular evening or night shifts (33%). Workers with irregular or rotating shifts have a somewhat lower rate of on-demand work (23%). Yet workers with a regular day shift are not immune to on-demand work (15%), nor are workers with a standard employment contract (18%). On-call work, defined here as schedule instability with a week or less advance notice, is less prevalent than on-demand work, but also shows a disparity between standard and non-standard employment. Workers with standard contracts are much less likely to work on-call than workers with temporary, third-party, or formal on-call contracts (9 vs. 21%). Workers with regular day shifts are half as likely to work on-call as workers with other types of shifts (7 vs. 15%), though workers with regular evening or night shifts are no more likely to work on-call than workers with irregular or rotating shifts.

It is important to underscore that disparities in prevalence are only part of the picture. Although unstable and unpredictable schedules are associated with non-standard forms of employment, a majority of early-career workers in non-standard jobs do *not* report on-call or on-demand work. Yet a significant minority of workers with standard jobs *do*. Since the vast majority of US workers classify themselves as having a standard employment arrangement, this group accounts for most of those with on-demand or on-call work. The same holds true for workers with a regular day shift. Even if we restrict our focus to workers with a standard employment contract *and* a regular day shift (not shown in Table 6.2), this group with traditional daytime jobs still account for a larger share of on-call and on-demand work in the NLSY97 cohort than workers in all other forms of employment. Thus, in order to understand the extent of on-call and on-demand work, it is critical to recognise the considerable instability and unpredictability that occurs in standard forms of employment, even if such employment is relatively more stable than night shift, temporary, or otherwise non-standard jobs (Carré and Heintz 2009).

6.3.7 Variations by Worker and Job Characteristics

Besides workers in non-standard jobs, which groups are most likely to experience constellations of unstable or unpredictable schedules? Table 6.3 draws on data from the SHED to address this question. We use the SHED for these analyses because it represents the entire population of current civilian employees eighteen and older (unlike the NLSY97) and because its large sample (relative to the GSS) allows for

more precise estimates of schedule constellations by demographic groups as well as occupation and industry. However, it should be noted the SHED lacks a measure of instability in hours, which other data (see Table 6.1) show to be more common than unstable timing. We are thus unable to analyse the prevalence of unstable hours or on-demand work using these data. Instead, we focus on variation in the prevalence of unstable timing—specifically employer-driven variation in start and end times—and on-call work, defined here as the combination of employer-driven variation with a day of less of advance notice.

We observe a U-shaped relationship between schedule instability and age. Unstable timing is most prevalent (25%) among 18- to 24-year olds, comparably high (18%) among those 55 and older, and least prevalent (10%) among 35- to 44-year olds. On-call work is most prevalent among employees 55 and older (7%), but not significantly different between those middle-aged and younger (4–6%). On-call work is more common among male than female employees (6 vs. 4%), but the prevalence of unstable timing does not differ significantly by gender. We find no significant differences between broad ethno-racial groups on these schedule measures. Other analyses of GSS and NLSY97 data not reported here suggest that there may be race and gender differences in hour instability which the SHED does not capture (see also McCrate 2018).

We find more marked differences in the prevalence of unstable timing and on-call work by industry, occupation, and full-time versus part-time status. Part-time employees are two and a half times as likely as full-time employees to say their schedule varies primarily based on their employer's needs (30 vs. 12%). They are also more likely to report on-call work with a day or less advance notice (7 vs. 5%, $p < 0.05$). Unstable timing is most common in sectors that include retail trade (33%), accommodation and food service (31%), and transportation (26%), where the prevalence is three to four times higher than in sectors that include finance, insurance, and real estate (9%) or administrative and information services (8%). On-call work is especially prevalent (17%) in wholesale trade, transportation, and warehousing, but exceedingly rare (2%) in education, health care, and social assistance.

We find similar patterns in our comparison of major occupational groups, although here the SHED data are of lower quality.[7] Unstable timing is most prevalent (30%) among sales and related occupations and least prevalent (4%) among computer, engineering, and science occupations. We estimate that on-call work is most prevalent (11%) among the broad group that includes production, construction, transportation, and maintenance occupations. On-call work appears especially rare (2%) among computer, engineering, science, and health technician occupations.

[7]Unlike many other surveys sponsored by the US government, the SHED does not use a standard industry and occupation coding scheme. As a result, many cases cannot be classified according to the sectors and groups used in Table 6.3. This is a problem particularly on the occupation variable (ppcm0160), which is missing or uncodable for more than 17% of the sample. Given this limitation, we focus on contrasts between broad occupational groups with especially high or low rates of unstable and unpredictable schedules, but urge caution with respect to the precise estimates and rank ordering, which may suffer from bias not corrected by the use of survey weights.

Table 6.3 Prevalence of unstable timing and on-call work by demographic and job characteristics, 2017 Survey of Household Economics and Decisionmaking (SHED)

Characteristic	Group	N	Unstable timing (%)	On-call work (%)
Age	18–24	232	25	4
	25–34	1106	15	4
	35–44	956	10	4
	45–54	1109	13	6
	55 and older	1717	18	7
Gender	Male	2537	16	6
	Female	2583	14	4
Race/ethnicity	White	3654	15	5
	Black	448	16	7
	Hispanic	713	16	6
	Other non-Hispanic	305	15	3
Job type	Full-time	4059	12	5
	Part-time	1007	30	7
Industry	Agriculture, extraction, construction, utilities	335	13	7
	Manufacturing	381	10	4
	Wholesale trade, transportation, warehousing	310	26	17
	Retail trade	514	33	4
	Finance, insurance, real estate	364	9	6
	Administrative, information, scientific, management services	964	8	4
	Arts, entertainment, recreation, accommodation, food services	314	31	9
	Education, health care, social assistance, public administration	1483	11	2
	Maintenance, non-profit, other	331	14	3
Occupation	Management, business, financial	975	14	5

(continued)

Table 6.3 (continued)

Characteristic	Group	N	Unstable timing (%)	On-call work (%)
	Computer, engineering, science	524	4	2
	Education, legal, arts, media	640	8	3
	Health practitioners, technicians	393	15	2
	Healthcare support, protective, cleaning, food service	398	19	5
	Sales and related occupations	389	30	6
	Office, administrative support	482	10	4
	Production, construction, transportation, maintenance	478	18	11

Note On-call work here refers to unstable timing in combination with one day or less advance notice.

These results are consistent with the view that, in a context of broad employer control over work scheduling, the instability and unpredictability characteristic of on-call work is shaped by complex processes of segmentation and decentralised bargaining (Carré and Heintz 2009). There is some evidence of bifurcation between highly skilled jobs, where on-call work is rare, and less skilled jobs, where on-call work is common. This segmentation also seems related to the use of part-time jobs, which are considerably more likely than full-time jobs to involve unstable timing and on-call work. However, employees in full-time jobs and capital-intensive sectors such as transportation, extraction, and construction also experience significant instability and unpredictability. Here again, we observe disparities between more and less advantaged groups of workers, yet significant unpredictability even among relatively privileged groups.

6.4 Regulatory Responses

A large body of research documents how on-demand and on-call scheduling practices make it difficult to fulfil responsibilities for caregiving, school, and additional jobs, fuelling work-to-family conflict, stress, and financial insecurity (Clawson and Gerstel 2014; Gassman-Pines 2011; Henly and Lambert 2014; Schneider and Harknett 2019). Recognition of these deleterious consequences has sparked initiatives by labour groups, reporters, and policymakers to improve work schedules of hourly jobs in which on-demand and on-call scheduling is widespread, particularly retail and food service jobs. While the effects of these regulatory responses remain to be seen, it is clear that these initiatives are being shaped by the institutional context of unilateral employer control and adversarial regulation in the USA.

6.4.1 The Business Case for Voluntary Change

Calls to 'make the business case' for improving scheduling practices can be found in the press, policy briefs, and the scholarly literature, attesting to the primacy of employer control in the USA. The goal of these efforts is to convince corporate managers that their firms will materially benefit if they voluntarily reduce schedule unpredictability and instability (Ton 2014). For example, we recently conducted a randomised experiment at the retailer Gap, Inc. to assess the business effects of an intervention designed to improve the predictability and stability of sales associates' work schedules. Initial results from this research show the intervention increased median store sales by 7% and labour productivity by 5% (Williams et al. 2018). The business-case argument centres on generating enlightened self-interest on the part of corporate officials, not on ensuring the basic human rights of employees or fairness in the workplace. But as Lambert (2014) explains, even a compelling business case for improving work schedules is likely to fall flat when firm profitability is determined more by short-term returns to shareholders than the sustained quality of products and services, job tasks are fragmented so workers are interchangeable, and the true cost of labour is externalised to the public through safety net programmes that supplement low pay with additional income, food, and housing. Not surprisingly, then, voluntary efforts by US employers to improve work schedules in hourly jobs have been modest at best.

6.4.2 Agitation for Adversarial Regulation

Labour groups and advocacy organisations have sought to regulate employer scheduling practices through more contentious tactics, including public shaming, increased enforcement of existing employment laws, and lobbying for new legislation. Journal-

ists have contributed significantly to agitation for scheduling regulation by exposing problematic scheduling practices, particularly erratic hours and short notice at large retail and fast food chains (e.g. Greenhouse 2012; Kantor 2014). These accounts seem to resonate with a broader public, including many who have either worked in retail or food service or know someone who has.

In response to media coverage and public outcry, some government officials have sought to curtail on-call work through more active enforcement of existing employment laws. Eight states and the District of Columbia have 'show up' or 'reporting pay' laws that require employers to provide some compensation to employees who show up to work a scheduled shift but are sent home immediately or before the scheduled end time (Alexander and Haley-Lock 2015). As originally written, the laws do not cover on-call shifts for which employees wait to be told by their employer whether or not to come to work. In 2015, the New York State Attorney General (AG) announced that the state was taking steps to treat the contact between employer and employee concerning the decision about an on-call shift as actually reporting to work. This would have required New York employers to provide reporting pay (three to four hours of pay, depending on the industry) for cancelled on-call shifts. Following this announcement and related investigations by the AG, six major retailers announced they would no longer use on-call shifts.

6.4.3 Legislative Efforts

Largely propelled by the actions of policy organisations and labour groups, policymakers in a growing number of jurisdictions are moving to introduce and enact legislation that regulates employer scheduling practices. Although scheduling legislation has been introduced at the federal level, as with paid leave, there has been more policy movement at the municipal and state levels. As of October 2018, four municipalities (San Francisco, Seattle, Emeryville, and New York City) and one state (Oregon) have passed comprehensive laws that regulate multiple aspects of work schedules.[8] These laws regulate scheduling practices of large, service-sector employers, primarily covering customer-facing, hourly jobs in retail stores and fast food restaurants. However, some proposals (e.g. in Chicago) envision broader regulation that would cover most hourly workers as well as lower salaried employees across the private sector.

The current and proposed laws commonly target multiple aspects of employer scheduling practices, providing employees with: (1) a good faith estimate of the number and timing of hours the employee will usually work; (2) a minimum of fourteen days advance notice of scheduled days and times; (3) compensation for

[8] Several additional municipalities have similar laws in the works, while other localities have passed laws with narrower provisions. See https://nwlc.org/wp-content/uploads/2017/01/Fair-Scheduling-Report-1.30.17-1.pdf for an overview of recent scheduling legislation in the USA, including variation by municipality.

employer-driven changes to the original schedule; (4) the right to refuse hours added to the original schedule; (5) the right to rest between shifts (i.e. at least 10 hours off between shifts on two consecutive days) and extra compensation for working more closely spaced shifts; (6) access to additional hours for existing employees before new or temporary workers are hired; and (7) the right to request a schedule adjustment without employer retaliation (such as reductions in future work hours). These provisions, and the administrative rules that define their implementation, represent a novel response to unstable and unpredictable scheduling practices that may have significant consequences for on-call and on-demand work. While more experience and research is needed to evaluate its consequences, the content and implementation of this legislation already illustrate the role of employer discretion and adversarialism in shaping the regulatory process.

The wide discretion of US employers to determine conditions of work is evident in most provisions of existing scheduling legislation. First and foremost, the laws do not directly regulate variation in employees' hours and thus do not directly address on-demand work. Industry associations have argued vehemently that employers need ample labour flexibility to respond to unforeseen business needs if they are to remain profitable (Committee on Civil Service and Labor 2017). The provisions in current scheduling laws largely concede this battle to employer interest groups. Although the good faith estimate provision may result in more consistent hours for employees, there is little in the laws to prevent employers from modifying or deviating from this estimate. The law does not require employers to guarantee minimum weekly or annual hours. Employees covered under the new scheduling laws are still, in effect, on zero hours contracts and at risk of on-demand work.

The laws do regulate advance notice, a defining feature of on-call scheduling. Indeed, the provision of premium compensation sometimes called 'predictability pay' holds the potential to reduce employers' use of formal on-call shifts. Similar to existing reporting pay laws, employers are required to provide a minimum amount of pay when they cancel a scheduled shift. But the laws stipulate greater disincentives to employers cancelling scheduled hours than adding previously unscheduled hours. Thus, the legislation may limit certain scheduling practices but not necessarily reduce the resulting unpredictability for employees. Moreover, provisions related to premium pay are likely to have different consequences for workers depending on the compliance strategy of their employer: avoid practices that cost a premium or simply pay to continue these practices.

Although the administrative rules guiding predictability or premium pay may reduce the use of formal on-call shifts, they may do less to reduce other changes to the posted schedule that create unpredictability characteristic of on-call work. In addition to some compensation for cancelled on-call shifts, the laws require additional compensation when workers agree to a manager's request to work additional hours (e.g. one extra hour of pay) or when workers are sent home early from a shift (e.g. half of the remaining hours). However, there are notable exceptions to these provisions. Administrative rules commonly require employers to provide predictability pay only for *employer-driven* changes to work schedules. In San Francisco, this means that if a manager asks an employee to work additional hours because another employee

has called off that day, then no premium pay is due to the employee who agrees to work the extra hours. In Seattle, if a manager offers additional hours to multiple employees via 'mass communication', then the employee who volunteers to pick up the hours does not receive premium pay. And in Oregon, no premium is required for additional hours worked by employees who have volunteered to be on a 'standby list' of workers who would like to be offered more hours. Given these exceptions, some workers covered by the laws will experience unpredictable schedule changes without being scheduled for formal on-call shifts or receiving additional compensation.

Notwithstanding the wide scope for employer control maintained under existing scheduling legislation, employers' response to scheduling legislation has been overwhelmingly negative, attesting to the adversarial character of the regulatory process. In legislative meetings and public hearings, employers and industry groups frequently characterise these laws as an onerous intrusion into core business operations (Tu 2016; Committee on Civil Service and Labor 2017). This adversarial approach results in a focus on the letter of the law—especially specific administrative rules that govern implementation—rather than the spirit of reducing unstable and unpredictable work schedules. Employer resistance pushes lawmakers and regulators to grant complex carve outs and exceptions. Moreover, lack of faith in employers to conform to the spirit of the law leads to requirements for extensive documentation, and in some municipalities, a private right of action for workers to sue employers for violations. Most municipalities require covered employers to document the exact date each weekly schedule is released to employees, the reason for each schedule change, whether or not the worker received premium compensation for such changes, and how the availability of additional hours was communicated to employees. In this adversarial context, even employers whose existing scheduling practices come close to the spirit of new legislation align themselves with competitors who oppose statutory requirements, as Costco did in its opposition to Seattle's Secure Scheduling Ordinance (Tu 2016).

6.5 Conclusion

Our analysis of the functions and consequences of scheduling practices reveals that on-demand and on-call work occurs across the US labour market, including in standard employment arrangements. Employment standards are weakly institutionalised in the USA in comparison with countries where labour parties or civil law established statutory protections tied to formal employment contracts. Because employers have unilateral control over many aspects of working time, they can pass instability and unpredictability onto workers without needing to formally designate workers as 'on-call' or in 'zero hours contracts'.

By adopting a multidimensional approach that analyses constellations of schedule control, volatility, and advance notice, we obtain estimates of the prevalence of on-call and on-demand work that are much larger than official estimates based on a categorical approach. We find that 6% of employees have variable work hours or

timing that they do not control and only learn about with a day or less advance notice. By contrast, official government statistics put the number of on-call workers at about 2% of employees. We find that on-demand work—defined as considerable volatility in work hours outside of the worker's control—affects at least one in five employees, whereas less than 1% of employees report an arrangement with no regular hours (equivalent to a zero hours contract). We show that workers with non-standard arrangements are at greater risk of on-call and on-demand work, though workers in standard employment account for most of those with on-call and on-demand work because of their greater numbers.

Concern with the negative effects of unstable and unpredictable schedules has spurred efforts by labour, advocacy organisations, and entrepreneurial politicians to regulate scheduling in hourly jobs most at risk of on-call and on-demand work, particularly in retail, food service, and hospitality. The most novel and potentially consequential of these efforts are 'predictive scheduling' laws which have been enacted or proposed in a growing number of US cities and states. These laws target multiple features of problematic work schedules while preserving substantial labour flexibility for employers. Nonetheless, they reflect the challenges of regulating employer scheduling practices in an adversarial and employer-dominated context. Recent scheduling laws focus primarily on reducing employer-driven unpredictability, but not instability, which is viewed as a crucial managerial prerogative. As a result, these laws have greater potential to limit on-call than on-demand work, although the latter is more prevalent in the USA. Moreover, the adversarial nature of the regulatory process surrounding these laws has resulted in administrative rules that tend either to impose strict requirements and substantial liabilities on employers or issue weak prescriptions with uncertain remedies for non-compliance.

We argue that a multidimensional, functional approach to working time is particularly useful in the US context of labour market fragmentation and unilateral employer control. Yet we believe this approach is also useful for comparative research, given that countries vary not only in the way they officially classify employment but also in the norms and practices surrounding standard employment (Vosko 2010). We hope that a clearer understanding of the functions and forms of unstable, on-call, and on-demand work will advance research on working time and strengthen the empirical basis for ongoing regulatory efforts.

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Chapter 7
Zero Hours and Near Zero Hours Work in Canada

Gordon B. Cooke, Firat K. Sayin, James Chowhan, Sara L. Mann and Isik U. Zeytinoglu

Abstract In Canada, many employees have variable schedules with few pre-assigned shifts and often sporadic work hours with little advance notice. Through case studies, a picture is painted of the employment challenges facing Canadians in precarious jobs. One case looks at personal support workers (PSWs) in the health and social care sectors. While one might expect PSWs to have stable, secure jobs, this is not the situation for many, in terms of pay, work schedules and employment status. In the second case, rural workers are studied. In short, they also face difficulty finding sufficient income opportunities due to sporadic employment opportunities, low pay, and often, highly variable and/or short workweeks. Yet, some owners and managers of small enterprises feel the need to use 'if and when' shift arrangements that might include near zero hours workweeks, occasionally or seasonally. The willingness of Canadian workers to accept paid shifts without advance notice is a reflection of a reluctance to complain to management, a lack of union and regulatory protection, and/or because of a need for any paid hours, even if inconvenient. In our opinion, Governments at various levels in Canada have not caught up, in terms of policy

G. B. Cooke (✉)
Faculty of Business Administration, Memorial University of Newfoundland, St. John's, Canada
e-mail: gcooke@mun.ca

F. K. Sayin
Sobey School of Business, Saint Mary's University, Halifax, Canada
e-mail: firat.sayin@smu.ca

J. Chowhan
Faculty of Liberal Arts & Professional Studies, School of Human Resource Management, York University, Toronto, ON, Canada
e-mail: chowhan@yorku.ca

S. L. Mann
Department of Management, University of Guelph, Guelph, Canada
e-mail: smann@uoguelph.ca

I. U. Zeytinoglu
DeGroote School of Business, McMaster University, Hamilton, Canada
e-mail: zeytino@mcmaster.ca

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responses, with the realities of the today's working conditions for those without power in the labour market. Given insufficient government intervention, we hope that Canadian companies more heartily embrace their social responsibilities, and design jobs with more stability and income certainty for their employees, especially for those with few, if any, guaranteed work hours.

Keywords Variable schedules · Casual · Labour law · Personal support workers · Rural employment · Young workers

7.1 Introduction to Zero Hours Work in Canada

In Canada, there is a group of precarious workers who have uncertain, limited and often sporadic work hours, sometimes approaching zero hours in a given week. Consider some examples. A person could be hired as day labourer. Such a person would or could be hired to work one day or more, or even part of a day, possibly at a construction or factory site, likely to do some basic tasks involving physical labour. A person would be hired for only a very short duration, to help with a particular task, and without an ongoing employment (or other) relationship. This might be done 'for cash' (i.e. the informal or 'black' sector), but it could also be via an employment agency that matches businesses or individuals who wish to hire a person to do 'odd jobs'. While similar to a zero hours contract, this day labourer is really working under a short-term, small-hours arrangement, regardless of whether there is a formal contract (which would be exceedingly rare) or merely made a verbal agreement (which would overwhelmingly be the norm). A more common example in Canada would be the type of casual worker who is typically assigned few scheduled work shifts. This person does not know if they will be called, and if called how many hours they will work. The design of these jobs means that these workers voluntarily 'wait by the phone', hoping to be called in for an unscheduled shift. In essence, a casual worker in Canada can be considered to have an informal type of temporary job, with an expectation of uncertain and fluctuating work shifts. If the worker is called, they are told the available hours of work. Since casual workers typically work fewer hours per week, and/or weeks per year, than they desire, it is important to be ready if a shift opportunity arises. Yet, the variability and instability of these work schedules spill over into leisure and social pursuits, and also hinders these workers from holding a second job that has more certain paid hours and shifts. Thus, the casual worker can be penalised and trapped at the same time. To be fair, though, there are two main types of casual workers in Canada. One type works a fairly steady number of hours over a given period, perhaps in the range of 20–30 h per week, albeit without having the certainty of ongoing employment, without guaranteed hours or a set schedule, and without receiving employer-provided benefits. Employers tend to utilise this type of casual worker as a way to save money and have extra operational flexibility compared to hiring another permanent full-time worker. (As an aside, there are casual workers in Canada who work full-time weekly hours, but they are

a smaller, specialised group, and their situation is beyond the scope of this chapter.) The second main type of casual worker in Canada consists of those who are used essentially on an as-needed basis to fill in gaps. These individuals might get a chance to work extra hours only when others are on vacation or during periods of peak sales or operations. Otherwise, this second type of casual worker typically works a short part-time workweek of fewer than 15 h per week and must try to be available if a paid shift is offered by the employer. While both types of casual workers face uncertainty, the situation is more precarious for the latter. Moreover, as explained in the following paragraph, a zero hours worker is a special example of this second type of casual worker in Canada.

Before proceeding, it is important to be precise about the terminology and definitions that apply in Canada. While the number of terms might seem excessive, it is a reflection of the fragmentation of working conditions. First, a *standard* job is one in which the incumbent is continuously employed, and works full-time hours on weekdays, with a pre-determined schedule (although possibly with some flexibility to suit individual preferences). In contrast, a *non-standard* job is, not surprisingly, one that has at least one non-standard work arrangement (NSWA). Possible NSWAs include non-permanent employment status (e.g. fixed term, temporary, casual), usually or averaging (only) part-time hours (of less than 30 h per week), having a variable work schedule in terms of days of work or in terms of hours of work and/or in terms of notice period.

As the above examples show, the term 'variable work schedules' is ambiguous. One could say 'flexible work schedules', but the obvious question would be how flexible, and for whom? We refer to a '*flexible work schedule*' as one in which the incumbent worker has some degree of latitude to choose and change work days, hours and shifts to fit their individual preferences. In contrast, we refer to a '*variable schedule*' as being one that fluctuates to suit the employers' operations or strategies. Note that an incumbent worker might be willing to accept, or possibly even be indifferent to, a given 'variable schedule', but that is not the point. Typically, a variable schedule is designed by the employer to suit their, not the employees' preferences.[1] Following in that same vein, 'little notice' is a situation in which an employer requests or demands that an employee work a paid shift with little or no forewarning. In other words, the work schedule is not pre-determined by the employer and disseminated to the affected employees ahead of time. Finally, an *on-call worker* has a short- or long-term arrangement where the person waits by the phone or computer, usually on an unpaid basis, (hoping) to receive an opportunity for a paid shift. While on-call workers can have part-time or full-time hours, individuals in this employment arrangement typically get only part-time paid work hours over time, even if sometimes working many shifts and many hours when the employer offers or demands extra shifts for operational reasons. We define that on-call workers have a variable work schedule and little notice of work hours at least some of the time. It should be noted that an on-call worker has one or more pre-scheduled work shifts in a given week or

[1]For studies of employer-driven changes to working conditions in Canada, see Lowe and Graves (2016) and/or Zeytinoglu et al. (2009).

work period. Going further, a '*zero hours worker*' is an extreme example of an on-call worker, because no hours (i.e. shifts) are pre-scheduled or guaranteed on a weekly basis. In practice, a zero hours worker in Canada has casual employment status, because the employer is not obligated or committed to provide any current or future work to the employee in question. Naturally, an on-call worker averaging few paid work hours and with minimal (but some) pre-assigned shifts (i.e. '*near zero hours workers'*), and/or a (true) zero hours worker need to be viewed differently from workers with steadier and longer workweeks who sometimes also work extra shifts with or without advance notice. These zero hours or near zero hours workers have an inherently precarious situation. Again, it is certainly likely that some small minority of these workers are comfortable with their work arrangement and might be grateful for it (or any employment). But, that's a long way from preferring such an arrangement, if given a real choice.

As an aside, we have chosen to exclude individuals who are self-employed without employees (SEWEs). SEWEs represent a growing and tangible share of Canadians today. Admittedly, some freelancing professionals are SEWEs and have substantial earnings and client lists. However, many SEWE individuals are small operators who turn reluctantly to this type of arrangement when steadier paid employment is unavailable. For these folks, self-employment is a form of low-quality work (Tal 2015), since SEWE individuals are classified as businesses despite being essentially subcontractors, they are not protected by employment legislation and minimum standards designed to protect individual workers (see Grimshaw et al. 2016; Saunders 2003). Nonetheless, the decision to be self-employed is a choice, at least to a certain extent, and a SEWE individual can decide where and when to be available to clients. As such, they retain more power over their schedule. For this reason, and notwithstanding some of the similarities, SEWE individuals are excluded from this study of zero hours workers. This side discussion on self-employment simply highlights the existence of yet another type of precarious work in Canada.

Very few Canadian workers have a formal (i.e. written) zero hours contract *obligating them* to be available for any shifts that might arise at the employers' discretion. That said, *if and when* a Canadian without any guaranteed hours (i.e. a zero hours worker), or with very few guaranteed hours (i.e. a near zero hours worker), receives an offer for a paid shift, that individual knows that turning down shifts is likely to lead to fewer future opportunities. In practice, these workers are economically obligated to be available for any shift opportunities that arise. Also, while these workers theoretically could work full-time hours, the reality in Canada is that these individuals typically have short part-time workweeks.

In this chapter, we next provide background information on the Canadian labour market, and then an overview of the legal and regulatory framework in Canada that restricts, and allows, the existence of on-call and zero hours work schedules. This is followed by a statistical snapshot of these workers on a national basis, and then, to understand the patterns more deeply, we present brief case studies of different types of affected workers. Finally, we offer concluding thoughts and policy responses that fit for Canada.

7.2 Back to the Beginning: The Canadian Labour Market

Before delving into specifics about zero hours work and workers in Canada, some realities of the contemporary Canadian labour market are provided. From an industrial relations perspective (e.g. Dunlop 1993), broad environmental factors (e.g. economic, social, political, legal) are thought to shape working conditions (and other aspects of employment) directly, but also via the strategic responses and choices, and interactions and reactions of stakeholders. It begs the question of which stakeholders are the most influential and in which way. In their seminal work published more than three decades ago, Kochan et al. (1986) concluded that the major factor affecting working conditions, albeit in the US, was management strategies. Because of weakening trade unions, declining union density, and structural changes to the economic and political environments, employers were more able to design conditions of work virtually unimpeded. This was the case in Canada at that time, and is even more so today. Years ago, Betcherman and Lowe (1997) detected several trends in the Canadian labour market that were likely to impact workers unfavourably. Those authors also predicted, correctly, a growing polarisation of working conditions within Canada, and a growing imbalance of power in favour of employers, which contributed to declining job quality, on average (see also Tal 2015). Moreover, Zeytinoglu et al. (2017a) found that Canadian employers seem to be increasingly choosing to use part-time and/or temporary workers, while an earlier study (i.e. Zeytinoglu et al. 2009) showed that more than 10% of Canadian employees had a variable work schedule (excluding flextime), and usage was driven mainly by employers to achieve operational and/or strategic goals. These Canadian findings are consistent with recent international analyses as well, such as Grimshaw et al. (2016) or O'Sullivan et al. (2017).

As the above descriptions show, Canada has a multi-tiered labour market, with privileged workers generally holding favourable and secure jobs and having plentiful opportunities due to their skills, credentials, connections and/or location, but then, at the opposite end of the spectrum, are those 'at-risk' (i.e. in precarious or vulnerable situations). Those 'at-risk' individuals tend to struggle to access good-paying employment with steady and sufficient and convenient paid hours, and hence are at risk of job loss, and/or economic and other hardships. Many Canadians experience working conditions between these two extremes. Nonetheless, conditions are polarised, with access to the best jobs essentially restricted to only powerful (and hence, privileged) individuals. This is not a theoretical point about how people perceive their work choices. When thinking about the possible characteristics of individuals with short workweeks and with uncertain work hours beyond their control, we can infer that a sizable majority of these workers do so involuntarily. According to Lowe and Graves (2016), recent surveys affirm that (low) pay levels and (undesirable) work schedules are among the most common complaints held by 'average' Canadian workers today. Those same authors also note that Canadians largely continue to feel anxious about their job and earnings prospects (see also Saunders 2003). Moreover, it has long been documented (e.g. Battista 2017; Law Commission of Ontario

2012) that certain identifiable marginalised groups like women, immigrants/ethnic minorities and youth are over-represented among those holding this, or any other, type of lower-quality, non-standard employment. Lowe and Graves (2016) also found that more credentialed Canadians have fewer concerns about job and pay stability, because of their superior labour market options.

One advantage of utilising an industrial relations perspective is that it reminds us of the interrelationships between different environments and between environmental changes and stakeholder actions. So, a change of legal environment, such as the enactment of new labour standards, should not be analysed *ceteris paribus*. Rather, in situations where employers hold the bulk of power over workers, and where employers are committed to minimising labour costs, any changes to labour laws are likely to trigger a strategic reaction from employers. So, a change in employment standards, such as a rise in the minimum wage or a new statutory right over setting one's work schedule, would, on the surface, benefit at-risk workers much more than it would privileged workers. The former might receive an increase to their hourly wage, or more stable paid hours, while the latter would be unaffected (due to much higher wages and control over ones' work hours and location, presumably). But, it might not be so if employers try to find a way to 'work around' (i.e. avoid) those restrictions. In contrast, privileged workers are more likely to extract relatively favourable terms of work, notwithstanding economic cycles and other environmental influences, and thus working conditions will undoubtedly be better, on the whole, than any legislated minimum standards. In broad strokes, at-risk workers essentially have to accept any jobs or working conditions that employers offer, even if undesirable, whereas the more sought-after a worker is, the more that they can demand and get working conditions that suit their work and life preferences. Eurofound (2016) observed how interests can diverge. That is, there are growing demands by unions and employees for more flexible schedules to improve work-life balance, but, at the same time, there is also a desire among some stakeholders for employers to be given more freedom to staff and schedule work shifts to be more efficient and effective (see also O'Sullivan et al. 2017). While both are reasonable, they are in conflict, since the latter would mean that employers decide when and how many paid shifts and hours workers would get. Again, sought-after individuals hold more bargaining power, and hence are much more likely to get the working conditions that they prefer. But, the corollary is that employers are much more likely to focus on their own strategic or operational goals when designing working conditions otherwise. Moreover, from an industrial relations perspective, it is expected that employers will react in a self-interested fashion if governments try to regulate conditions of work. For instance, where governments have tried to limit the ability of employers to terminate permanent workers, employers might chose to hire temporary workers in response. Similarly, if governments restrict zero hours arrangements, it would be reasonable to expect some employers to try to switch to near zero hours arrangements that meet the letter, but not the spirit, of the regulations.

Readers should not get the impression that only low-paid workers are in zero hours contracts. One exception is a substitute teacher who might find out, early in the morning, of a day's shift, or might even be offered an assignment lasting a week or

more, possibly even including several months filling in while an incumbent teacher is on parental or sick leave. Similarly, sessional instructors at third-level institutions in Canada might be offered a 13-week-term teaching assignment immediately prior to the start of a term, without any advance notice, and even face cancellation of the course if there is low enrolment, without pay to the instructor for the preparation of the course. Nurses on a casual list can also be offered good-paying shifts without advance notice, to fill in due to illnesses, vacations or operational fluctuations.

While rare in terms of the actual proportion of workers in these arrangements, the existence of zero hours and other precarious work schedules has become a topic of conversation in the mass media in Canada (e.g. Grant 2017). For example, a recent national news story (i.e. CBC 2018) documented the rapid growth of smartphone apps that match free agent restaurant or nightclub workers in Canada to employers who are seeking individuals to work a single shift, as an example of the emerging 'gig' economy. Certainly, as mentioned earlier, casual jobs with a part-time workweek are commonplace in many industries in Canada, especially among those in low-paid occupations. But, near zero hours workers, and true zero hours workers, receiving no pre-assigned weekly shifts, are rarer. Nonetheless, they do exist, and the main reasons for the existence of these arrangements are employer strategies, coupled with the lack of labour power and lack of legislation restricting their use. Certainly, some powerful Canadian employers require some of their employees to be on-call for possible shifts, and that extends beyond new (or student) workers to include even those having accumulated tenure in that workplace (Friend 2015). Though there have been some successes by organised labour groups to publicly shame employers into providing more certain hours, on-call hours continue to be in lower-paying service sector jobs in Canada. But as Friend (2015) noted, even getting employers to guarantee 15 paid hours per week can be a struggle for entry-level service workers.

7.3 The Canadian Legal Framework

Turning to the legal and regulatory framework in Canada, it is most accurately described as modest. In practice, and as described above, employers face relatively few working time or related labour regulations. As a result, employers have substantial freedom to design jobs (and work schedules) as they wish. More broadly, Canada has a liberal market economy, if using Hall and Soskice's (2001) seminal conceptualisation. Moreover, the unionisation rate in Canada hovers at only 28% in 2016, and density and coverage is much lower in the private sector, at only about 15% as of 2016 (Statistics Canada 2017c). Additionally, where trade unions exist, bargaining is conducted typically at a very decentralised level. As such, Canada has a unilateral working time regime, as per Eurofound's (2016) typology, where individual employees and employers negotiate contracts and work time, collective bargaining structures are generally decentralised, and legislation plays a minimal role in working time standards.

For all workers in Canada, the legal environment consists of minimum standards, plus specific protection via human rights legislation, pay and employment equity legislation, and health and safety legislation (e.g. Hebdon and Brown 2016). While the latter three provide important restrictions and obligations on employers to act in a fair, just, and safe way, they infrequently impact individual workers directly. In contrast, minimum standards impact each workplace on a daily basis because they place restrictions on employers in terms of work hours and schedules, work breaks, rates of basic and overtime pay, and termination rules and pay, among others. Thus, any employee has the right to file a complaint about alleged violations of any of these standards on any given day. In practice, though, these standards are so limited that they are applicable mainly to those in entry-level jobs where employers could be tempted to cut corners and save costs. Relatively highly skilled or educated workers, and/or those with seniority in a given workplace are very likely to receive much more favourable pay, hours and schedules than the legally mandated minimums.

Unionised workers in Canada are also affected by labour relations regulations which specify how unions and unionised employers must or most not act. Again, though, these regulations do not impact unionised workers on a regular basis. But, of course, unionised workers would or could receive protection and certainty over their work schedules and hours via the applicable collective agreement. But, since few casual, temporary and on-call workers in Canada are unionised in the private sector, statutory minimum standards are the only protection that these workers possess.

Since, in practice, they are only restricted by the aforementioned minimum standards, Canadian employers have substantial freedom to implement work schedules as they wish. Moreover, the bulk of existing labour regulations are established at a provincial or territorial basis. Those rules pertain to all workers within each of those 13 regions, except for a small minority who fall under federal (i.e. central) government jurisdiction. Thus, there are 14 different sets of laws and regulations. Each of these jurisdictions has established a minimum hourly wage, as well as a minimum scheduled shift duration (e.g. 2 h in Newfoundland), a minimum length if called into an unscheduled shift (e.g. 3 h worked or paid in Newfoundland (see Government of Newfoundland and Labrador n.d.). But, on the whole, there are only modest restrictions on the existence and use of casual and on-call types of employment, and variable work schedules. Moreover, since workers in these arrangements tend to have sporadic and short 'normal' workweek length and short workplace tenure, any minimum standards in terms of termination and severance pay provide only woeful 'security'. To add insult to injury, to seek recompense for any perceived violations by the employer, an individual must file a complaint with the applicable labour ministry to initiate an investigation. Needless to say, ensuring anonymity (or freedom from reprisals) can be a challenge; for example, if a single worker is alleging being owed payment for a disputed shift within a given organisation. Thus, this solution mechanism is especially problematic for employees in precarious jobs (Saunders 2003).

Via the Fair Workplaces Act of 2017, the progressive Government of Ontario introduced a broad set of additional employment laws and protections for all workers within its jurisdiction (see Government of Ontario 2017). In addition to raising the

minimum wage, the Act also ensures that all workers get at least two paid sick days annually as well as the right to take additional unpaid sick or personal days. The Act also ensures that non-standard workers receive the same hourly pay as their permanent, full-time counterparts if having comparable duties within an organisation. Not surprisingly, this Act was heartily supported by organised labour as well as anti-poverty activists. Importantly for this chapter, the legislation also mandates (i) a minimum payment of three hours of pay for individuals if *required* to be on-call and not called in for a paid shift and (ii) the right to refuse a work shift, without penalty, if given less than 96-h notice. While the intent of this legislation is admirable, evasive employers probably can bypass the regulation by shifting to an 'if and when' scheduling arrangement in which workers with short workweeks are *offered* last-minute paid shift opportunities. In a similar vein, Canada's Federal Government recently disseminated a discussion paper containing proposed new rights for workers (under federal jurisdiction) in terms of flexible work arrangements to facilitate work-life balance (see Government of Canada 2016). The authors of that paper envision enacting legislation to entrench the right, of individual employees, to customise their work schedules (in terms of workweek length and days and hours of work) to suit individual preferences. For those in permanent, stable, secure jobs, this is undoubtedly a positive development. But, considering the labour market polarisation described above, one could argue that the discussion paper misses the point, because it would not protect the ones least able to demand changes from their employers. For those with short workweeks and inadequate income and work shift opportunities, being available for last-minute shift opportunities is the reality, and having preferred work days and times is an unreachable luxury.

In our opinion, Canada's employment legislation offers only limited protections for marginalised workers, and governments at various levels in Canada have not caught up, in terms of policy responses, with the realities of the today's working conditions for those without power in the labour market. In particular, the legislative framework provides little protection for those in non-standard employment, recognising that employers are increasingly relying on these types of workers to buffer their core workforces from operational and financial fluctuations. Filing a complaint is impractical, especially if relying on the goodwill of one's employer(s) to provide additional work shifts. So, to recap, Canada's patchwork legal framework pertaining to zero hours and near zero hours workers is limited and insufficient, especially since private sector employers are unlikely to be constrained by trade unions.

7.4 A Statistical Snapshot

To create a statistical snapshot, we utilised Statistics Canada's 2003–2017 Labour Force Survey (LFS), which is representative of all Canadians 15+ years of age (for more details, see Statistics Canada 2017b). Since it is so difficult to capture all, and only, zero hours and near zero hours workers, we necessarily strayed from our definition to create this statistical snapshot for Canada. While only a proxy, it gives

a sense of the prevalence of this type of non-standard employment. Next, we present case studies to illustrate two examples of non-standard workers who are at risk of having (only) a zero hours or near zero hours job.

In 2017, the total number of employees in Canada, aged 15 years and older, was about 17.1MM, according to the LFS. Of these the number of paid employees in Canada was estimated to be 14.4MM (85%). In addition, there are estimated to be another 1.2MM of self-employed and incorporated persons (7%) and 1.4MM self-employed unincorporated persons (8.4%). These estimates exclude those unemployed or not in the labour market.[2] According to the LFS, among all paid employees in Canada, 4.4% actually worked less than 10 h in a given week, and among all self-employed incorporated or unincorporated persons, that rose to 5.9 and 13.0%, respectively. When aggregating the three categories, 5.2% among the 17.1M working Canadians had an actual workweek of less than 10 h. To be fair, and as discussed earlier, some individuals undoubtedly prefer to have a short workweek. Also, there are certain to be some individuals, within these categories, who worked a short workweek for personal or operational reasons, temporarily. Moreover, having a short actual workweek does not mean that a person is in a zero hours or near zero hours job, necessarily. We also remind readers that self-employed persons, by definition, have at least some control over their work hours and schedule. Nonetheless, it would be a fair presumption to think of self-employed unincorporated persons in particular as being 'small operators' typically when compared to self-employed incorporated, and the percentage (of 13.0%) affirms that a tangible proportion of the self-employed unincorporated have minimal work activity (compared to 6% of self-employed incorporated).

Although the data is not available to identify near zero hours workers precisely, having access to (i) workweek length and (ii) work schedule variability allows for a reasonable estimate to be made. Among the 14.4MM paid employees in Canada in 2017, 2.7% have variable hours and a workweek of less than 10 h in a given week. Moreover, over the past decade, this percentage has only varied slightly, from a low of 2.5% in 2008, to a high of 2.8% in 2011. Admittedly, these estimates of near zero hours workers will incorrectly include some individuals with short workweeks and variable schedules but who either select their own shifts or are provided sufficient advance notice (and thus are neither a zero hours nor near zero hours worker). On the other hand, focusing only on those with short workweeks and variable schedules excludes zero hours and near zero hours workers who are assigned lots of work hours without (much) advance notice. Notwithstanding these (off-setting) complications, we have confidence in our estimates to give an approximate picture.

[2]For comparison purposes, the total Canadian population was approximately 36MM in 2017.

7.5 Case Study 1—Personal Support Workers (PSWs) in Ontario

This first case study is on personal support workers (PSWs) employed in home and community care sector in Ontario, within Central Canada. PSWs attend to the well-being and physical, logistical and emotional needs of their clients, and work in hospitals, long-term care institutions or nursing homes, and in the home and community care sector. Although there might be minor variations between provinces and territories in terms of employment conditions of PSWs in the home and community care sector, overall there are more similarities than differences. PSWs employed in the home and community care sector visit the care recipient where 'home' can be the recipient's house/apartment, an adult care programme, a retirement home, or a supportive housing programme. Care recipients are the elderly, persons discharged from hospitals and individuals with disabilities. In the hierarchy of subsectors within the health care sector, acute care institutions such as hospitals are considered by Governments in Ontario (and the society in general) as the most important and they receive bulk of the health care funding from the Provincial Government, followed by long-term care institutions and nursing homes in receiving funding. The home and community care sector is always discussed by politicians as an important component of the health care system, but when it comes to public financing, the sector is chronically underfunded (Denton et al. 2007a, b). This underfunding affects the employment conditions of workers, resulting in many only being able to attain zero hours, or near zero hours jobs with 'if and when' shift schedules (though this terminology is not used by laypersons in the sector in Canada). Put bluntly, PSWs employed in the home and community care sector are the *lowest in the hierarchy of workers* in health care, and their employment conditions reflect the characteristics of precarious work in terms of pay, benefits and job and income security.

In discussing the experience of PSWs with zero hours 'if and when' employment arrangements, we rely on data collected in 2015 in Ontario. There were an estimated 26,000 PSWs employed in home and community care sector in Ontario, Canada, at the time of the PSW study started in 2014 (Zeytinoglu et al. 2017b). A total of 2341 PSWs responded to the 2015 survey. This section focuses on 1746 respondents who completed the survey (for further details see, Zeytinoglu et al. 2017). The home and community care PSWs in the study, and in this sector, are predominantly female (93% in the study), and married or in a common law relationship (66%), with an average age of 45, and 41% are immigrants (see, https://pswshaveasay.ca; Zeytinoglu et al. 2017b). In terms of gender, marital status and age, the study resembles earlier studies in Canada. The immigrant population among PSWs is much larger than the immigrants' representation in the Canadian society (Statistics Canada 2017a). In urban centres, PSWs tend to be racialised minority immigrant women, because this is one of the few available jobs that they can find, and/or one of the few jobs that allowed them to enter Canada as an immigrant. In rural areas, with fewer immigrant minority workers, personal support work is more likely to be a job for non-racialised women without better employment opportunities. Our research did not ask how much

PSWs earn, but it is well known that they typically earn slightly above the minimum wage (Zeytinoglu et al. 2014), with few benefits.

As the Ontario-wide survey data show, 59% of the PSWs are employed with 'no guaranteed hours of work', that is they are in zero hours 'if and when' employment arrangements; and 88% preferring guaranteed hours. In contrast, among the 41% of PSWs having guaranteed hours, 98% prefer guaranteed hours. Among the 'no guaranteed hours of work' group, the average tenure is 9.5 years, and when asked to describe their hours of work, 36% select full-time hours, 50% part-time hours and 22% casual hours. In answering a separate question, they said that their average weekly hours of work are 28. Compared to this group, those who work guaranteed hours have 10.8 years of tenure, and 65% select full-time hours, 33% part-time hours and 5% select casual hours. Of the PSWs with 'no guaranteed hours of work', 61% want more hours, 33% want same hours and only 6% want less hours. Compared to this group, PSWs with guaranteed hours of work are more likely to be employed in the hours of work they prefer with 35% want more hours, 56% want same hours and 9% want less hours. PSW work is shift work, though those in 'no guaranteed hours of work' are more likely to be employed in split shifts and weekend shifts. Almost all PSWs, whether in guaranteed hours or not, are paid hourly. However, when it comes to possible employer-provided benefits, of the PSWs with 'no guaranteed hours' of work, 38% receive no benefits, while among PSWs with guaranteed hours, 20% receive no benefits. This suggests that even among those with guaranteed hours of work, there is precariousness in terms of benefits. These percentages could also be an indication of being an independent contractor, rather than an employee. In Canada, only the latter would be eligible to possibly receive employer-provided benefits. Of those who say they receive benefits, still PSWs with 'no guaranteed hours' of work are less likely to receive benefits compared to those with guaranteed hours of work: vacation benefit 52 and 70%, sick time benefit 18 and 48%, dental benefit 25 and 49%, prescription drugs 29 and 54%, and pension 13 and 29%, respectively. PSWs with 'no guaranteed hours' of work are more likely to be dissatisfied with benefits received compared to those with guaranteed hours of work.

In terms of union membership or coverage by a collective agreement, PSWs responding to this survey have a high membership or coverage (41% for those with 'no guaranteed hours' of work and 47% for those with guaranteed hours), and this is well above national union membership. Noting that unionised workers generally receive good pay and benefits (source needed), the percentages shown here are probably for the better employed PSWs.

It is important to note that although job insecurity is a concern for PSWs (Denton et al. 2007a, b; Zeytinoglu et al. 2015), they mainly consider themselves to have 'continuous' employment (with de facto guaranteed hours) because of the sectoral labour market conditions. There is a high demand for home and community care workers because the elderly population is rising, hospitals are discharging patients who need home care to recuperate at home and the trend for persons with disabilities (young and old) being cared at home is well established. All of these people need PSWs' care at home. In addition, the undesirable employment conditions in personal support work lead to voluntary turnover, making it easy for those looking for a

job. These are low-paying, low-benefit jobs with unreliable schedules, split-shift schedules, physically and emotionally demanding and 'unsafe' jobs (Zeytinoglu et al. 2015); for those who are willing to endure these conditions there are plenty of PSW jobs that provide continuity if not formal security. Anyone prepared to work in the morning and then in the evening split shifts, drive or take the bus a few times during the day to commute from one home to another, in all types of weather (when it is hot or cold, sunny, rainy or snowing), with their workplaces being someone's home and have to adjust different work environments and needs according to demands of the care recipients while following the employer's regulated/standardisation demands can easily find a job in the sector. In addition, PSWs must deal with family members who could be similarly demanding, or who could be involved in unsafe activities in the home while the PSW is working with the care recipient.

Our study also shows that location plays a role. More of the PSWs with 'no guaranteed hours of work' are employed in rural areas (43%) than those with guaranteed hours of work (32%), with the former group more likely to travel between care recipients with their own means (i.e., using their car since public transportation is non-existent in rural areas) (91% vs. 65%). The PSWs with 'no guaranteed hours of work' are also less likely to work as part of a neighbourhood or building team (37%) as compared to PSWs with guaranteed hours of work working in neighbourhood or building team (57%) where travel time is shortened due to placement to care recipients close to each other.

This case study illustrates that PSWs, notwithstanding being credentialed and being part of Canada's publicly funded health and social welfare delivery system, can experience rather uncertain and unstable work schedules. In fact, our data shows that some PSWs have only modest quality jobs, and potentially a near zero hours, or zero hours, schedule.[3] While the unemployment rate among PSWs in Canada is low, that masks an important reality. The ease in finding a job gives the impression that personal support work is structured around continuous jobs with guaranteed hours, though they are in fact often zero hours, or near zero hours, 'if and when' employment arrangements (albeit with an expectation of shifts materialising).

7.6 Case Study 2—Rural Employment

For this second case study, we turn to the employment experiences of rural individuals, and especially young adults. These individuals have been of interest to us for years because they are thought to be relatively disadvantaged because of the structural barriers that they can face finding training opportunities and good-quality employment *locally*. Focus groups for individuals between the ages of 18–25 were held in rural Ontario in the summer of 2011. There were 92 individuals who partic-

[3] *T*-tests confirmed that, compared to PSWs with guaranteed hours, PSWs *without* guaranteed hours want significantly more paid hours, are significantly less likely to receive benefits and are significantly less satisfied with pay, hours and 'work', on average.

ipated in these focus groups. Individuals were asked questions about their job—the positive and negative aspects about their job; whether they would leave their rural area for a job (and if they did, what would make them come back); what kind of job they would want in the future; what skills they would need to get that job; their employment experience during high school; and from their perspective, what the Government could do to help youths in rural areas get employment.

With respect to the types of jobs that the participants held, a large number of people had jobs in the food industry. Others worked in general labour jobs, such as in an garage, factory, lumber yard or paper company, and doing tasks such as a miller, landscaper, painter, floor installer, sanitation worker or construction labourer. Entry-level office-related jobs were also common. A number had worked in retail as a service rep or cashier. Other areas included: child care related, sports related, sales and marketing, medical related, call centres, cleaning, grocery store—produce manager, pet related, dog shelter, pet shop and tourism. Other various jobs included in a photograph laboratory, television studio, carnival, or as a hotel valet, card dealer or museum staff.

The most cited positive aspects of these jobs were consistent hours, pleasant co-workers and a good friendly atmosphere, which would make their work more enjoyable. Also, interaction with people and customers was also important. Some liked their work with children while others found their jobs easy and fun. Pride in their job and helping others were also positive aspects for some. Also considered positives were work-related perks, i.e. travel, employee discounts and safety on the job. Location was important to some. Some respondents found the experience they got from working would help in the future. Respondents liked their jobs to be challenging and fulfilling. They liked being busy, with variety on the job so they wouldn't be bored on the job. A good supervisor or manager made the work experience more positive. Some liked to work independently. Good wages and being paid on time were positives to the respondents. It was clear from the focus groups that consistent hours and flexibility so as to mesh with hours from a second job were a priority, suggesting that the majority were near zero hours workers, hence the need for a second job.

The most cited negative aspects of these jobs were complaints about the uncertainty about hours worked, indicating the possible presence of 'if and when' schedules. Some said that they did not get enough hours, and worked only part-time while others did not like the late night shifts and/or the last-minute schedule changes. These changes interfered with their hours on getting or managing second jobs; yet a large percentage of the participants needed to hold a second job to 'get by'. Some people had only contract work or seasonal work to rely on. A bad atmosphere, being overworked, and dealing with a bad boss were also common complaints from the respondents. Some did not like working with unpleasant co-workers and would prefer to work with people their own age. Poor wages and not being paid on time were also noted by the participants. The lack of public transportation was a common problem for some workers. They found it hard to get to work without adequate transportation available, which is not surprising given the lack of public transportation in rural areas.

When asked whether they would leave their rural town for a better job, those who said they would not leave cited the following reasons. Some like living in a smaller community and enjoy the great people while some said they would not leave the region. Some wanted to finish school first. Staying for their family was also cited by many. A few respondents said they would not leave now because they have a job. Some may leave but plan to come back later. It was clear from the focus groups that almost all individuals found it preferable to remain in their small, rural town, however, given the zero hours and 'if and when' jobs, and subsequent need for a second job, many felt it may be necessary to move to an urban city for more stable and consistent employment. To be clear, some of our respondents were currently summer students holding a job during an off term while part way through a programme at a third-level educational institution. Others were working, or seeking work, after completing (or leaving) second or third-level education. But, it would be an oversimplification to view the first group as only wanting or needing a temporary job of any quality while the latter are looking to start their career with a first real job. In practice, these categories get blurred because young workers interested in working in rural Canada have to plan their education and employment search accordingly. Some choose to attend a nearby third-level institution (if it exists) to be able to gain skills and credentials while retaining a rural job and building local business connections. Others might try to find 'good enough' local employment after finishing second level education. If successful with their search, then they will stay and work. If not, then they tend to look 'away', eventually, for better employment and/or education options. Finally, others seek specialised third-level credentials, even from urban institutions, that are perceived as a future gateway to good employment opportunities in rural industry and occupations. In any case, the reality is that, among our young rural adult respondents, few held a job with full-time hours, growth opportunities, and a good hourly wage, and those that did were either lucky and/or holding valued credentials.

When asked what would make them return to their rural town if they did leave for better employment, an overwhelming number of participants responded that family and friends would be the main reason to bring them back to the region. Also, jobs available in the region, i.e. government jobs or better jobs in their fields, would bring some back. When some were ready to start a family and settle down, they would move back to the region. A good community and good people would also bring people back. Some like the area and found it quiet and relaxed and would come back to retire.

When asked what their ideal job would look like in the future, a large number of the individuals said they would be interested in jobs in the medical field, social services, and education and government jobs. The individuals responded that they recognised that post-secondary education was an important factor in getting the job they wanted; however, the lack of transportation, and awareness of and access to post-secondary education were the major barriers. Many individuals realised that they had to develop some extra skills to present themselves in a better light to potential employers. Some of the skills they suggested were: learn French, finish their degree, get a driver's licence, develop their interpersonal skills, do volunteer work, learn CPR,

take computer programming course, business management training, course on computer design and get some on the job training. They also highlighted, however, that employment centres were not centrally located, and transportation to employment services was limited.

Most individuals felt the Government should be doing more to help workers. Lack of sufficient transportation was a reoccurring theme in many of the focus groups. They complained that they could not easily get to their jobs with the existing transportation system. Some felt there was a lack of communication of opportunities for workers. There were too many communication and physical barriers. They suggested that the Government needs to create more jobs for youth—for various levels of education and create more entry-level positions where no experience is needed. There is a need for more youth programmes and opportunities for youth.

In summary, the focus groups painted a bleak picture of the employment experience for rural youths with the main issues being casual and near zero hours jobs with limited guaranteed hours and 'if and when' schedules, and hence the need for a second job, if available, out of financial need. Despite their desire to remain in their rural town, most felt the need to leave the community if they wanted a job with better pay and more consistent hours, even though it was important for them to remain in their community because of the lifestyle and their family and friends. Another major issue worth noting was the lack of transportation which also made employment difficult. And despite their motivation to find a better job, awareness of and access to post-secondary education were also major barriers.

We also note similarities in themes from the focus groups to comments made by small employers in rural Newfoundland and Ontario in our related studies (e.g. Cooke et al. 2015). These interview participants had been approached to understand the realities of operating small businesses in seemingly challenging locations. Several small business owners in rural locations described how difficult it is to make a profit, given low population levels, high cost of living, relatively low incomes among their customers, and a short and cyclical season if involved in tourism/hospitality. One entrepreneur said that it was only feasible to offer seasonal employment, and hours of work during the shoulder weeks would need to vary sharply depending upon customer levels. Another business owner had found that, because of out-migration of more mobile individuals, it was hard to find and retain good-quality workers to take part-time or casual employment. But, the use of those non-standard work arrangements was an operational necessity to control costs given modest and uncertain revenues and razor thin profit margins.

When we compare the responses from rural youth and from small rural employers, some common ground emerges. It can be frustrating and demotivating for rural individuals who can only find non-standard employment with fluctuating and short work schedules. Yet, for operational reasons, it is defensible if employers are only willing to offer employment featuring casual and/or on-call schedules. That said, we are unaware of any business conditions that require rural employers to rely on zero hours or near zero hours schedules. Rather, we see how some use of 'if and when' scheduling would or could be justified.

7.7 Discussion and Recommendations

To summarise, while zero hours work is exceedingly rare in Canada, *near* zero hours work is more prevalent, affecting in the range of 2 and 3% of workers, according to our earlier provided estimate. In our view, a true zero hours schedule, without any guaranteed hours, is inherently unfair to employees and is very unlikely to be an operational necessity for employers. On the other hand, 'mom and pop' businesses can face significant revenue challenges and uncertainty in today's business climate in Canada. Thus, we have sympathy for the owners and managers of small enterprises who feel the need to use on-call arrangements that might include near zero hours workweeks, occasionally or seasonally. To us, having some guaranteed work hours in combination with 'if and when' shift arrangements are much more palatable than being truly (obligated to be unpaid and) on-call. While legislative restrictions in Canada are rather weak and limited, one Provincial Government has recently implemented a new employment standard' requiring employers to pay employees if obligating them to be available for a possible unscheduled work shift (i.e. if on-call). That said, its applicability is limited, and employers can easily design scheduling to avoid that requirement by offering 'if and when' shifts to a pool of casual workers hungry for more hours. This illustrates the Canadian labour market. We remind readers that Canada has a liberal market economy and a unilateral working time regime. That is, employers face only modest regulatory restrictions when designing jobs generally, and work schedules in particular, and few private sector workers are unionised. While the Canadian economy is fairly strong and unemployment is low overall, working conditions are polarised. Those in temporary, casual and/or on-call jobs are probably in their position involuntarily because jobs with more secure hours (and hence pay) are unreachable. In our view, zero hours and near zero hours jobs in Canada deserve to be categorised as among the lowest quality, all else equal because weekly pay is likely to be low and uncertain, and because being on-call hinders the holding of other jobs simultaneously.

It is fair to say that very few individuals would freely choose to be a zero hours or near zero hours worker in Canada or elsewhere. Moreover, while many individuals *might be willing* to be assigned or offered extra work shifts at the last minute (due to economic need), it is implausible that anyone would prefer little or no notice (unless they are appropriately compensated for this inconvenience), as opposed to being given advanced notice or to choose one's paid work hours. The willingness to accept paid shifts without advance notice is a reflection of an unwillingness to complain to management, and/or because of a need for any paid hours, even if inconvenient. Similarly, it will continue be a difficult decision for an individual to file a complaint to Government about any violations by one's employer, given the risks versus rewards.

A peculiarity of the Canadian labour market is the prevalence of two-tiered employment conditions within organisations. In the public sector and in the private sector, and in unionised and non-union organisations, it is not uncommon for permanent, full-time employees to be insulated from financial and operational impacts by a buffer of non-standard workers, likely with casual employment status. Those

non-standard workers, or their paid hours, are increased or decreased as needed, to protect the core workforce. It is confounding why Canadian employers utilise this approach, or more broadly, why employment standards, and working time regulations in particular, are not more substantial in Canada, to help protect precarious workers. While the left-leaning New Democratic Party (NDP) has not been in power at the federal level, labour regulations are implemented at a provincial level in Canada, and many provinces have had, or currently have, an NDP Government holding majority power. Nonetheless, those NDP Governments have seemingly focused on infrastructure projects, taxation rates, and/or social welfare policies, rather than labour protections, per se. To be blunt, Canadians as a whole seem to value the operational efficiency and flexibility of employers more than enhanced protections for workers.

Given the short workweeks and short job tenures that exist today, it is difficult for affected individuals to qualify for (un)employment benefits. To qualify, Canadians must surpass the locally designated threshold of paid hours (of at least 420 h). For those working full-time hours, this threshold is low, but for those with short and sporadic workweeks, qualifying for these social benefits can be unattainable. Thus, public policy protections for zero hours workers in Canada are be described as weak and given contemporary labour market realities. Yet, it is unclear who will, or could, advocate successfully for improvements. To help zero hours and near zero hours workers in Canada, any policy interventions would have to try to provide more income security for these and other non-standard workers, without being perceived as harming the competitiveness of Canadian employers. This is to say that tweaking around the margins of minimum standards will not get the job done. Rather, it is time to look at bolder solutions such as Denmark's flexicurity regime, Ireland's community employment schemes which provide income supports while simultaneously allowing individuals to top-up with any available community work, or guaranteed annual incomes. In other words, the policy goal should be to ensure that if only sporadic work schedules are available, local individuals will not be desperate enough to accept any last-minute shifts at any time, to stave off economic hardship. At the same time, employers should be permitted retain the flexibility that they need, but might find that more desirable work schedules will need to be offered to entice sufficiently attractive workers.

Although it will require a change of policy direction and priorities, one bold possibility would be for the Canadian Government to consider implementing a universal guaranteed income. Short and unstable workweeks are the reality for some Canadian workers, and these work schedules are likely to become more prevalent, not less, in the future. This is part of a broader trend of polarisation of working conditions among Canadians. A guaranteed, modest and means-tested income for adult Canadians would be a way to provide a base level of income certainty for individuals, but also to incentivise workers to seek out local employment opportunities, even of a sporadic and/or casual nature.[4] We remind readers that Canadian workers face 'claw-backs' if earning any wages while receiving employment insurance. This is not to

[4]While a universal guaranteed income offers the possibility of reducing poverty, and boosting the labour market participation rate, and annual income levels, for those only able to access sporadic,

suggest that we like, accept or condone the existence of zero hours schedules. But, it is also the reality that many small- and medium-sized enterprises, in Canada's private sector, have thin profit margins and will try to match labour levels with fluctuating revenue opportunities. The result is going to be some level of short, fluctuating work schedules, regardless of the regulations.

Yet, we also encourage more long-term thinking when employers are designing jobs. We suggest that employers should consider the full cost of the ongoing hiring and training of several (near) zero hours casual and/or temporary workers, which invariably involves voluntary turnover for better opportunities, as compared to investing in a smaller number of full-time workers for the longer-term. We also suggest that employers with robust profits and resources consider their corporate social responsibility (CSR), and offer more stable, permanent employment. In today's society, there is an increasingly strong focus on CSR, and it may even be used as a marketing tool towards attracting customers. In other words, customers may lean towards one particular company because they value and treat their employees well. And with an increasingly number of organisations with a CSR strategy as the foundation of their organisation, this type of value placed on employees would be aligned with their strategy of being a 'caring' organisation. This chapter raises many opportunities for future research. For example, research should examine the impact on the well-being of the worker and their families of zero hours jobs. Perhaps if there were evidence to suggest there is a positive relationship, then organisations with a CSR focus would be more likely to adopt the appropriate policies. In addition, future research should examine whether zero hours employees are less productive and therefore more costly to the employer. If there was evidence to show this relationship, then organisations may be more likely to lean more towards permanent workers for which they would have less turnover and who would be more productive. Lastly, future research should address the long-term effects on employability for zero hours workers, thus aiding policy makers in the development of employment programmes and strategies for at-risk and casual workers. Understanding the social and economic impact of this type of working arrangement is important from both an academic and practical perspective. Future research in this area is needed for multiple stakeholders: for organisations with a CSR focus who may be interested in using employment practices that are aligned with their strategy; for zero hours workers so that we can better understand the impact on their health, well-being and future employability; and for policy makers, namely employment centres and government agencies who provide employment services.

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non-standard work, it does not appear to be a politically palatable option among Canadians at this point.

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Chapter 8
Zero Hours and On-call Work in Anglo-Saxon Countries: A Comparative Review

Michelle O'Sullivan

Abstract This chapter reviews zero hours work and working time uncertainty in a comparative context, based on the findings of the country studies in this volume. It identifies the various employment arrangements in Anglo-Saxon countries according to their levels of working time uncertainty and job instability and reviews the extant of zero hours work and working time uncertainty in each country. While there are multiple reasons why employers use employment arrangements with zero hours work and working time uncertainty, the chapter focuses on it as a mechanism of managerial control. The chapter then identifies clusters of countries according to the strength of their state regulatory responses. Despite similarities amongst the countries in terms of employment regimes, their comparatively weak levels of labour regulation and the weak labour market position of workers, some countries have responded more strongly than others with labour regulation. Finally, the chapter examines the importance and challenges of labour law and social protection as avenues of protecting people with significant working time uncertainty.

Keywords Zero hours · Uncertainty · Job instability · Managerial control · State responses · Trade unions · Labour law · Social protection

8.1 Introduction

Historically, a chief concern of unions and, later, policy makers was the protection of workers from excessive working hours, argued by some as a symptom of employer greed (see Contensou and Vranceanu 2000). Through the twentieth and twenty-first centuries, working hours generally fell in developed countries and working time norms such as delineating work from non-work time became part of the regulatory system associated with the standard employment relationship (SER) (Campbell

M. O'Sullivan (✉)
Department of Work & Employment Studies, Kemmy Business School, University of Limerick, Limerick, Ireland
e-mail: michelle.osullivan@ul.ie

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2017; Rubery et al. 2005; Supiot 2001). While standard working time is still a dominant feature of employment systems, there has been increasing diversification of working time patterns, extension of working time across the seven day week and fragmentation of working time (Broughton et al. 2016; Campbell 2017; Fagan et al. 2012; Zeytinoglu and Cooke 2006). These are not surprising developments since 'impelled by competition, capitalists continually transform production' through, for example, the extension of the working day and the intensification of work (Buroway 1983, 588). These developments in working time have been enabled by a shift from collective and regulated models of working time to more employer-led systems of working time, with some suggesting this is indicative of a new flexible capitalist temporality (Wood 2016; Rubery et al. 2005). Zero hours and related forms of work epitomise employer-led working time. This chapter examines zero hours work in a comparative context, based on the findings of the Anglo-Saxon country studies presented in this volume. In some of these countries, such as Ireland, the UK and New Zealand, zero hours work have become recognisable terms in public and policy discourse due to high-profile workplace disputes and trade union campaigns for increased regulation. While the terms are less familiar in Australia, the USA and Canada, working time uncertainty is a feature of their labour markets. This chapter responds to the two themes of the book outlined in the introductory chapter. The first involves examining the extent to which zero hours is a phenomenon similarly experienced in the Anglo-Saxon countries. The second theme concerns the regulation of zero hours work and associated working time uncertainty in Anglo-Saxon countries. Of course employment regulation can be outcome of union–employer relations at workplace, enterprise and sectoral levels, but the organisation of employment is also influenced by other significant factors including the policies and practices of the state (Rubery 2006). Labour law is particularly important in Anglo-Saxon countries as it is dominant in regulating working time (Berg et al. 2004; Eurofound 2017). This chapter pays particular attention to regulatory responses to zero hours and working time uncertainty by the state and examines the extent to which these responses can effectively constrain employer-led working time.

8.2 Working Time Uncertainty in Anglo-Saxon Countries

Given the variety of contractual arrangements, organisational practices and terminology used across countries, we classify employment arrangements identified in the country studies according to the level of working time uncertainty (WTU) and level of job instability (JI) they entail. An employment arrangement can be described as having low WTU if it entails a guaranteed number of hours, which are regular in number on a daily and weekly basis and which are scheduled at regular times of the day and week. The fact that hours may be guaranteed provides some security of income but not necessarily sufficiency of income as this depends on the interaction between the number of hours and hourly pay, that is, 'living hours' (Ilsøe et al. 2017). An employment arrangement has high WTU if it involves no guarantee in

the number of hours and inevitably then, little certainty as to the regularity of the number from week to week and little certainty regarding the scheduling of hours on a daily and weekly basis. Including the level of instability in a categorisation of employment arrangements provides further insight into the nature of work and provides a more nuanced insight of the precariousness of work. Job stability in this instance refers to the extent to which the employer offers security in the current employment arrangement. Figure 8.1 illustrates four quadrants representing various permutations of WTU and JI. Given the range and complexity of employment relationships, not all can be included here but we include those most relevant to zero hours type work. The bottom left quadrant with low WTU and low JI is typified by the standard employment relationship, which is permanent and involves a guaranteed number of full-time hours that have high regularity in their scheduling. Permanent part-time employment could also be included in this category as it may also involve guaranteed hours which are regularly scheduled. The opposite quadrant with high WTU and high JI represent much of the zero hours and on-call arrangements in this volume. They include zero hours contracts (ZHCs) in the UK, zero hours contracts and If and When contracts in Ireland, zero hours contracts and casual work in New Zealand, on-demand casuals in Australia and casual work in Canada. Some of these arrangements involve legal distinctions. For example, the requirement on workers to be available or not to an employer is the critical legal difference between a zero hours contract and If and When contract in Ireland and between a zero hours contract and casual work in New Zealand. However, as the country studies highlight, there is little dissimilarity between the forms of employments with regard to the lived experiences of workers. Even where workers are not legally required to be available to an employer, they may feel they an obligation to be available given that employers may schedule more hours to workers with greater availability (see also Lambert 2008; Lambert and Henly 2009). The employment arrangements noted in the US chapter can also be included here—on-demand work which Fugiel and Lambert define as involving considerable volatility in the number of weekly hours, and on-call work involving unstable working hours and short advance notice for hours.

Another category of employment arrangements are closely related to zero hours work but could be categorised as having medium WTU and low to medium JI. This group includes Hybrid If and When contracts in Ireland, 336 and short hour contracts in the UK, and minimum hours arrangements in Australia. These are arrangements whereby the employer provides some guaranteed number of hours but any additional hours are offered at the pleasure of the employer and, therefore, workers' guaranteed hours may constitute some or even a minimal proportion of their total weekly working hours. While providing some certainty on the number of hours, they may provide little certainty with regard to the scheduling of hours. In terms of JI, workers may be offered such employment arrangements on a permanent or temporary basis.

The bottom right quadrant refers to employments with low JI but high WTU. This category includes employment arrangements whereby a worker has a permanent contract but may work on a zero hours/on-demand basis or have high schedule instability. For example, in Ireland, the state health service issued contracts of indefinite duration to 90 care support workers on an 'as and when needed basis' leading

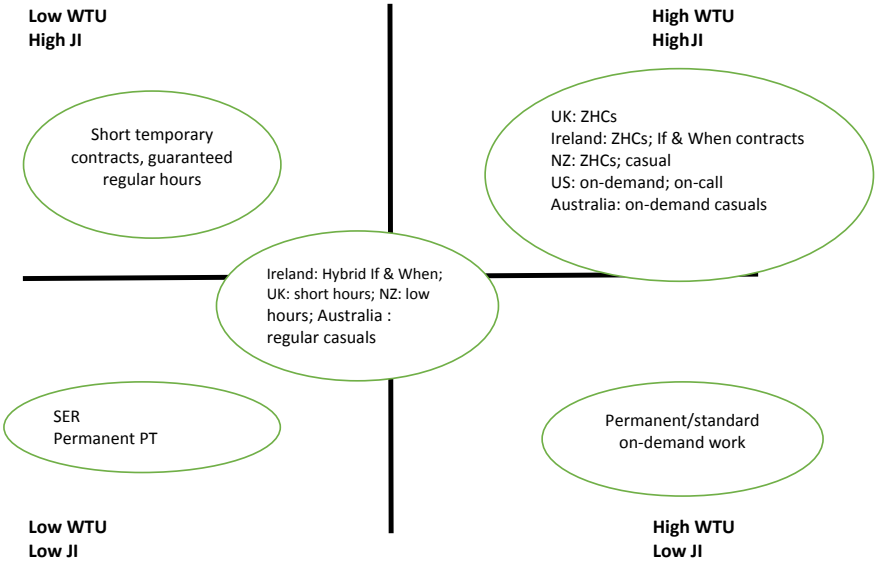

Fig. 8.1 Employment arrangements by working time uncertainty and job instability

to an industrial relations dispute. Where workers are on 'permanent' contracts with no guaranteed hours, the low JI offers little substantive protection for workers. In the USA, Fugiel and Lambert (Chap. 6) find that a substantial minority of workers with standard employment contracts are subject to on-demand work. In Australia, Campbell, Macdonald and Charlesworth (Chap. 4) note the prevalence of a small proportion of workers who are classified in national statistics as permanent but who identify themselves as casual because of the volatility of their working hours schedules.

8.3 The Extent of Zero Hours Work

National data in Anglo-Saxon countries have many deficiencies with regard to capturing zero hours work and many do not use the term statistically. The UK is only country in which the national labour force survey captures the prevalence of zero hours contracts, defined as contracts with non-guaranteed hours. Even then, data are problematic. There were rapid increases since 2011 in the number of employees who reported working on zero hours contracts with 2.8% of the workforce categorised as zero hours workers in 2016. In an effort to obtain more accurate data, the UK national statistics office surveyed employers and those results indicate that 6% of employment contracts involve non-guaranteed hours though Adams, Adams and Prassl note (Chap. 3) that 6% may be an underestimation due the nature of the

survey question. The remaining countries have to rely on other measures to provide some indication of zero hours and on-call work in the absence of surveys with direct questions on non-guaranteed hours. In Ireland (Chap. 2), the authors use available data on the variability of hours and find that 4.3% of employees worked constantly variable hours in 2017. While this figure represented a reduction since the beginning of the economic recession in 2008, and even more so when a longer-term perspective is taken, the profile of variable working tells a more nuanced story. The proportion of full-time employees with variable hours has reduced since 1998, but the proportion of part-time employees with variable hours was the same in 2017 as in 1998. The US and Canada chapters use measures such as variable hours and advance notice as a way to capture people on zero hours type work. In the USA, 6% of employees are estimated to be on-call, characterised by Fugiel and Lambert as involving unstable working hours and less than one days' advance notice for work. However, variances in the amount of advance notice given by employers to employees have a considerable impact on estimates of uncertain work. If the benchmark used is unstable hours and notice of one week or less, Fugiel and Lambert estimate that almost 15% of employees can be categorised as on-call. In Canada, Cooke, Sayin, Chowhan, Mann and Zeytinoglu (Chap. 7) note that zero hours work, where workers have no pre-assigned weekly shifts, are rarer than casual jobs with a part-time workweek. They estimate that 2.7% of employees had variable hours and 'short' hours of less than 10 per week in 2017 and this figure has remained relatively stable over the last decade. In Australia, there is no data which specifically focus on a group of workers with on-call work, but available data suggest that a majority of casual employees (58%) have non-guaranteed hours. Almost 40% of casual employees do not have the same number of hours each week, amounting to 10% of all employees. In New Zealand, 10% of employees have irregular work schedules.

If there is an upside to a lack of data specifically on zero hours and on-call contracts, it is that analysing the components of working time which characterise uncertainty, such as irregular hours and short advance notice, reveals the wider prevalence of such features beyond the narrow confines on one employment type. As Fugiel and Lambert (Chap. 6) assert, there is evidence 'that conventional categories of employment arrangements underestimate the prevalence of work schedules that function to create unstable, on-demand or on-call work'. Their analysis of the USA shows that 18% of employees in standard employments (aged 30-36) work with unstable work schedules, while 9% have unstable work schedules plus short advance notice. Similarly the data from Australia and New Zealand also suggest that uncertain working time is not confined to non-standard employments. In Australia, Campbell et al. find that 2% of all employees are classified as permanent but self-identify as casual while Campbell's estimate of irregular work schedules in New Zealand includes temporary employees with working hours that vary according to employer needs, and permanent employees with 'no usual working time' (Table 8.1).

There are some commonalities across the countries in regards to the types of industries and workers who are most likely to do zero hours type work. The Ireland and Australia chapters both refer to the prevalence of zero hours or on-demand work in accommodation and food, community care, relief teaching in schools and retail.

Table 8.1 Estimates of employees with zero hours type work or working time uncertainty

Ireland	4.3% employees with variable working hours
UK	2.8% workforce or 6% of employment contracts with non-guaranteed hours
Australia	12% employees who are 'on-demand' casuals or permanent employees who define themselves as 'casual'
New Zealand	10% employees with irregular working time schedules
USA	10% employees have major variability in their weekly working hours 6.4% employees have variable work hours or timing that they do not control and get one day or less advance notice of work
Canada	2.7% have variable hours and a workweek of less than 10 hours

Sources Chaps. 2–7

The UK chapter also notes the prevalence of zero hours work in accommodation and food as well as administration and support services, and construction. Health and social care is highlighted for zero hours or on-demand in the UK, Ireland and Australia, whereas in the US, on-call work is rare in healthcare. The US chapter distinguishes between unstable timing which is common in retail, accommodation and food service, and transportation, while on-call work is prevalent in wholesale trade, transportation and warehousing.

In terms of the profile of workers associated with zero hours work and working time uncertainty, there is evidence from this volume of groups typically considered more vulnerable to segmentation. In the UK, Australia and New Zealand, zero hours and on-call work are more prevalent amongst young people and women with caring responsibilities though the UK chapter notes that the relationship between women and zero hours contracts is insignificant once industry and occupation are controlled for. In the USA, on-call work is more prevalent amongst older workers while unstable timing is more common in younger age groups. Migrant workers are cited as being more likely to work on-call work arrangements in the UK, Australia and New Zealand, while in Ireland, lower proportions of migrant workers have variable working hours than native workers. On-call workers or those with significant working uncertainty tend to be low-wage, lower-skilled, more likely to work part-time hours and, unsurprisingly, to have greater variability in their hours than other contracts. It has been argued previously that a trend in employer strategies towards high-skilled employees was a shift to results-based systems rather than time-based systems (Rubery et al. 2006). The country studies in this volume highlight the prevalence of employer-led time flexibility and extension of zero hours work to groups of high-skilled occupations such as nursing, teaching and third-level lecturing. Their employers may be more likely to be public, and their fragmented working time are the outcomes of increased pressure by governments on public sector employers to control costs and be more responsive to changing demands for services.

8.4 The Nature of Zero Hours and On-call Work: A Mechanism of Managerial Control

Zero hours work and jobs with significant working time uncertainty serve employers' strategy of cost minimisation towards profit maximisation. Zero hours work not only offers a cheap form of hiring labour but acts as a source of managerial control. Some organisations elicit workers' cooperation through better reward systems, career paths or working hours that suit family commitments but evidence suggests people on zero hours work are subject to significant protective gaps. The nature of zero hours work is that people are paid for hours worked only and are less likely to receive the benefits of those in standard employment relationships. This situation is facilitated by the lower collective power of people in zero hours work. The absence of guaranteed hours and the unpredictability of hours means organisations can use the bait of future hours as a mechanism of coercion, with more hours acting as a 'carrot' and the possibility of no hours acting as a 'stick' in order to secure required worker behaviour. As Adams, Adams and Prassl highlight in the UK (Chap. 3), zero hours work induces workers against raising grievances for fear of being denied future work. Workers may have limited alternatives to a zero hours arrangement because of a range of factors such as loose labour markets, lack of affordable available childcare, structural barriers facing particular groups, such as women and migrants, and geographical locations. Cooke et al. in their case studies of the Canadian labour market (Chap. 7) underline the vulnerability of particular groups to zero hours work such as young adults in rural areas and women, especially minority immigrant women, in the home and community care sector. In the latter case, women can find it relatively easy to find a 'job' as a personal support worker, yet the reality is that the healthy labour demand for such work has not translated into secure working hours. The rural location of work compounds the insecurities associated with zero hours work as workers spend more of their pay on travel costs.

Not all managers may use the prospect of working hours on a consistently coercive basis with zero hours or on-demand workers. It is not always certain that all managers will implement organisation policies as planned and may dilute them to gain worker commitment and avoid conflict (Hyman 1987). Previous research has pointed to the importance of the supervisor relationship in jobs with high temporal flexibility, where they can mediate the harshness of flexibility policies and offer workers respite by allowing them some control over scheduling (Lambert 2008). For example, Murphy et al. (Chap. 2) note that in Ireland some managers facilitate zero hours workers' requests to schedule hours in a particular pattern so that they could meet the accessibility requirements for income assistance payments from the state. However, organisations' increasing use of technology and data surveillance, and organisational pressure on frontline managers to meet targets, militates against manager autonomy on working time scheduling. In the case of platform-based work, the 'frontline manager' has been virtually eliminated or has just become 'virtual'. In some ways, the dilemmas of managerial control in platform work are similar to those in other jobs, where 'changing spatial and temporal dimensions … exacerbate

the indeterminacy of labour potential' (Gottfried 1992, 447). Platform companies have attempted to resolve this indeterminacy dilemma by maximising the use of technology and data to operationalise organisational policies as intended, without possible distortion by lower-level management. It has long been recognised that technology can provide information conducive to managerial control and can reduce the space for lower management discretion (Hyman 1987). Howcroft, Dundon and Inversi (Chap. 11) discuss the myriad of ways in which platform companies exert control over workers from recruitment to performance, while offering little stable employment or certainty of hours. They suggest that technology has been 'leveraged by employers to create new constraints through the digitalisation of life rather than liberate people from the drudgery of work'.

While organisations can use zero hours work as a coercive form of control, it can be argued that they also have used ideological power which 'generates consent within the workplace and other spheres of economic life' (Degiuli and Kollmeyer 2007, 500). Country studies in this volume cited employer arguments that zero hours work was also beneficial to workers and the state. Three arguments were presented by employers. First, that zero hours work was beneficial in the flexibility it offered employers and workers. Employers deemed labour flexibility an operational necessity for hyper-competitive consumer-oriented markets. In this way, 'the flexibility of the adaptability of labour' is decided by employers as the solution to the 'changeability of markets' (Pollert 1988, 43). The labour flexibility required by employers was not presented as disadvantageous to workers but as desirable by them, particularly by women and young people, who employers claimed have the greatest preference for flexible hours. Thus, the term flexibility is 'a handy legitimatory tool' in which all forms of production and organisational flexibility are presented as inherently connected to labour (Pollert 1988, 43). Yet flexibility in the context of zero hours and on-demand work means working time scheduling which suits the needs of employers. Second, employers argued that zero hours work was of benefit to workers in that it acted as a stepping stone to more stable employment in the labour market. Third, zero hours work was beneficial to workers and the state by acting as an alternative to unemployment. These arguments serve to normalise the 'inevitability of job instability' (Degiuli and Kollmeyer 2007, 512) and reinforce the trend of making casual labour 'ideologically visible' (Pollert 1988, 46). Such ideological power is critical because it can potentially have the effect of workers accepting instability as an unavoidable situation which is 'beyond the control of corporate or government leaders' (Degiuli and Kollmeyer 2007, 506). Other studies on managerial control have argued that hiring contingent workers acts as a source of threat to core workers (Gottfried 1992). The question of whether employers deliberately recruit people in contingent, precarious work as a general tool of worker discipline has been debated (Hyman 1987; Rubery 1978). The country studies in this volume emphasise that employers view of on-demand workers as an organisationally efficient and cost effective response to meeting organisational goals. While this moderates the behaviour of zero hours workers such as dissuading them from raising grievances, it is open to further research as to whether there is knock-on impact on other workers, by design or default. This may depend on a number of factors including the prevalence of zero hours work or

working time uncertainty across a firm or industry, the extent to which the wider workforce are unionised and the strength of employment regulation.

The ideological power of managerial control can impact the wider workforce if it influences the way the state regulates the labour market and employment. There are significant linkages between ideological power of employer arguments and the role of the state in the labour market. The influence of such arguments on the institutions of the state is important, particularly when employer arguments align with the ideological orientations of governments. In this volume, Adams et al. note how government politicians in the UK have lauded the virtues of zero hours work, while Campbell et al. argue that Australian federal governments have been heavily influenced by employers, and in the USA, Fugiel and Lambert refer to the lack of prospects of regulation in Republican-controlled states. Anglo-Saxon countries as liberal market economies are more likely to have right-leaning governments which support and lead market-driven solutions to labour market issues. The employer contentions about the benefits of zero hours and on-demand work speak to the state function of accumulation through flexible labour markets and satisfying dominant state goals of reducing unemployment and public expenditure. Individual state freedom to pursue flexible labour markets has been facilitated by comparatively low union density and collective bargaining coverage and weaker union involvement in regulation. Yet some Anglo-Saxon countries have responded more than others to calls for greater regulation of zero hours work and working time uncertainty. The next section discusses the nature of the regulatory responses across countries.

8.5 How Have States in Anglo-Saxon Responded to Zero Hours Work and Working Time Uncertainty?

Workers are less likely to be exposed to precarious conditions the more employment protections are set at a decent level and extend to all workers (Grimshaw et al. 2016). To what extent have Anglo-Saxon countries configured on flexible labour markets responded to zero hours work and working time uncertainty through enhanced employment protections? How effective is regulation in terms of coverage of workers and scope of regulations? Countries can be classified according to the strength of their regulatory responses in terms of coverage of workers and scope of regulations, the latter concerning working time uncertainty, such as the number of working hours and the regularity and scheduling of hours (Table 8.2). It is argued that countries with strong responses are those which introduced national-level regulations, thereby having a wide coverage of workers. In addition, strong regulations are those which significantly restrict employers' discretion to have arrangements based on non-guaranteed hours and employer-led flexibility in regard to the regularity and scheduling of hours. Figure 8.2 graphs countries on a continuum according to the strength of their regulatory responses in regards to increasing security of hours and scheduling practices. The 'minimalist cluster' refers to those Anglo-Saxon countries with the

Table 8.2 Strength of regulation on zero hours/on-call work and working time uncertainty

	Strong	Moderate	Weak
Guaranteed hours	Ban on non-guaranteed hours	Some guaranteed minimum hours	No guaranteed hours
Regulations on scheduling	Significant restrictions on employers' discretion regarding regularity of hours, timing of hours, length of shifts and cancellation of hours	Some restrictions on employer-led scheduling	Few or no restrictions on employer-led scheduling
Worker coverage level	Nation-wide coverage	Restricted to geographic region or industries	No coverage or very limited in geographic coverage

weakest regulatory environment aimed at zero hours work and ameliorating working time uncertainty (Fig. 8.2). This group is weak in terms of the coverage of workers and scope of regulation with few national laws governing the number, regularity and scheduling of hours. The UK is a member of this group as its only state response to date on zero hours work was the introduction of legislation which regulated exclusivity clauses. While the government argued that it was protecting zero hours workers, the regulation entailed little protective value and presented no discernible challenge to employers' employment practices. Since the legislation, significant media interest, union campaigning and employment law cases related to the gig economy led to the government commissioning the so-called Taylor review into 'modern employment practices' and it remains to be seen what regulations will emerge from this. Within the UK, individual countries have made/attempted to make additional regulations related to zero hours contracts. In Wales, regulations introduced in 2017 state that where a domiciliary care worker on a non-guaranteed hours contract has worked regular hours over a three month period, their provider of domiciliary support service must offer them a choice of contracts, including one which guarantees the average hours they worked in the reference period. Alternatively, it can be agreed between the provider and worker that they will continue on a contract with non-guaranteed hours. In 2015, the Northern Ireland Executive prepared a set of proposals including a right of someone on a zero hours contracts to request a fixed hours contract where they have been working fixed hours for six months. The proposals did not come to fruition and progress on the issue has been stalled further by the collapse of the Executive Government there in 2017.

A second category is the 'constrained scheduling cluster'. This group includes countries which have regulations on scheduling issues associated with on-call work or working time uncertainty but are constrained in that regulation tends to be set at a

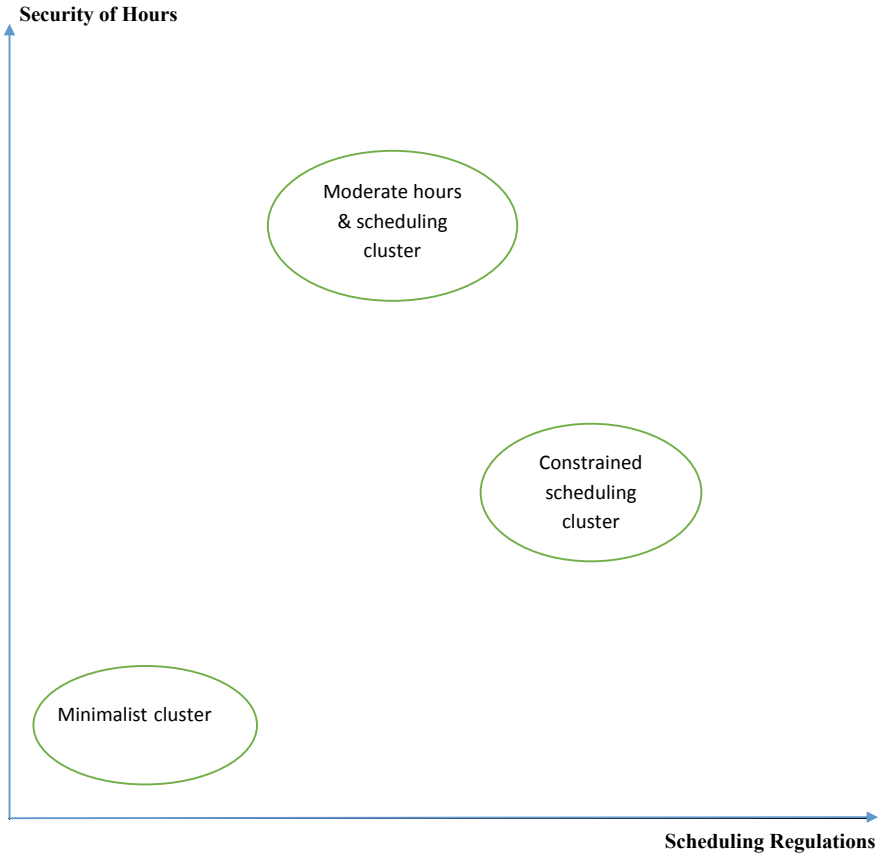

Fig. 8.2 Regulatory responses to zero hours type work and working time uncertainty in Anglo-Saxon countries

sub-national level, applying only to certain geographical regions or varying between regions, and sometimes only to specific groups of workers so overall there is limited coverage of workers. This cluster includes the USA and Canada. In the US, some states have significant regulations addressing working time uncertainty relating to minimum hours for shifts, advance notice and compensation for lack of notice, rest breaks between close shifts, and employees being offered hours before new employees are recruited. Similarly in Canada, laws at provincial or territory level provide for minimum hours when an employee is called in for a scheduled or unscheduled shift. There are some useful regulations on scheduling practices that can cause significant disruption for workers. However, the constrained scheduling cluster includes countries that generally do not have regulations which provide for guaranteed hours or regularity of those hours and, therefore, do not tackle the fundamental causes of working time uncertainty. In addition, as Fugiel and Lambert note in relation to

the US, exit options included in regulations significantly dilute the strength of the legislation and reduce worker coverage.

The third group of countries can be labelled the 'moderate hours and scheduling cluster' which have regulations relating to increasing security of hours and some provisions on scheduling practices. The regulations tend to be set at national level either through legislation or awards so have greater coverage of on-call or on-demand workers though they have fewer scheduling regulations than some countries in the constrained scheduling cluster. This third cluster includes Australia and New Zealand. In Australia, a state body, the Fair Work Commission, recently introduced a provision in awards for casual workers to request a conversion to standard employment after 12 months. The regulations relating to guaranteed hours are moderate in nature. While the regulation could positively impact workers, there are limitations to its effectiveness because it is a right to request conversion and not an automatic right to more standard employment. In addition, the employee must work a regular basis and with the prospect of ongoing employment.

Ireland is in a somewhat fluid position in terms of categorisation. At the time of writing, it can be included in the minimalist cluster because it currently has a weak regulatory environment which enables employers to have significant discretion to offer no or limited guaranteed hours (O'Sullivan et al. 2017). There are also very limited scheduling regulations outside of rest breaks. However, the government has announced that a new Bill will come into force in March 2019 (the Employment (Miscellaneous Provisions) Bill 2017). The Bill proposes a number of new regulations related to zero hours work including: a ban on zero hours contracts, where an employee has to be available to an employer; an employee right to be placed in a specific band of hours if their contract does not reflect the actual number of hours worked per week; an employee right to specific minimum pay where they are called into work but sent home. While the banded hours provision is a potentially significant improvement for employees who have low guaranteed hours through Hybrid If and When contracts, and the Bill will constrain some schedule instability, it is limited by not addressing If and When contracts or additional forms of scheduling instability. Based on the new legislation, Ireland's position would shift from the 'minimalist cluster' to the 'moderate hours and scheduling cluster'.

With the introduction of the Employment Relations Amendment Act 2016, New Zealand's position has shifted from the minimalist cluster to the moderate hours and scheduling cluster. The legislation provides that in situations where employers and employees have agreed hours, details of this must be stated in contracts such as the number of hours, start and finishing times, and days of the week with work. The legislation requires employers to have genuine grounds for requiring employees to be available beyond agreed hours and to pay reasonable compensation to employees for such availability. However, as Campbell points out, a key flaw in the legislation is that it does not specify the number of guaranteed minimum hours. While media globally described the legislation as banning zero hours contracts, Campbell (Chap. 5) points to the inaccuracy of this assessment. The legislation does not regulate employment arrangements where there are no agreed hours and where employees are not contractually required to be available to an employer.

Despite the similarities in, and market orientation of, production and employment regimes of Anglo-Saxon countries, there have at least been some movements by various state institutions at national or sub-national level towards regulation of zero hours type work and working time uncertainty which will to some limited extent ameliorate the impact of the market on zero hours workers. The reasons for differing levels of state intervention are varied, but an important factor relates to the interaction of power relations between unions, employers and the state.

8.6 Trade Unions, Employers and the State

Given that 'workplace control is the outcome of struggle' (Gottfried 1992, 446), and that workers are not inevitably passive agents of labour control through coercive or ideological means, some of the responses of individual states have been influenced by worker collectivism and resistance. In Ireland, there was increasing pressure placed by trade unions on the government to investigate zero hours contracts. This pressure formed part of Irish trade union campaigns on fair and decent work in the context of the economy recovering from a deep recession, and also unions' concern over the rise in zero hours contracts reported in neighbouring UK. Trade unions placed pressure on the Labour Party, as a minor party in a coalition government, to take action resulting in the government commissioning a study of zero hours contracts in 2015. The issues of security of hours and unstable scheduling were kept on the political agenda by a dispute between workers and the largest retailer, Dunnes Stores. Similarly in New Zealand, a trade campaign on zero hours work in fast food gained wider traction in public discourse leading eventually to the introduction of legislation. Australia, being the third member of the moderate hours and scheduling cluster in Fig. 8.2 is more unusual. Its enhanced regulations on casual and on-demand work originate from a state institution, the Fair Work Commission, and not from the other state machinery particularly the government. The experiences of New Zealand and Ireland differ from Australia, where there has been an 'absence of pressure from trade unions and other social actors around problems of on-demand work' (Campbell et al. Chap. 4). Campbell et al. cite numerous possible reasons for the lack of union action including their structural weaknesses and perhaps some acceptance by workers about the inevitability of employment instability. While Australian governments have been slow to regulate working time uncertainty, the Fair Work Commission has filled the regulatory gap, somewhat reflecting a particular institutional pathway of regulation. Ireland, New Zealand and Australia are arguably the countries most likely to have improved employment regulation given that, as discussed in Chap. 1, they have been found to be 'LME-like' and not as extreme in their liberal market values as the US, Canada and UK (Schneider and Paunescu 2012). Political factors may also have played a role in Ireland and New Zealand, which had coalition rather than single-party governments.

In the UK, there have been a series of high-profile union campaigns and disputes with companies employing workers on an on-demand basis, particularly in gig com-

panies. The conservative government, under pressure from unions and the media, initiated investigations on employment issues relating to zero hours and gig working. However, Adams et al. (Chap. 3) argue that government measures to date still reflect the commitment to 'flexibility' as 'a laudable aim'. In the USA, unions and other civil society groups have had to focus their efforts at local levels given their weaknesses, and those of the Democratic Party, at national level (Fugiel and Lambert, Chap. 6). Thus, there is little prospect of national-level regulations restricting on-demand work but scheduling regulations at sub-national levels have been increasing and in some cases go significantly further than regulations in other countries.

Industrial relations activity at sectoral level can be as important as at national level (Bechter et al. 2012). Indeed, union and civil society group organising in the retail sector was influential in gaining traction on zero hours work and working time uncertainty in public and political discourse in Ireland, the UK and the US, while union campaigns in fast food were prominent in the US and New Zealand. Counter to employers' and some governments' arguments about the benefits of zero hours work as 'flexible' employment, unions and civil society organisations presented a strong counter ideological argument about the exploitative nature of zero hours and related work, demanding greater state intervention. This has been against the backdrop of concern about the impact of labour market and income inequality and also, in some countries, of the need for governments to regain favour from workers after the global financial crisis. Other actors were also influential in state regulatory responses. While Standing (2013) criticises parts of the media for degrading and demonising zero hours workers and the precariat, the country studies in this volume referred to the positive influence of the media in framing zero hours work and working time uncertainty as being detrimental to workers, giving greater momentum to union campaigns and keeping pressure on political agendas. The media and campaigns of social actors indicate the effective use of ideological power to portray zero hours workers as requiring and deserving of state protection.

Ireland's proposed measures go the farthest compared to other Anglo-Saxon countries in terms of regularising the number of hours workers get if their contract does not reflect the reality of the hours they regularly work. Some US states and districts comparatively go the farthest in terms of imposing restrictions on schedule instability or at least compensating workers for such. Even in countries with similar market-oriented production and employment regimes, there is potential for additional market-correcting mechanisms to protect workers. Worker resistance reveals the limits in the extent to which the state can relinquish the legitimation function, which involves 'maintaining popular consent by pursuing social equity and fostering citizenship and voice at work' (Hyman 2008, 262). Thus, there has been some restoration of the 'web of rules' lost through contraction of the SER and collective bargaining (Wright et al. 2018). Some governments responded eventually to the strategies of employers who react more swiftly to economic developments (Hall and Thelen 2009). To provide for an 'orderly operation of the employment relationship' (Treuren 2000, 81), the state can be forced to de-commodify labour to an extent necessary for the necessary for the continuation of a capitalist market system (Treuren 2000; O'Connor 1974; Polanyi 1957). While some Anglo-Saxon countries

have to some extent addressed the 'deviant behaviour' of employers (Streeck and Thelen 2005), the measures are of, at most, a 'moderate' nature so that policies pursuing legitimation have not been sacrificed at the expense of accumulation. The measures incorporate significant 'exit options' and the measures introduced in each country are not so extensive in scope as to significantly impede managerial control of labour through fragmented working time. In addition, the absence of state actions to strengthen the role of unions or collective bargaining in the regulation of zero hours work and working time uncertainty ensures the continuation of flexible labour markets and any new rights granted to workers are tentative. Not unexpectedly, employer organisations lobbied against any state measures which would limit their prerogative and, as Offe (1984) notes, states are cautious not to undermine the long-term interests of capital. The consensus amongst authors in this volume is that not enough has been done to protect workers with significant working time uncertainty.

8.7 Labour Law, Social Protection and Working Time Uncertainty

While the SER remains the dominant employment relationship in developed countries, it has contracted and collective bargaining has been diluted as a mechanism of employment regulation. In such an environment, it is inevitable that unions demand a stronger role by the state in the labour market particularly in very low unionised sectors where statutory regulation may be the only significant source of 'checks and balances' on managerial control. How useful is labour law as an avenue for improving the working lives of those undertaking zero hours type work? Minimum standards in labour law can be useful to unions in negotiating with employers, recruiting members and diffusing workplace change (Brown et al. 2000; Heery 2011; Colling 2009). On the other hand, it could be argued that statutory regulation can have an individualising effect on the employment relationship so that workers become increasingly reliant on the law to exercise their employment rights or solve workplace problems rather than on trade unions and collective bargaining (O'Sullivan et al. 2015a; Heery 2011; Piore and Safford 2006). In using labour law, trade unions and workers can be dragged into legal minutiae which can lead to unpredictable decisions of state bodies. For example, the mobilisation of workers in gig companies such as Uber and Deliveroo led to multiple labour law cases across Anglo-Saxon countries but resulted in contradictory decisions on employment status. Notably, many of the decisions on the employment status of drivers and cyclists turned on the extent and nature of managerial control over workers. While workers' success in such cases may be a source of change in companies, workers' reliance on labour law is an uncertain strategy.

The effectiveness of labour law is dependent on a number of factors. First, on the coverage, scope and enforcement of laws (Appelbaum and Schmitt 2009; Prosser 2016). The legal systems of Anglo-Saxon countries facilitate employer strategies of hiring workers on very casual arrangements with little commitment to workers in

terms of hours or benefits. The regulation that has emerged in response to working time uncertainty is restricted in the US and Canada to workers to certain geographical regions and, in Ireland and New Zealand, to workers who are required to be available to an employer. Second, regulation can have unintended outcomes partly because, as Cooke et al. argue (Chap. 7), 'it is expected that employers will react in a self-interested fashion if governments try to regulate conditions of work'. For example in Ireland, working time legislation introduced in 2000 was intended to regulate zero hours contracts, but employers avoided their legal obligations by hiring people under more precarious If and When contracts. This experience is prescient for New Zealand, and Ontario in Canada, where new legislation in both jurisdictions resembles Ireland's legislation by regulating for employments where an employer requires a worker to be available on-demand. Will employers react in a similar way to those in Ireland, and shift workers onto arrangements where workers are not required to be available? So even when the legal landscape changes, gaps in the law mean that the reality of on-demand work for workers may not change. Third, the effectiveness of law can depend not just on one specific law but on the impact of the entire body of law that effects employment. There have been some contradictory developments in this regard. In some countries, there have been enhancements in labour protections such as increases in minimum wages, but there has also been deregulation. In the UK, the government reduced workers' protections under unfair dismissals law and introduced fees if workers took labour law cases against employers, while in the UK, USA and Australia, laws have reduced the power of trade unions. Such deregulation can significantly negate the effectiveness of new employment regulations and can divert trade unions' efforts towards reversing deregulation.

While none of the country study authors consider their individual state's regulatory responses to be sufficiently strong, an amalgamation of various state regulations would constitute a more effective bundle of measures. These include a right of workers to clear and accurate information on working time patterns, a right of workers to contractual working hours which reflect the reality of working patterns, and restrictions, and strong penalties, on employers who schedule hours at short notice or send workers home from a shift. None of the Anglo-Saxon countries have a statutory ban on all forms of zero hours work. Guaranteed working hours are not necessarily a panacea to problems faced by people with working time uncertainty because 'they can ring hollow for employees under these regimes of forced availability, because it is management's unilateral control over rostering these guaranteed hours that degrades their employment' (Hadjisolomou et al. 2017, 3011). Any regulation which purports to give rights and choices to workers over working time requires collective strength for its effective implementation (Lee and McCann 2006). The state measures introduced in Anglo-Saxon countries on working time uncertainty are an improvement on a comparatively low base for labour regulation generally, but state measures in other countries go much further. For example, other countries prohibit the use of zero hours work or grant a right to workers of a guaranteed number of hours. Others limit employers' scope to use zero hours or on-call arrangements to certain sectors or groups of workers, limit the length of time a worker can undertake zero hours

work and place obligations on employers to notify state bodies about their use of zero hours or on-call work (see O'Sullivan et al. 2015b).

The country studies highlight the interactions between social security or welfare systems and zero hours work and working time uncertainty. The role of the welfare system is a prime example of the tensions in the functions of the state. The state can intervene to 'break the ties binding the reproduction of labour power to productive activity in the workplace' (Buroway 1983, 589) such as through welfare states. At the same time, the configuration of welfare protection systems in liberal regimes can support accumulation by pushing workers into poor employment such as zero hours work and workers can it difficult to meet the requirements to access welfare protection. Employers can use workers' need for welfare protection and the accessibility requirements of welfare systems as a source of managerial control. It has been argued that social welfare systems need to be reconfigured so that they include paid periods outside work as a part of the normal career path a condition for giving greater autonomy to employees in setting their working patterns (Boulin et al. 2006) and that welfare protection needs to be de-coupled from employment (Alberti et al. 2018; Rubery 2015).

8.8 Conclusion

If the purposes of work are to contribute to people's survival and self-development, and the functioning of economies and societies, then zero hours work severely undermines these. Standing (2013) argues that zero hours workers are 'nominally employed, but unemployed in being unused, in a twilight zone of not earning and not receiving benefits'. Zero hours workers and workers with significant working time uncertainty can experience more exposure to protective gaps than workers in standard, and also many non-standard, employment relationships as they can fall between the cracks of labour regulation and welfare protection systems. Zero hours work and work with high levels of working time uncertainty are the products of employer policies, enabled by employment regimes built on flexible labour markets and weaker regulatory environments. This volume indicates though, that despite similarities between Anglo-Saxon countries, there is room for enhanced employment regulation and some states have responded more strongly than others. Where they have regulated, it has been in response to the continuous pressure of unions, civil society organisations and media, and a discourse that sought to contradict employers' contention that labour flexibility, as they conceived it, is a value shared by workers. Employment regulations which have been introduced by states may ameliorate to some extent the negative impact of working time uncertainty for some groups of workers but with significant exclusions and loopholes, are unlikely to disrupt employer-led working time model on which Anglo-Saxon labour markets are built.

Labour regulations do not have to emerge solely within states, as external regulation from supranational bodies can be an important source. Given the challenges for 'fair voice' in liberal market economies (Marchington and Dundon 2017), the

institutions of the EU and the International Labour Organization (ILO) are potentially important because they are grounded on social dialogue, at least giving the opportunity for unions to lobby to have issues concerning working time uncertainty on policy agendas. The next two chapters examine the only recent concern for zero hours and unpredictable work within EU policy and the relevance of ILO's principles and conventions in addressing unpredictable work.

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Chapter 9
The Space for Regulation Beyond Borders? The Role of the EU in Regulating Zero Hours Work

Agnieszka Piasna

Abstract This chapter explores how challenges related to zero hours contracts are addressed at the European Union (EU) institutional level. It considers whether in the current context of EU social and economic policy, there are sufficient legal grounds and favourable policy climate for sound regulation addressing this type of work. The chapter first describes the EU competence in the areas of work and employment conditions, in order to define the scope for EU actions. Against this background, it then evaluates the current direction and agenda of EU employment policy to identify what actually has been done. The analysis includes the European Pillar of Social Rights proclaimed in 2017. The chapter then explores in more detail the proposals and negotiations around the revision of two EU directives most pertinent to zero hours contracts: on working time and on working conditions. This serves to present the views of the European social partners on the issues of regulating non-standard employment, the most recent proposals about zero hours contracts, and to show how difficult it has been to achieve any compromise. Overall, efforts by the EU institutions to improve working conditions for workers on zero hours contracts are perceptible and a welcome step but the precedence given to flexibility in the EU employment policy and the tendency to under-enforce social rights call into question their ability to produce intended results.

Keywords Employment policy · Flexibility · Working time · Employment contracts · Employers · Trade unions

9.1 Introduction

The policy objective of constructing social Europe, that gained speed in the 1990s and early 2000s, resulted in a dynamic development of regulation at the European

A. Piasna (✉)
European Trade Union Institute, Boulevard du Roi Albert II, 5 Box 4,
1210 Brussels, Belgium
e-mail: apiasna@etui.org

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Union (EU) level in the areas of non-standard employment, working time, and health and safety. However, with the focus on equal treatment and non-discrimination, the legislative acts of that period were not designed in a way that would effectively challenge the pervasiveness of casual or atypical work arrangements, including zero hours type work. Moreover, policies and concrete measures at the EU level have traditionally centred on the quantity of jobs and reduction of unemployment, rather than on the qualitative aspects of employment (Burchell et al. 2014; Piasna et al. 2017). As a result, the EU employment policy tends to be directed towards measures that favour entry and permanence in the labour market, even if this was to be achieved through flexible or non-standard forms of employment (Regalia 2013).

Implementation of social policies weakened considerably in the period following the 2008 crisis, which was characterised by budgetary austerity and deregulatory reforms. "Social devaluation" (Degryse and Pochet 2018), referring to primacy given to neoliberal economic policies to the detriment of progress towards better employment and living conditions, was taken as a route to restoring competitiveness of European economy and to recovery in employment levels. One of the examples is the renewed commitment to flexicurity policy, which for the EU Commission became an encompassing strategy for balancing the expectations of economic growth, full employment, and social cohesion. At the EU level, it evolved from the emphasis on supply-side policies and employability substituting for job security (European Commission 2007), to the prominence given to flexibilisation and deregulation of the employment relationship (European Commission 2010). Whatever was proposed or recommended to improve the situation on the EU labour market tended to come with a caveat that it should not limit in any way a necessary flexibility for employers, nor create barriers for business (European Commission 2017e).

In consequence, employment policy and labour regulation in the EU were increasingly characterised by the transfer of risks and responsibilities from employers to the workforce, including in the management of working time (see, e.g. Piasna 2018). Such policies, through redefining the basic power relations between employers and workers, gave employing organisations greater scope for determining terms and conditions of employment. They also created a favourable climate for employers to firmly resist any regulation encroaching on their need for a flexible and highly adaptable workforce.

With some signs of recovery in employment levels and an entry in office of the new European Commission presided over by Jean-Claude Juncker in 2014, social issues made a strong comeback to the EU policy discourse. Perhaps the strongest statement came with the *European Pillar of Social Rights* (EPSR), proclaimed by the European Commission, the European Parliament, and the Council of the European Union in November 2017. The Pillar announced revision of some of the EU legislative acts in the area of working conditions, made promises to address the challenges related to atypical forms of employment and ensure fair and good working conditions (see, e.g. European Commission 2017a). Most importantly, however, the Pillar effectively paved the way for zero hours contracts into the EU policy-making process, by explicitly pointing to such arrangements as a high-risk category of atypical work that requires action at the EU level.

The crucial question is whether the grand promises are capable of delivering concrete actions, and whether there are sufficient grounds and policy climate at the EU level for sound regulation addressing zero hours type work. In addressing these issues, the chapter is structured as follows. The next section describes the EU competence in the areas of work and employment conditions, in order to first assess what the EU institutions *can de jure* do to address zero hours type work. Against this background, section three then evaluates what the EU *can* de facto do based on the current direction and agenda of its employment policy. Sections four and five explore in more detail two legislative acts at the EU level in the areas most pertinent to zero hours contracts, that is working time and employment contracts. This serves to present the views of European social partners on the issues of regulating non-standard employment and their most recent proposals about zero hours contracts. The final section concludes by considering whether in the current context of EU social and economic policy, effective regulation of zero hours contracts can be achieved.

9.2 The EU Competence for Regulating Zero Hours Contracts

Regulation at the EU level has an important role in ensuring a certain degree of harmonisation across the Member States. Regulations introduced at the country level would not necessarily achieve the same level of protection or transparency, which might risk a divergence between countries and unfair competition based on unequal social standards. Thus, the role of the EU in ensuring a level playing field across its members has the advantage of providing common minimum standards applicable in all countries and thus limiting the scope (at least to some extent and in those areas directly addressed by the directives) for the race to the bottom in terms of social protection between Member States.

There are several levels at which the EU institutions can address the issues of work and employment conditions. At a general level, primary legislation, in the form of treaties, sets out the ground rules for EU action in the areas of working conditions and health and safety. In particular, the Charter of Fundamental Rights (Article 31) expresses the right to fair and just working conditions, by emphasising the respect for health, safety, and dignity at work. Moreover, the Treaty on the Functioning of the European Union (Article 153), in addition to improvements in "the working environment to protect workers' health and safety", explicitly mentions "working conditions" as a field in which the EU can adopt binding rules to support and complement activities of the Member States (Article 153 (1) (a, b)).

Arguably, these legal grounds for the EU regulation on the quality of working conditions provide appropriate legal basis to address also the precariousness inherent in zero hours contracts at the EU level. This is based on a strong relationship between working conditions and precariousness, as well as negative impact of precarious work on health and safety of workers. However, thus far, health and safety,

rather than precariousness more broadly, have been dominant grounds for EU regulations introduced in the social field. In consequence, working conditions tend to be approached from a very particular angle in such regulatory measures. The main issues identified in the area of working time, for instance, are limits on long working hours, ensuring minimum rest periods, or paid leave (as in the Working Time Directive). While these fundamental rights in principle may also apply to workers on zero hours contracts, as far as they protect their health and safety at work, they do not address the specific risks and precariousness involved in these contracts and will not curb their use.

Moreover, the Article 153 of the Treaty, which is the main legal basis in the area of social policy, allows the EU institutions to adopt binding rules only in the form of minimum requirements and in a manner that will not put (virtually) any constraints on the operations and development of small and medium enterprises (see, e.g. European Commission 2017h). Thus, while in theory there exists a legal basis for formulating social policy at the EU level, in practice the EU basic law constrains the scope and content of potential regulation and gives priority to economic issues (see, e.g. Kuttner 2013). This was, for instance, very prominent in the social partners' consultations regarding the revision of the Written Statement Directive (see further in this chapter).

The principles and objectives set out in the treaties (primary legislation) form the basis for deriving binding legal instruments, in the form of regulations, directives, and decisions (secondary legislation). Finally, there are measures that can be taken at the EU level, such as guidelines, recommendations, declarations, and opinions, which are not binding for the Member States but may provide guidance as to the interpretation of the EU law. These are often referred to as "soft law". Therefore, directives are probably the best-suited legal instrument in which the EU institutions are equipped for addressing precariousness and uncertainty inherent in zero hours type work. Directives can be used for setting minimum requirements in the area of working conditions, and once passed, all Member States are required to take action to (gradually) implement them.

However, as discussed further in the chapter, the content of the EU directives often proves too weak to be used as legal grounds for eradicating casual work. Also, the execution of rights and provisions contained in the existing directives remains an issue, especially for workers in the most vulnerable employment situations. As rightly pointed out by O'Connor (2013), individuals in the most precarious forms of work are often not in a position to vindicate the formal rights afforded by EU employment regulation because of their extreme marginality and the absence of collective representation. Many types of casual work, such as zero hours contracts, are also not explicitly targeted by EU employment regulation.

Finally, the EU directives addressing non-standard employment seek to curb the risk of precariousness by means of equal treatment with workers on standard contracts. The problem with the equal treatment and non-discrimination principle is that it is often very difficult, if not impossible, to indicate a comparable worker with a standard employment contract (i.e. full-time and open-ended), with the same organisation and nature of work, and in the same enterprise as a non-standard worker. Such

standard employment comparators might not be available in particular for those working in enterprises heavily relying on atypical forms of employment.

9.3 The Direction of EU Employment Policy

The EU socioeconomic governance assumes the mutual reinforcement and effective balancing of economic, employment, and social policy, with the objective of "ensuring that parallel progress is made on employment creation, competitiveness, and social cohesion in compliance with European values" (Council of the European Union 2006, 23). However, in practice, this positive interaction has not always worked as intended (Zeitlin 2007). Scholars such as Mailand and Arnholtz (2015) and Maricut and Puetter (2018) point to an uneven evolution of the influence and organisation of actors in the domains of finance and employment within EU institutions, which has produced an asymmetry between economic and social issues. The asymmetry in favour of the economic actors has been undoubtedly accentuated by the crisis of 2008, which brought about a significant slowdown for social Europe with a legislative breakdown in the social domain (Degryse and Pochet 2018).

In consequence, the EU policy put emphasis on enhancing competitiveness and job creation, among others, by increasing labour market flexibility. Even in periods of economic prosperity, the idea of promoting flexibility in working life has played a key role in efforts to improve the employment intensity of economic growth (Anxo et al. 2006). This had immediate consequences for non-standard and casual employment, including zero hours contracts, with very little efforts so far to eradicate these forms of work. Instead, most of the policy documents produced at the EU level either contain direct calls for more flexibility and less regulatory burdens for employers (e.g. European Commission 2010), or propose social policy measures with the reservation that they should neither constrain employers nor obstruct the development of new (i.e. atypical, flexible, and in most cases casual) forms of work (e.g. European Commission 2017e).

A further hurdle on a way for regulating zero hours type contracts at the EU level is a tendency to mix flexibility for employers with flexibility for workers. "Flexibility" tends to be promoted in various policy areas without strict definitions as essentially beneficial for all. Examples of such an approach can be found, for instance, in the work–life balance policy, where one of the provisions for parents is a right to request flexible working arrangements (European Commission 2016). Similarly, low participation of women in the labour market is blamed, among others, on "rigid working arrangements" and one of the solutions proposed is "flexible working arrangements" (European Commission 2015). At most, only "extreme flexibility" (European Commission 2017i, 116) is seen as undesirable, yet there is no clear delineation of a boundary beyond which the "extreme" form begins.

In a similar vein, the European Pillar of Social Rights, which aims at creating convergence between Member States towards better working and living conditions, very much replicates such commitment to flexibility. The Pillar is built around three

areas of rights: equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion. In the area of fair working conditions, perhaps the most pertinent to zero hours contracts, one of the objectives is to provide "secure and adaptable employment" (European Commission 2017j). Thus, adopting the language of flexicurity, the provision of fair and secure working arrangements is from the start conditioned on ensuring "the necessary flexibility for employers to adapt swiftly to changes in the economic context" (idem). According to the Pillar, it is not the use of atypical contracts leading to precarious working conditions that should be prevented, but rather just the abuse of them. On top of that, entrepreneurship and self-employment are encouraged. It is very likely that regulations negotiated under such ambiguously formulated policy objectives will not provide for eradication of zero hours contracts, but admittedly the Pillar paves the way for at least some regulation on some extreme features of such arrangements.

The intention of the Commission was to integrate the Pillar in the European Semester, a cycle of economic and fiscal policy coordination within the EU economic governance framework. This integration is manifest, among others, in an almost verbatim transcription of the flexicurity language from the Pillar into the EU Employment Guidelines (European Commission 2017e), which contain common priorities and targets for employment policies for all Member States.

The commitment to flexibility, very much linked to flexicurity policy, distorts the processes of policy evaluation and recommendation. Policy objectives at the EU level are formulated in a way which emphasises the need to ensure flexibility for employers, encourages new forms of work and flexible work arrangements, while only calls for prevention of abuses or extreme forms of flexibility. This results in very weak, and often contradictory, recommendations on atypical employment. Essentially, the thrust of policy seems to be that quality employment would be achieved through deregulation and more contractual diversity (European Commission 2017e), which stands in contrast to the vast body of research linking deregulation and non-standard employment with poor job quality and precariousness for workers (see overview in Rubery and Piasna 2016). Examples of such contradictions can be found in the Country-Specific Recommendations (CSRs), issued by the EU to all countries to assess the implementation of Employment Guidelines and to put forward proposals for the European Semester. For instance, Poland in 2015 was advised that permanent employment is burdensome, costly, and not attractive for employers, but that a high proportion of non-standard and weakly protected contracts may reduce the quality of available employment (European Commission and Council 2015). The CSRs have also consistently evaded the issues of zero hours contracts. Ireland, for instance, received no policy recommendations on precarious or zero hours type work between 2015 and 2018. In documents addressed to the UK, the Commission have only noted on several occasions that there is a "room for improvement" in the area of low-wage employment (CSR in 2017) or that upskilling could assist those confined to "low-wage and/or low-hours of work" (CSR in 2016), yet there have never been direct references to zero hours contracts, nor calls for eradicating these arrangements.

The difficulty in addressing zero hours contracts in the EU policy and regulation also arises from a notion that they are relatively exotic, present only in a few Member

States, and often in a different legal form. The true extent of these work forms is certainly masked by inconsistency in terminology used to refer to zero hours work. In the EU policy documents, we find a mix of terms such as on-demand work, casual work, on-call work, or a more descriptive form of low-wage, low-hours, and/or low-progression jobs. Examples can be found in the CSRs for the UK, cited above. This hinders not only quantification and analysis of such jobs, but also effectiveness of any policy responses, which take too narrow view on this issue.

Thus, overall, despite the existence of legal grounds for the EU institutions to address the quality of working conditions and regulate the use of zero hours contracts, the policy agenda tends to be dominated by a commitment to labour market flexibility. Even the recently launched European Pillar of Social Rights is built around the vision of balancing rights for workers with flexibility for employers, subjecting the former to the latter. Against this background, the following section summarises the most recent developments in EU regulation by examining the proposals and negotiations around the revision of two EU directives—on working time and on contracts of employment, which are the areas of regulation most relevant and directly applicable to zero hours contracts.

9.4 Regulation of Working Time in the EU

Working time regulation at the EU level has been a contentious issue from the start. When the first European Directive on Working Time (93/104/EC) was adopted in 1993, the choice for the legal basis was between working conditions and health and safety. Although the former would allow for a broader scope of issues related to working time organisation to be covered by regulation, due to disagreement between the Member States, and in particular an opt-out of the United Kingdom, the health and safety legal basis was chosen (Degryse and Pochet 2018). The regulation thus established upper limits on weekly working hours and prescribed minimum daily and weekly rest periods, annual holidays, as well as a rest break during working hours. There was little, if any, attention to short or variable work hours, and workers' independence and control over their own working schedules. In other words, there was no applicability to zero hours type work. Moreover, the enforcement was relatively weak, with a widespread use of voluntary opt-out clauses from the regulations (Rubery et al. 2006).

Following the amendment of the Directive in 2003 (2003/88/EC), the European Commission was obliged to review its implementation within 7 years and the consultation process has been dragging ever since. The long consultation process confirmed widely persistent divergencies between social partners in their views on regulation in the area of working time. The EU institutions arguably contributed to this dispersion of views by steering the debate around difficult-to-reconcile policy objectives. On the one hand, a need for securing protection of all workers and in particular those who work atypical hours was recognised, while on the other, an emphasis was put

on enabling employers to implement flexible work organisations and on preventing "excessive regulatory burden" (European Commission 2017c, 2).

The fact that working time regulation at the EU level has been thus far based solely on health and safety legal foundation, also considerably limited the scope for introduction of new provisions into working time regulation. The proposals from workers' representatives at the EU level to address the problem of precarious work, irregular hours, and working time underemployment—with zero hours contracts as a prime example—were resisted by the European employers' organisations claiming it exceeded provision of minimum standards for health and safety reasons. Thus, the postulates of trade unions, among others, to obligate employers to give notice to workers about scheduling of their working hours sufficiently in advance to allow arranging their private life (e.g. ETUC 2011), were consistently opposed. Faced with mounting case law of the Court of Justice of the European Union and disagreements in the consultation process, the Commission opted for issuing an Interpretative Communication on the Directive (European Commission 2017d) instead of the revision, which was not binding for the EU Member States and did not create any new rules or provisions.

9.5 Regulation of Employment Contracts at the EU Level

In EU employment policy, the issues relating to non-standard form of work have been so far mainly addressed through a series of directives (most importantly a trio of atypical work directives, and the Working Time Directive). However, until now there has been no piece of legislation at the EU level that would be directly applicable to zero hours contracts, and they were not covered by nor mentioned in any of the directives dedicated to protecting atypical workers. Therefore, it was certainly a breakthrough, when in 2017, zero hours contracts explicitly appeared in the proposal for a revision of one of the older directives on working conditions, the so-called Written Statement Directive (91/533/EEC) dating back to 1991. The revision of the directive was long overdue, and the launch of the European Pillar of Social Rights in 2017, with its mission to deliver new and more effective rights in the area of fair working conditions, offered a convenient vehicle for carrying this process forward.

In view of the diagnosis that the EU labour markets are faced with a growth of atypical and casual employment, with zero hours contracts used as an illustrative case, the Commission asserted that the existing regulation on employment contracts (i.e. the Written Statement Directive) was no longer sufficient and effective in coping with new labour market challenges (European Commission 2017g). The provisions of the existing directive mainly focused on an employer's obligation to inform employees of the conditions applicable to their contract or employment relationship. This was deemed too narrow in scope and not sufficiently enforced at a country level. Indeed, provision of information on conditions of employment falls far short of any concrete actions to improve those conditions.

Based on such an evaluation, the Commission decided to launch the consultation process on the revision of the Written Statement Directive (European Commission 2017b) and soon put forward a number of concrete proposals (European Commission 2017i). To make the revision process consistent with the rhetoric of the EPSR and stress the link between these initiatives, the revision's aim was declared as making employment contracts fairer and more predictable for all types of workers.

For zero hours workers, two points from the Commission's new proposal were particularly relevant. The first one was the extension of the scope of the directive to include new and casual forms of employment, such as on-call contractors, zero hours contracts, voucher-based workers, and platform workers. The original version of the directive contained a gateway for excluding zero hours contracts by explicitly excluding from its scope people working less than 8 h per week, whose employment relationship lasts less than one month or is of a casual or specific nature. The second point of the new proposal was more radical and consisted of an introduction of a minimum floor of rights to ensure fair working conditions for all workers.

The proposal for new minimum rights included a right to limits to flexible work arrangements and to enhanced rights to predictability of work, particularly relevant for workers in casual or on-demand employment relationships. It consisted of a series of provisions addressing some of the main grievances related to zero hours type work. The proposal included a right to a minimum advance notice before a new assignment or a new period of work, a right to define with the employer reference days and hours in which working hours may vary (although without setting any limits on the reference period), and a right to a minimum of guaranteed hours set at the average level of hours worked during a preceding period (European Commission 2017i). Part of the new rights was also a prohibition of exclusivity clauses, which prevent workers from working elsewhere, for contracts that are not full-time employment relationships.

Moreover, the proposal for the revised directive included a definition of a worker, thus extending its scope to those currently excluded from rights due to their lack of an employee status, such as on-demand workers, voucher-based workers, or platform workers. The concept of "worker" is broader than "employee" or "employment contract" and refers to "a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration" (European Commission 2017f, 8). The new proposal also included changes in relation to the type of information to be provided to workers, the deadline and means for providing it, and strengthened provisions for enforcement. In the area of working time, for example, a new point was included requiring provision of information on working time schedule for workers on very variable hours, thus expanding a current rule including only information about the maximum length of a working day and week.

Thus, the Commission's proposal can be summarised as aiming at ensuring that each worker receives information about their working conditions in writing and benefits from a set of minimum rights to reduce precariousness. However, it did not go as far as to break with the flexicurity narrative, because reducing precariousness for workers was to be achieved "without obstructing the development of new forms

of work" (European Commission 2017h: 3). With all these changes and new rights, the revision of the Written Statement Directive in fact evolved towards a proposal of essentially a new directive, at the time of writing called the *Directive on transparent and predictable working conditions in the European Union* (European Commission 2017f).

9.6 Responses from the European Social Partners

In the consultations process launched by the European Commission on the possible direction for the revision of the Written Statement Directive, workers' and employers' organisations presented clearly contrasting views. While trade unions, in general, were in favour of proposed changes and advocated for even more thorough solutions in line with the Commission's proposal, employers' organisations opposed to virtually all parts of the proposal. Instead of entering into negotiations, employers' representatives proposed to open "exploratory talks" (European Commission 2017h, 6) to first assess if it was feasible and appropriate to even initiate a dialogue between the EU social partners. The effect of such an additional exploratory phase would certainly be a delay in the whole legislative process, and a likely outcome would be an inability to finalise the revision of the directive before the end of the legislative term of the existing Commission. It was not certain whether the new Commission would continue the work on the proposal in its current shape. Faced with such a scenario, workers' representatives urged the Commission to come up with a proposal without delay and were not in favour of adding the stage of exploratory talks. Thus, social partners did not manage to reach an agreement even on whether to start or not direct negotiations together. As a result, at the time of writing, there was no social partners' joint position or agreement at the EU level.

9.6.1 Representatives of Employers

With regard to the consultation process itself, the Confederation of European Business (BusinessEurope), representing private-sector employers of all sizes at the European level, was fully opposed to it on the grounds that it goes much beyond the scope of the initially planned revision. The revision was initiated within the Commission's Regulatory Fitness and Performance (REFIT) programme, which should aim at making EU legislation simpler, less costly, among others, by removing unnecessary administrative and legal burdens. Thus, extending existing provisions and adding new ones was seen as contrary to the REFIT principles and adding more red tape for companies.

Moreover, the proposal put forward by the Commission was judged as not respecting the principles of subsidiarity and proportionality. Employers' organisations were generally in favour of avoiding any regulation at the EU level and leaving adapta-

tions of the legal framework to law and collective agreements at a national or even company level instead (BusinessEurope 2017a). When it comes to the content of the proposal, the amount of information to be provided to workers about their working conditions, a written format and a requirement to do so at the start of the assignment and not two months later, was heavily criticised as costly and burdensome for companies. Other employers' organisations at the EU level expressed broadly similar views (European Commission 2017i; UEAPME 2018).

Not surprisingly, however, the most contested issue were the minimum rights for workers, which BusinessEurope described as "unacceptable for business" (BusinessEurope 2017b). In the words of the Director General of BusinessEurope, "[t]he Commission's proposal […] should not be misused to introduce through the back door new social rights, which will undermine growth and employment" (quoted after BusinessEurope 2017b, 1). Thus, the narrative from the employers' organisations resembled very much the efforts of the European Commission in the years following the 2008 crisis (see, e.g. European Commission 2010, 2012) to argue that employment protection in at least some EU countries have had harmful economic and labour market effects (see discussion in Piasna and Myant 2017; Rubery and Piasna 2016). Employers' organisations brought up similar arguments also with regard to transitions from atypical to more secure types of contracts. In their view, if rules governing open-ended contracts were not "overly strict", it would promote transitions to such contracts and employers would be more likely to offer permanent positions (BusinessEurope 2017a). The remedy for non-standard employment was then deregulation and not expansion of protection and workers' rights.

In addition to these general assessments, employers' representatives also explicitly addressed issues pertaining to zero hours contracts and on-demand work more broadly. In their view, zero hours contracts represent a very specific type of work arrangement that only exists in a limited number of EU countries. Therefore, such contracts should not be a subject of regulation neither at the EU level, nor in the directive which is general in scope and in principle applicable to various forms of contracts (BusinessEurope 2017a). Interestingly, employers emphasised the distinction between on-demand work (in which they include zero hours contracts), as an arrangement whereby a worker is not obliged to take up any work proposed by a company, and on-call work, where workers have to be available for work (BusinessEurope 2017a). Workers' scope for accepting or refusing work under zero hours contracts has already been put into question (e.g. O'Sullivan et al. 2015), but it is equally disputable whether such alleged flexibility in working time should constitute sufficient grounds for excluding zero hours contracts from basic worker rights and protection.

9.6.2 Representatives of Workers

Trade union's responses differed markedly from those expressed by employers' representatives. In general, the European Trade Union Confederation (ETUC), the major

trade union organisation and the only social partner representing workers at European level, welcomed the Commission's proposal for revising the directive as a much-needed step in the right direction, even if weaker than expected (ETUC 2017). In the consultation phase, workers' representatives emphasised a need for the provision of a new set of minimum rights and for the largest possible scope of the directive, so that all workers are covered, including those on casual and short-hour contracts.

While ETUC acknowledged that the Commission included measures that specifically protect workers on flexible contracts, such protections were deemed not sufficient and not addressing the worst forms of precariousness. For instance, a proposal for including a right to request a more secure employment was assessed as too weak a provision that will not have any real impact on employment situation of workers in zero hours type contracts (ETUC 2017). ETUC insisted on a need for more effective solutions to securing a higher number of guaranteed paid hours, less variable work schedules, and addressing abusive forms of flexibility as experienced by workers on zero hours contracts. But above all, workers' representatives emphasised that the Commission's proposal did not foresee a prohibition on the use of zero hours type contracts.

With a presumption that the proposal for a revised directive represented a valuable basis for further work and had a potential of providing a significant improvement for EU workers, ETUC put forward a number of amendments (ETUC 2018). In their proposal, much attention was dedicated to provisions highly relevant for zero hours contracts by addressing the extreme uncertainty of the number of work hours and income. To begin with, ETUC advocated that employers should give information about working hours with advanced notice period established by the social partners, with the aim of ensuring as much predictability for workers as possible. In situations when workers are given notice for work and they do show up at work as requested, but the employer fails to provide them with all or part of the announced work, then workers should be paid for all announced hours. Workers' representatives also emphasised a need for setting minimum guaranteed hours, but to avoid this to be zero, their proposal was that after three months the average actual hours worked shall become the guaranteed hours for the worker. All hours worked above the guaranteed minimum should be paid at a higher rate. Such a provision would deter employers from understating the number of guaranteed hours and encourage a realistic estimation of actual duration of working time.

Workers' representatives also pointed out that a requirement to inform workers about their work schedule and reference hours within which the worker may be required to work must be more concretely specified. In the Commission's proposal, the reference period had de facto no limits and it would be possible for an employer, should they choose to do so, to stretch the reference hours over 7 days a week or 24 h a day. Furthermore, ETUC advocated for a deletion of certain exemptions in order to include in the scope of the directive also people working 8 h per week or less, or in small and medium enterprises.

Thus, overall, workers' representatives regarded the Commission's proposal as not putting enough limits on flexibility for employers and the use of zero hours type arrangements. They argued that more could have been done on the grounds

of working conditions, as defined in the EU primary law, that was chosen by the Commission for the revision and the proposal of the new directive. Nonetheless, workers' representatives seemed to agree on one thing with employers' organisations, namely that the proposal went much further in promoting the interests of workers than any of the Commission's proposals over the past years.

9.7 Discussion and Conclusions

There was very little space in the course of the past decade for regulating zero hours type work at the EU level. On the one hand, regulation of working time was restricted to health and safety legal basis, which gave little scope for provisions going beyond setting maximum limits on the number of working hours and minimum limits on rest periods. The issues related to minimum working hours, their greater predictability or minimum guaranteed pay for workers on very variable schedules, were repeatedly contested as hindering competitiveness and going beyond the limit of EU competences. On the other hand, the other most important policy pillar for casual work, that is employment protection legislation, was sacrificed at the altar of pro-market deregulatory policy in the post-crisis years.

The launch of the European Pillar of Social Rights in 2017 was certainly a positive sign of a return of attention to social issues at the EU level. It proved to be not only rhetoric, as a sheer number of initiatives in the legislative process within one year after the launch of the Pillar shows that the commitment to deliver on social issues moved to concrete actions. One of these concrete actions was a revision process of the Written Statement Directive, a piece of EU-level legislation most directly applicable to zero hours contracts. In its current shape, the proposed directive on predictable and transparent working conditions combines two areas of regulation particularly relevant for zero hours work—working time and employment protection. If implemented, the right to predictability of work schedule for on-demand casual workers, including zero hours contracts, would complement the protections from discrimination due to type of employment relationship created by earlier directives on part-time work (97/81/EC), fixed-term work (99/70/EC), and temporary agency work (2008/104/EC).

It is certainly a progressive proposal, yet it replicates some of the paradoxes of current EU employment policy. It juggles a high level of protection for workers with greater flexibility for employers, and more predictability of work with no barriers on development of new forms of work. Thus, the proposal for a new directive does not contain a ban on zero hours contracts, but instead it looks for solutions that will provide at least some protection to workers and at least to some extent increase the predictability of their work, yet without really acting on variability of hours. The intensified demands for increased labour market flexibility also accentuate the problem of vindicating formal rights by workers in precarious positions and accessing the protection of rights promised by existing EU employment regulations. All

these factors raise serious concerns about the capacity of the revised directive to fundamentally change the situation of zero hours contracts.

What is more, the launch of some of the initiatives in the social field had a profoundly damaging impact on European social dialogue. Negotiations between the European cross-industry social partners stalled not only with the Written Statement Directive, but also on issues related to work–life balance and access to social protection, among mutual accusations of an unwillingness to start a dialogue. Given that the European social dialogue is a fundamental part of the European social model, it is unfortunate that it faced such difficulties precisely when social issues started to gain prominence at the European policy level. Restoring trust and cooperation between the European social partners is particularly important when it comes to addressing challenges related to atypical forms of employment and providing fair working conditions for workers in casual and new forms of work.

Therefore, it remains to be seen what compromise can be achieved and what impact it will have on working conditions for precarious workers. While the efforts to improve working conditions for workers on zero hours contracts are a much anticipated and welcome step the precedence given to flexibility in the EU employment policy and the tendency to under-enforce social rights prompts that a more radical change of course is needed at the EU level.

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Chapter 10
Zero Hours Contracts and International Labour Standards

K. D. Ewing

Abstract This chapter considers international regulation of issues relating to zero hours work and its potential. In doing so, the chapter examines the importance of the ILO principle that 'labour is not a commodity' and its application. It discusses the extent to which ILO Conventions and Recommendations regulate working time, non-standard employment and zero hours work. It is argued that it is unlikely that international labour standards will emerge to fill regulatory gaps directed at casual workers, guaranteed minimum working time or transparency in the employment relationship, and that responsibility now rests with national governments.

Keywords Non-standard employment · Commodity · Conventions · Working time · Labour law · Trade unions

10.1 Introduction

Zero hours contracts (ZHCs) are a symptom of a much larger problem of non-standard employment (NSE). This is a phenomenon of working life which is familiar to workers in developing countries but which is now growing in the developed world. The matter was the subject of detailed examination by the International Labour Office (ILO) in its report *Non-Standard Employment Around the World* (ILO 2016), which gave an account of the various forms of NSE now operating in practice. These were said to include temporary work (covering fixed-term contracts and casual work), part-time and on-call work, multi-party employment relationships (including temporary agency work), and disguised self-employment (including sham self-employment). ZHCs were classified as a form of casual work, the ILO reporting that this was a form of employment associated particularly with Canada, Ireland and the UK, and until recently New Zealand.

K. D. Ewing (✉)
King's College London, Strand, London WC2R 2LS, UK
e-mail: keith.ewing@kcl.ac.uk

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However, it was the UK that was the principal focus of the International Labour Office's analysis of ZHCs, for it was in the UK that these arrangements were said to have grown most rapidly. The report acknowledged that the apparent growth may be associated with a better 'awareness and understanding among workers of the existence of these contracts' (ILO 2016, 85). For these purposes, a ZHC was defined as 'one in which the worker is not guaranteed hours of work, but may be required to make themselves available for work with an employer' and, moreover, 'employers are not required to offer workers any fixed number of working hours at all per day, week or month' (ILO 2016, 85). At the time of the report, some 800,000 workers in the UK were reported by the Office for National Statistics to be engaged on such arrangements (with some 40% of whom working for less than 16 hours weekly), though this was acknowledged potentially to be an underestimate, as many people failed to identify themselves as being engaged on a ZHC.

Before going much further, it is necessary to pause and question the classification of ZHCs as a form of 'casual' employment. They are not casual in the sense that casual implies choice, in the sense of *no opportunity in practice to refuse* when work is offered. Nor does it imply choice, in the sense of the *need in practice to accept* work when it is available. What characterises ZHC work for many is a relationship of dependence on the decisions of an employer by workers whose income relies on shifts being made available. Choice implies power, in this case the power to refuse without adverse consequences. While that may be the position of some workers on ZHCs (such as the retired looking to supplement their income), it is not the reality of the great majority of such workers. If the shift is not offered, there is no work for workers who may have no other sources of income. ZHCs are best seen as a separate species of the NSE genus.

That said, apart from identifying patterns of NSE and their prevalence, the International Labour Office report also attempted dispassionately to explain the reasons for such practices, though these are now fairly well known. One explanation for NSE generally is that businesses are seeking 'numerical flexibility', as a result of 'seasonality, changes in the business cycle, competition from other firms for market share, or external shocks' (ILO 2016, 158). The other principal reason is cost: 'workers in NSE are often cheaper, either because of lower wages or as a result of savings on social security and other benefits' (ILO 2016, 161). These benefits include employment protection legislation, with NSE workers typically excluded from job security and other safeguards: they are easy to hire and fire because of labour law rigidities and may be excluded from other benefits (Adams and Prassl 2018). There may also be tax and national insurance advantages to employers who engage workers on such terms (Adams and Deakin 2014).

The implications of such arrangements are also fairly well known. The economic purposes of the employer have significant social implications for workers. According to the International Labour Office, numerical flexibility comes at a high price, particularly in its most extreme forms:

> Workers in on-call employment and casual arrangements typically have limited control over when they work, with implications for work–life balance, but also income security, given

> that pay is uncertain. Variable schedules also make it difficult to take on a second job' (ILO 2016, xxiii).

If the purpose of using NSE is to reduce costs, then it is obvious that workers in such arrangements will suffer 'substantial wage penalties relative to comparable standard workers' (ILO 2016, xxiii). But it is not only workers who suffer, with levels of NSE associated with low productivity (ILO 2016). There are also wider issues for society more generally, as those in NSE experience difficulties getting 'access to credit and housing, leading to delays in starting a family' (ILO 2016, xxiv).

This chapter considers why urgent steps should be taken to deal with ZHCs in the context of the institutional objectives of the ILO. The chapter also discusses the extent to which ILO instruments currently regulate both working time generally and NSE specifically. In doing so, we identify gaps in the regulatory protection for workers, and examine how these gaps can best be filled, having regard to the role of trade unions and collective bargaining. The chapter begins with a discussion of the importance of the decommodification of labour in the ILO's founding principles.

10.2 'Labour is not a Commodity'

The International Labour Organization (ILO) was founded in 1919, a product of the Treaty of Versailles. Its aims were set out in the preamble to its Constitution, which provides that

> Whereas universal and lasting peace can be established only if it is based upon social justice;
>
> And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;
>
> Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries (ILO 1919).

Under the ILO Constitution, a permanent body was established to give effect to the foregoing objectives, as well as subsequently the provisions of the Declaration of Philadelphia, which was adopted in 1944 as the ILO was revived towards the end of the Second World War (Supiot 2012). Before considering that permanent machinery and what it does, it is necessary to deal briefly with the Declaration of Philadelphia, which sets out a number of more detailed objectives of the ILO in what is in effect a Bill of Social Rights. Fundamental to the Declaration and to the ILO generally is

the principle re-affirmed in the first sentence of the Declaration that 'labour is not a commodity', a principle which was obvious implications for all NSE and ZHCs in particular. That said, this is a principle of international law which by its embrace of the language of the labour market in recent legal texts (such as ILO Convention 181 and ILO Recommendation 2014—both discussed below), the ILO itself is doing much to diminish.

Despite its appearance in an international treaty, only limited work has been done by lawyers in recent years to explain what is meant by the principle that 'labour is not a commodity' (O'Higgins 1997; Evju 2013), and there is little discussion of it in judicial decisions. A notable exception is *Africa Personnel Services (Pty) Ltd v Namibia* [2009] NASC 17 where the applicant labour supply company successfully challenged a legal ban on agency labour on the ground that the ban violated the [Namibian] constitutional right to carry on 'any trade or business' (Botes 2013). One of the arguments for the Namibian government in defending the challenge was that agency work was not covered by the constitutional protection because it derogated from the principle that 'labour is not a commodity', entrenched in the Declaration of Philadelphia 'to which Namibia is committed under Article 95(d) of the [Namibian] Constitution'. In an extended discussion, the Supreme Court of Namibia acknowledged that the meaning of the principle is not always uniformly understood, before adding that its 'undeniable basic premise' is that

> Labour is not a tradable innate object but an activity of human beings. Unlike a commodity, it cannot be bought or sold on the market without regard to the inseparable connection it has to the individual who produces it: it is integral to the person of a human being and intimately related to the skills, experience, qualifications, personality and life of that person. It is the means through which human beings provide for themselves, their dependents and their communities; a way through which they interact with others and assert themselves as contributing members of society; an activity through which to foster spiritual wellbeing, to enhance their abilities and to fulfil their potential (*Africa Personnel Services (Pty) Ltd v Namibia*, above, para 70).

Developing this theme, the Court referred to 'bilateral employment relationships which did not accommodate adequate measures of social responsibility for the well-being of employees; where labour was bought (and sold) as if a commodity detached from the human aspect thereof', and to work practices that led to 'the de-humanisation of contract workers and their treatment as mere units of labour: as commodities' (*Africa Personnel Services (Pty) Ltd v Namibia*, above, para 71). But no matter how strong the argument, an attack on agency labour (even if informed by specific historical concerns in Namibia) was nevertheless unlikely to succeed. As the Court pointed out, the ILO itself had by ILO Convention 181 recognised the 'role which private employment agencies may play in a well-functioning labour market' (*Africa Personnel Services (Pty) Ltd v Namibia*, above, para 99). Consequently, it would be difficult to conclude that by adopting the Convention, 'the ILO would be in conflict with one of the most basic principles upon which it was founded' (*Africa Personnel Services (Pty) Ltd v Namibia*, above, para 100), an argument which it is hard to gainsay.

But although the defence based on the ILO principle that labour is not a commodity was unsuccessful, the case is nevertheless an important vindication of the same

principle and a clear exposition of what it might entail. To that extent, the reasoning is applicable not only to agency supply but to all NSE, including ZHCs, particularly where the nature of the work relationship:

> (i) is such that labour is 'bought (and sold) as if a commodity detached from the human aspect thereof',
>
> (ii) where as a result there is a 'de-humanisation of contract workers and their treatment as mere units of labour', and
>
> (iii) can be said not to 'accommodate adequate measures of social responsibility for the wellbeing of employees' (*Africa Personnel Services (Pty) Ltd v Namibia* above);

It might be argued of course that points (i)–(iii) above are the features of most employment relationships, even in so-called secure work (Marx 1968). But if the principle that labour is not a commodity is to be more than a critique, and is to bear any normative fruit, it may be necessary to confine the discussion to particularly exploitative working practices.

With that in mind, the essential feature of the reasoning in *Africa Personnel Services (Pty) Ltd* was the recognition that (a) NSE has a tendency towards the commodification of labour, which (b) can be avoided by effective regulation. Although the reasoning was developed in the specific context of agency supply, ZHCs clearly also have a tendency towards commodification, particularly when compounded by agency supply. Indeed, such practices are the *ultimate form* of commodification (HC 2016), the state permitting employers to eschew any responsibility for the welfare of the people they engage. Workers are used when needed, discarded when not, as employers in some cases exercise what are little more than rights of ownership over the worker by insisting that they are to make themselves available for the employer's exclusive use. The only question is whether it would be possible as a practical matter to regulate such practices to prevent abuse, consistently with any meaningful notion that labour is not a commodity, or whether the principle and the practice are so fundamentally irreconcilable that it is necessary to ban ZHCs altogether.

10.3 International Labour Standards

The reference to ILO Convention 181 in *Africa Personnel Services (Pty) Ltd v Namibia* is a reminder that there is more to the ILO than the principle that labour is not a commodity. It is nevertheless fundamentally important to acknowledge that it is this principle that drives much of what the ILO does through the permanent machinery established by the ILO Constitution. Key features of that machinery relate to the unique methods by which the ILO is governed, including the principle of tripartism, by which trade unions and employers enjoy representation in all the governing institutions along with the government representatives of the Member States. This is a remarkable feature of the ILO, which probably could not be replicated today, and means that the ILO as an organisation has an institutional commitment to strong trade unions, without which tripartism could not function effectively.

The principle of tripartism thus informs the composition of the governing institutions, of which the most significant for present purposes is the International Labour Conference which meets annually in Geneva, where the ILO is based. The Conference is in effect the ILO's parliamentary arm, and as such is composed of representatives from each of the 187 Member States. Every state may send four representatives—two from government and one each nominated by trade union and business organisations, respectively. All of these four representatives have a vote, and they are expected to act independently so that trade union representatives will not necessarily vote with their government representatives, and frequently do not. Indeed, these representatives are organised separately by the Workers' Group and the Employers' Group respectively, and will typically vote with the Group rather than the wishes of their national government.

The role of the Conference is to make Conventions and Recommendations, which require approval in the final vote of at least two-thirds of the delegates voting. Once a convention is approved, it will normally not come into force until it has secured a minimum number of ratifications by the Member States. It is important to note that once it comes into force, a Member State is not obliged to ratify the Convention, even though the state in question may have supported it and voted for it. The classic example is the Hours of Work Convention 1919 (ILO Convention 1), which was strongly supported by the UK, but which to this day has failed to ratify it, initially because of its effects on collective bargaining in some sectors (Ewing 1994). Once ratified, the convention will give rise to binding obligations in international law, though the means available to enforce international law and ensure compliance are very limited.

The legal effects of a ratified convention in domestic law will vary according to the way in which the country in question gives effect to international treaties in its own legal order. In some countries (so-called monist jurisdictions), treaties once ratified may have direct legal effects and be enforceable in the domestic courts. In other countries (so-called dualist countries such as the UK and Ireland), ratified treaties have no direct legal effects and only become enforceable when implemented by legislation. What is then enforced is not the treaty but the legislation giving effect to the treaty, and with the result that the courts may have to apply legislation which fails to meet the requirements of the Convention, in the event of any inconsistency. As in *Africa Personnel Services (Pty) Ltd v Namibia*, however, ILO conventions may be used by domestic courts to interpret a wide range of national legal texts, including labour legislation, human rights standards and even national constitutions.

There are now 189 international labour conventions which have been adopted since 1919, though the last to be adopted was the Domestic Workers Convention 2011 (ILO Convention 189). The failure to adopt any measures in recent years is not a sign of the completeness of the international labour code, so much as an indication of where the balance of power lies in the ILO and elsewhere in an era of neo-liberalism and globalisation (see La Hovary 2013). The power lies firmly in the hands of employers who are seeking a regression rather than an advance of standards, and with conservative-led governments seeking a limitation rather than an expansion of the ILO's role. These are political realities to be confronted when considering below

the deficiencies and gaps in the international labour code and its failure to keep pace with changing working practices in the global economy. It is the same realities that lead us to lament the low levels of ratification of ILO Conventions.

In addition to these 189 Conventions, there are also 205 Recommendations. Although made by the International Labour Conference in a manner substantially similar to Conventions, Recommendations do not have the same legal status. They are not open for formal ratification by the Member States, but even if adopted they do not give rise to legal obligations. Recommendations are not treaties, but are nevertheless an important source of values, and may be adopted either to give more detailed guidance to the provisions of a Convention, or to set standards where there is a need for some kind of normative framework but a lack of political will for a stronger instrument. Relevant to the present discussion is ILO Recommendation 198 (Employment Relationship Recommendation 2006). But despite their lack of any formal legal status, Recommendations may nevertheless be influential, as in the case of Recommendation 119 (Termination of the Employment Relationship Recommendation 1963), which influenced the adoption of unfair dismissal legislation in the UK (Donovan 1968).

10.4 International Labour Standards and Working Time

There is currently no shortage of international standards on working time. While the starting point is the ILO, the regulation of working time is addressed directly and indirectly also in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, as well as in regional instruments such as the European Social Charter (Council of Europe) and the EU Charter of Fundamental Rights (EU). The need to address the problem of working time was one of the factors leading to the creation of the ILO in the first place, a need reflected in the preamble to the ILO Constitution referred to above, where reference is made to the urgent requirement to improve working conditions, for example 'by the regulation of the hours of work, including the establishment of a maximum working day and week'.

There are now also many ILO Conventions dealing with working time, typically following the instruction of the ILO Constitution and focussed on *limits upon* working time rather than *entitlements to* working time. Indeed the only international treaty of general application that might conceivably be stretched to include the latter is the European Social Charter, which seeks to guarantee to workers 'reasonable daily and weekly working hours' as well as 'remuneration such as will give them and their families a decent standard of living'. Although the former was no doubt drafted (in 1961, and revised in 1996) with long hours and limits in mind, it is flexible enough to be adapted to minimum hours as well, especially in view of the need for hours to satisfy guarantees as to pay. The Social Charter is thus important incidentally for the reminder that issues about working time and payment systems are inescapably intertwined.

So far as limits on working time are concerned, the foundational instrument is ILO Convention 1 (Hours of Work (Industry) Convention, 1919), which establishes in international law the principle of the eight-hour day (or the 48 hour working week), giving effect to a long-running trade union campaign that was partially responsible for the creation of the ILO. There are now more than 20 Conventions dealing with working time in one form or another—whether limiting the number of hours worked, providing for paid holidays, or regulating night work. Some of these instruments apply generally or to broad sectors (such as industry or commerce and offices), while others are confined to particular narrow sectors (such as mining). In addition, there are a number of conventions dealing generally with specific aspects of working time (such as night work or holidays), or with working time by specific categories of workers (such as women and children).

The preambles to these instruments generally make clear that their main purpose is the welfare of the worker from the privations of long hours. However, a different purpose is to be seen in ILO Convention 47 (Forty-Hour Week Convention 1935), approved at a time of high unemployment. The latter provides for the reduction in the working week from 48 to 40 hours, in order to spread available work as widely as possible (Collins et al. 2019). In 1935, when this instrument was made, shortage of work was causing 'hardship and privation' among workers, for 'which they are not themselves responsible and from which they are justly entitled to be relieved'. Although the reduction in hours might have the effect of making more work available in countries that adopted this principle, neither Convention 47 nor any subsequent instrument provided any obligation on the Member States to guarantee minimum hours, with one exception.

The exception is Convention 137 (Dock Work Convention 1973), which addresses the problem of containerisation, in what was then the latest threat to workers in a notoriously casualised sector. Only 25 ILO Member States have ratified Convention 137, including only eight EU Member States. Nevertheless, it is important for the expression of a simple principle (albeit one difficult to deliver in practice) that may well be capable of much wider application than the limited circumstances to which it currently applies. Article 2 provides that:

> 1. It shall be national policy to encourage all concerned to provide permanent or regular employment for dockworkers in so far as practicable.
>
> 2. In any case, dockworkers shall be assured minimum periods of employment or a minimum income, in a manner and to an extent depending on the economic and social situation of the country and port concerned.

That said, Convention 137 pulls its punches in an important respect, which has implications for any possible extension of the principle it introduces.

Thus, while it is important to create an obligation, it is also important to identify to whom the obligation is addressed, and to do so in a manner that is open and inclusive. While Convention 137 is stated to apply to 'persons who are regularly available for work as dockworkers and who depend on their work as such for their main annual income', it is undermined significantly by the question of scope, the terms 'dockworkers' and 'dock work', being defined to mean 'persons and activities defined

as such by national law and practice'. In contrast, Convention 152 (Occupational Safety and Health (Dock Work) Convention 1979) dealing with health and safety rather than guaranteed working hours is drafted in more mandatory terms, referring to 'any person engaged in dock work', defined in turn to mean 'all and any part of the work of loading or unloading any ship as well as any work incidental thereto'.

10.5 International Labour Standards and NSE

With the limited exception of Convention 137, the international labour code thus deals with only part of the problem of working time: it deals with limits but not entitlements to working hours. In the absence of effective regulation through the prism of working time, questions arise as to whether it is addressed through the regulation of NSE. Here, however, the code provides only limited recognition of the problem of NSE, with a patchwork of provisions that barely touch the question of ZHCs. The first issue to arise here is the question of employment status and the uncertainty about whether those engaged on a casual basis or ZHCs are employees or not. Remarkably, there is no convention on the employment relationship, and it was only in 2006 that the Employment Relationship Recommendation (Recommendation 198) was adopted, which acknowledged that labour law 'should be accessible to all, particularly vulnerable workers'.

Recommendation 198 is useful for two reasons. The first is the duty on the Member States to have in place a 'national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship'. Among other things, that policy should

> combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due (ILO Recommendation 198).

The Recommendation also gives guidance on the criteria for determining an employment relationship, the existence of which should be 'guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties'.

But although employment status is fundamental (Countouris 2011; Freedland and Kountouris 2012), it is not the most important problem facing ZHC workers. Key problems are the regularity of hours and the uncertainty of when work will be available. There are now a number of instruments dealing with different categories of NSE workers (including part-time workers, homeworkers, temporary agency workers and domestic workers), but there is no instrument dealing with casual workers

generally or ZHC workers in particular. Indeed, instruments dealing with NSE sometimes specifically exclude casual workers. The Part-Time Work Convention 1994 (Convention 175), for example, is designed principally to promote the principle of equal treatment between full-time and part-time workers, but permits discrimination against part-time workers with hours below a prescribed threshold, with obvious implications for part-time workers on ZHCs.

The Home Work Convention 1996 (Convention 177) also addresses equality of treatment, which should be directed to seven prescribed matters, such as wages, health and safety and maternity protection. However, it says nothing about working time or the supply of work; nor does it deal with the termination of employment. To the extent that ZHCs could conceivably be covered by the Private Employment Agencies Convention 1997 (Convention 181), this is to the extent only that the latter requires the Member States that have ratified the Convention to ensure adequate protection for workers employed by the agencies in relation to a range of matters, including working time and working conditions. While this seems designed mainly to address excessive hours in accordance with the historic ILO focus on working time, it is nevertheless probably an adaptable enough formulation to cover irregular hours.

Nevertheless, for the most part there is little direct protection for workers on ZHCs, even when ZHC employment can be combined with another form of NSE. Rather, the problem is thus the potential exclusion of ZHC employment from what limited protection these NSE instruments might otherwise provide. Indeed, this is a problem that is not confined to the NSE instruments, but one encountered also in more general instruments such as the Termination of Employment Convention 1982 (Convention 158). The latter makes provision for unfair dismissal protection, but permits the exclusion of workers 'engaged under a contract of employment for a specified period of time or a specified task', as well as 'workers engaged on a casual basis for a short period'. It is only in relation to the former that

> adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention (Convention 158).

In the absence of any targeted protection for what the ILO refers to as casual workers (defined albeit wrongly to include ZHC employment), there are the exhortations of the Transition from the Informal to the Formal Economy Recommendation (Recommendation 204). The preamble to this Recommendation recalls that 'decent work deficits—the denial of rights at work, the absence of sufficient opportunities for quality employment, inadequate social protection and the absence of social dialogue—are most pronounced in the informal economy'. While this may describe the position of ZHC employment, the Recommendation seems addressed principally to the problems of the developing world, and in any event, ZHCs are now part of the mainstream formal economy. The need here is not for a transition from the informal to the formal economy but from regular to irregular jobs where the latter are considered normal.

ZHCs and the 'Effectiveness' of Labour Law

The preamble to the Transition from the Informal to the Formal Economy Recommendation (Recommendation 204) refers to and draws inspiration from the Declaration of Philadelphia, but also to the two important ILO declarations adopted since. These are, respectively, the ILO *Declaration on Fundamental Principles and Rights at Work* (ILO 1998) and the ILO *Declaration on Social Justice for a Fair Globalisation* (ILO 2008). The latter was adopted with spectacularly bad timing and bad luck on the eve of the global financial crisis. That said, while much of what it contains was addressed in response to the labour law of globalisation, its content seems equally relevant in large measure to the labour law of austerity, labour law of both epochs driven largely by neo-liberal thinking. Said to reflect 'the wide consensus on the need for a strong social dimension to globalisation in achieving improved and fair outcomes for all' (ILO 2008, 1), the aim of the Declaration was to 'place full and productive employment and decent work at the centre of economic and social policies' (ILO 2008, 2).

The commitments and efforts of the Member States were to be based on the four 'important strategic objectives of the ILO' (ILO 2008, 8) through which its Decent Work Agenda is partially expressed. The latter is an initiative adopted in 1999, with a focus on:

- Promoting jobs—an economy that generates opportunities for investment, entrepreneurship, skills development, job creation and sustainable livelihoods.
- Guaranteeing rights at work—to obtain recognition and respect for the rights of workers. All workers, and in particular disadvantaged or poor workers, need representation, participation, and laws that work for their interests.
- Extending social protection—to promote both inclusion and productivity by ensuring that women and men enjoy working conditions that are safe, allow adequate free time and rest, take into account family and social values, provide for adequate compensation in case of lost or reduced income and permit access to adequate healthcare.
- Promoting social dialogue—involving strong and independent workers' and employers' organisations is central to increasing productivity, avoiding disputes at work and building cohesive societies.

Some of these themes, slightly adapted, were fleshed out in the *Declaration on Social Justice* of 2008.

Particularly significant is the need for 'policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection' (ILO 2008, 10). While traditionally the reference to hours might have related to *excessive* hours, that can no longer be presumed to be the only concern in the face of new problems about *shortage* of hours, *allocation* of hours and *regularity* of hours. Also significant is the need to promote social

dialogue and tripartism with a view among other things to 'making labour law and institutions effective, including in respect of the employment relationship, the promotion of good industrial relations and the building of effective labour inspection systems' (ILO 2008, 10). Note here the reference to 'making labour law effective', *in contrast to* the reference to 'effective labour inspection systems', important though the latter undoubtedly is.

The two are distinct, a point reinforced further by the Employment Relationship Recommendation (Recommendation 198), which provides that labour law protection 'should be accessible to all, particularly vulnerable workers, and should be based on a law that is efficient, effective and comprehensive, with expeditious outcomes'. So what are the implications of the principle of labour law effectiveness? The first relates to the scope of protection, as is also made clear in the Employment Relationship Recommendation, which provides that in defining the employment relationship 'national law or practice, including those elements pertaining to scope, coverage and responsibility for implementation, should be clear and adequate to ensure effective protection for workers in an employment relationship'. This provides a separate line of argument from those relating to the principle that labour is not a commodity for the analysis of ZHCs. The relevance of both of these principles is not confined only to ensuring that all workers are entitled to the social protection labour law can provide.

Arguments for effectiveness were deployed in the Employment Relationship Recommendation (Recommendation 198) to address questions relating to the scope of employment rights. That is to say, 'who is covered?'. However, effectiveness goes beyond the scope to include content, though how far it goes is contestable (Weiss 2006). That is to say, 'covered by what?'. There is no point being covered by employment rights if there are no substantive rights or protections in the first place, or if the nature of employment is inherently precarious. The point is made in the preamble to the Transition from the Informal to the Formal Economy Recommendation (Recommendation 204), which refers to 'the denial of rights at work, the absence of sufficient opportunities for quality employment, inadequate social protection and the absence of social dialogue'. Although referred to in the context of 'Decent Work', that would seem also to be an adequate normative starting point to inform our understanding of an effective labour law. It is also convenient as a condition that describes the situation of many workers engaged under ZHCs.

10.6 Filling the Regulatory Gaps on Zero Hours Contracts in the ILC

In its report on *Non-Standard Employment Around the World,* the International Labour Office made a number of proposals to deal with the problems faced by workers in NSE generally. The first is what the authors referred to as *plugging regulatory gaps,* defined to mean that

> Ensuring equal treatment for workers in NSE is essential; it is also a way of maintaining a level playing field for employers. Establishing minimum guaranteed hours and limiting the variability of working schedules can provide important safeguards for part-time, on-call and casual workers. Legislation also needs to address employment misclassification, restrict some uses of NSE to prevent abuse, and assign obligations and responsibilities in multi-party employment arrangements. Efforts are needed to ensure that all workers, regardless of their contractual arrangement, have access to freedom of association and collective bargaining rights. Improving enforcement is also essential' (ILO 2016, xxiv).

For ZHC workers, two aspects of the remedies proposed are especially opposite—the need to address the question of employment status ('employment misclassification'), and 'establishing minimum guaranteed hours and limiting the variability of working schedules'. The latter is an important proposal that begs questions about how it can meaningfully be delivered (and meaningfully delivered by international intervention), given the complexity of employer needs and employee expectations. At the heart of this matter, however, is a need for employers to take greater responsibility for the management of their staff (O'Neill 2018), and to treat them in a manner more consistent with the values of the Declaration of Philadelphia. That Declaration underpins the principle that labour is not a commodity by affirming that 'all human beings' have 'the right to pursue' their well-being in 'conditions of freedom and dignity, of economic security and equal opportunity'.

It is now widely accepted that the most effective way to address this problem in a way that is flexible and responsive to the needs of both employer and worker is by a legal obligation on the part of the former to specify minimum guaranteed hours and to notify the latter accordingly. This is the model adopted in the EU under the Social Pillar and the Draft Employment Directive, which is discussed in Chap. 9. It is also the model adopted in the UK in a separate initiative which led to the introduction of the influential Workers (Definitions and Rights) Bill 2017–19, a private member's bill presented by Chris Stephens, a Scottish National Party backbencher in the Westminster Parliament (Chacko 2018). The only precedent for anything like this at the ILO are the instruments dealing with dockworkers referred to above, which sought to guarantee a combination of minimum hours and minimum income but stopped short of prescribing how this might be done.

That said, it is a striking omission of the international labour code (ILC) that there is only very limited recognition of the need for transparency in the form of specificity of obligation in the employment relationship. A recent example is the Domestic Workers Convention 2011 (Convention 189), which requires the employers of domestic workers to provide written information about the terms of their

employment, including specifically their hours of work. Convention 189 is notable also for expressly providing that time spent on-call while on the employer's premises but not actually working is to be treated as working time. The latter is an important safeguard against abuse and a reminder that while the specifying of hours is essential, it is not enough. It is the responsibility of those who draft instruments of this kind to recognise the limited capacity of law to change behaviour and to anticipate avoidance strategies designed to maintain the status quo.

That said, when the International Labour Office writes about plugging the gaps, the biggest gaps are the gaps in its own international labour code. The first gap relates to minimum working hours, and the second to transparency in the employment relationship. The conflation of the two provides a possible solution to the ZHC problem, with regulated transparency the vehicle for the carriage of a policy of guaranteed minimum hours. It is not enough simply to require the employer to set out the minimum working hours in the contract, as revealed by the experience of EU law as a result of Directive 91/533/EEC (employer's obligation to inform employees of the conditions applicable to the contract or employment relationship). This already requires the employer 'to notify an employee to whom this Directive applies, hereinafter referred to as "the employee", of the essential aspects of the contract or employment relationship'.

As the current proposals to amend this Directive reveals (European Commission 2017), however, the foregoing is obviously not clear enough or sufficiently well targeted. Following the example of the Domestic Workers Convention, 2011, it would not be enough at international, EU or domestic level simply to improve the transparency obligation by specifying the guaranteed minimum, if this simply encourages the employer to say 'one hour per week, and additional hours as and when required'. The practice of 'specificity of obligation through transparency' would thus have to be reinforced by an additional transparency requirement embracing another obligation on the employer. As a general principle, if transparency is to be the route to a solution to the ZHC problem, there needs to be a requirement on employers to pay punitive penalty rates for every hour the worker is asked to work, beyond the guaranteed minimum specified in the contract. Only in this way would transparency be a genuine reflection of expectation.

10.7 The Role of Trade Unions

In the absence of legislation either to prohibit or better regulate the problem of ZHCs, attention turns to the role of collective bargaining in regulating zero hours work. The ILO has proposed a role for collective bargaining in addressing the NSE problem generally:

> Collective bargaining can take into account particular circumstances of the sector or enterprise and is thus well-suited to help lessen insecurities in NSE. However, effort is needed to build the capacity of unions in this regard, including through the organization and representation of workers in NSE. Where it exists, the extension of collective agreements to all

> workers in a sector or occupational category is a useful tool to reduce inequalities for workers in NSE. Alliances between unions and other organizations can be part of collective responses to issues of concern to non-standard and standard workers alike (ILO 2016, xxiv–xxv).

In the current climate, however, this seems at best an off-loading of responsibility, for a number of reasons. First, it is largely because of the collapse of collective bargaining structures that NSE practices have been allowed to flourish in some developed countries. It is true that there are examples of important collective bargaining initiatives in relation to minimum and irregular hours of work. In Ireland, the seminal *Study on the Prevalence of Zero Hours Contracts* reported that

> Banded hours arrangements have been introduced in a number of major retailers. Tesco, Penneys, Marks and Spencer and SuperValu have all collectively agreed banded hours agreements with Mandate. Mandate claimed banded hours agreements give "some element of control back to workers and challenging complete open ended flexibility". Banded hours place each employee within a set guaranteed 'band' of hours e.g., 15–19 hours. A periodic review takes places on an annual basis and if any employee continuously works above the band they are in, they are automatically lifted into the next band (i.e., the higher number of hours that they have actually been working now becomes their new guaranteed band) (O'Sullivan et al. 2015, 64).

It is also true that ZHCs operate in the UK in sectors either where trade unions once had a strong presence (transport, health and construction), or where there was previously trade union involvement in the regulation of terms and conditions through wages councils (catering and hospitality) (ONS 2017). The issue is not one of trade union capacity but employer resistance, which the ILO seems powerless or fearful to address.

Second, collective bargaining cannot be a solution to the problem of ZHCs at a time when collective bargaining structures continue to be dismantled (most notably in the EU), and while collective bargaining density continues to fall. The ILO argues that 'the extension of collective agreements to all workers in a sector or occupational category is a useful tool to reduce inequalities for workers' (ILO 2016, xxv). However, the countries to which the problem of ZHCs was specifically identified (such as Canada and the UK) are the countries where regulatory style sector-wide collective bargaining does not exist or is limited. This indeed would be one solution to the problem (O'Sullivan et al. 2015), but it is one that is generally not available, and the position is not helped by the International Labour Office proposing solutions by means it has done nothing to promote, with the ILO supervisory bodies stubbornly taking the view that collective bargaining procedures are for the parties themselves to determine (ILO 2018).

It is also a proposal that runs against the grain of contemporary history; for although it is not an option generally available in the countries where the problem of ZHCs has been identified, it is an option that is gradually running out elsewhere, leaving space for a wide range of NSE practices to develop as a result. This is a development that is being driven by the EU, using powers initially under financial solidarity packages during the Euro crisis to require the decentralisation of collective bargaining procedures and the deregulation of employment protection regulation, as conditions of financial support. The process is one on which the ILO could only report

and condemn (ILO 2011), despite the clear impact on industrial relations procedures. The European Commission has, morever, used treaty powers to require decentralisation and deregulation from countries that hitherto had avoided fiscal support with coercive conditions (Bogg and Ewing 2019; Ewing 2015).

Third, the International Labour Office's position is an acknowledgement of the weakness of trade unionism rather than a response to it. Trade unions are designed principally as regulatory bodies, for the purpose of making and administering the rules by which work is done (Ewing 2005). 'Tripartism' is a feature, or expected feature, of the ILO's functioning. The idea that trade unions should build 'alliances' with other organisations may be a pragmatic response to the problem; but as a long-term solution to ZHCs or indeed any other major problem of working practices, it is hardly a satisfactory answer. Once the staple of social democracy, this is a major functional regression of the trade union role: pressure groups with no leverage, seeking ad hoc gains. It is a development the International Labour Office might have been expected to confront rather than accept, if only because of the notional commitment to collective bargaining in many important texts (1944, 1998, 2008).

All of which is to say that ZHCs are a symptom of a particular economic model, and as such the symptom is unlikely to be effectively cured until the underlying cause is addressed. Collective bargaining is thus unlikely to be a systematic solution to the problem of ZHCs until there is an economic policy change that embraces both collective bargaining and regulatory legislation as tools of economic management. These are the lessons of history, with ZHCs being seen by some commentators as having parallels in the casualisation of dock-work in the UK before 1946:

> Owing to uncontrollable forces in the shipping industry, such as tides, wind and weather, which affect the regularity of the arrival of cargoes by ship and barge, also the seasonal trades in tea, timber, cotton, bananas, wool, &c., casual labour has been more pronounced in our ports than in any other industry. Men are engaged day by day, either for a part of the day, a full day or for the full operation of loading or discharging a ship. There is no continuity, and there is always the element of chance about what will be forthcoming on the morrow (Awbery 1946).

Responses to casualisation of dock-work had been piecemeal, incremental and ineffective for the best part of 25 years before the Attlee government took radical action to establish the National Dock Labour Scheme (Awbery 1946). Although that solution may not be transferable to the modern question of ZHCs, the experience of the 1940s suggests nevertheless that there is unlikely to be a long-term solution without a political commitment to new rules of economic management, in which trade unions are deeply embedded.

10.8 Conclusion

Anyone waiting for the ILO to deliver a solution to the ZHC problem will wait a long time. That said, the International Labour Office has made clear what needs to be done, and it is now the responsibility of national governments to do something about it. As

the International Labour Office pointed out, there are obvious solutions to the problem (guaranteed minimum hours), and as has the EU has shown (albeit imperfectly) there are solutions readily available. It has been suggested that if regulation is the answer, obligation through transparency would be the most appropriate way forward, as the EU appears to have embraced in the Draft Directive on the Employment Relationship. In the United Kingdom, Chris Stephens MP has laid out a more developed model for this purpose, with enthusiastic trade union support.

The response of national governments nevertheless has been lamentable, such as in Britain where legislation was introduced to prohibit employers requiring workers on ZHCs to work exclusively for them (Small Business, Enterprise and Employment Act 2015, s 153). Although well-intentioned, this paradoxically further threatens to enhance the vulnerability of ZHC workers by making it harder to show that they are not independent contractors. Further examination of the issue in the government-inspired Taylor review was dogged by an unfettered acceptance of the current economic model under which ZHCs flourish (Taylor et al. 2017), leading to proposals for limited legal reforms to be cautiously implemented. Although some of the Taylor proposals are well made, the report generally has been the subject of withering criticism (Bales et al. 2018).

Government and employer resistance to change tells us why there is unlikely ever to be a solution to the problem at the ILO, until the problem is resolved by other means and international action is no longer required. There is unlikely to be an international labour convention to fill the regulatory gap, whether directed at casual workers, guaranteed minimum working time, or transparency in the employment relationship. Quite apart from well-rehearsed institutional failings of the ILO (Creighton 2004), in the current economic and political climate, the employers' voice in Geneva is now just too loud (La Hovary 2013). Even if there were ever to be such an international instrument, its adoption, in any event, would be only the start of another difficult process of persuading countries to ratify and then implement the instrument in question.

As an indication of the scale of the latter problem, we need only look at the levels of ratification of the NSE directives already in force. The Part-Time Work Convention 1994 (Convention 175) has been ratified by only 17 countries (and only 10 EU Member States); the Homework Convention 1996 (Convention 177) by only 10 (including only five EU Member States); the Private Employment Agencies Convention 1997 (Convention 181) by only 33 (including only 13 EU Member States); and the Domestic Workers Convention 2011 (Convention 189) by only 25 (including only six EU Member States). The UK has ratified none of the foregoing, while Ireland has ratified only one, relevant because these are two of the countries where ZHCs or variations thereon have been identified as particularly prevalent.

In truth, ILO consideration of regulatory or collective bargaining solutions to the ZHC problem is unlikely to have been on the radar of any government, least of all the countries where ZHCs are most prominent. Nevertheless, the regulation of working time by means of collective bargaining, whether or not in combination with the type of regulation referred to above, is likely to be the most attractive way forward. It depends on the nature of collective bargaining, with recent interest

in the adoption of sectoral-based initiatives by trade unions and political parties offering a more effective solution to workplace-based problems than the gradually declining enterprise based arrangements prevalent in English-speaking common law jurisdictions (IER 2016, 2018; IPPR 2018; Labour Party 2017).

A system in which sectoral bargaining arrangements were dominant and in which collective bargaining density returned to historically high levels is likely to be a system in which there would be little resistance to the regulation of abuse. It is also one in which as a result genuinely benign forms of NSE could be contemplated, though as suggested above this is not something that is likely to be deliverable in a labour law infused by the values and purposes of austerity and neo-liberalism. Like many other problems, the ZHC question will be answered not by piecemeal reforms, but by a different kind of economics that renders such practices morally redundant and legally unsustainable. It seems otherwise implausible to believe that there can be 'policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all' (ILO 2008, 10).

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Chapter 11
Fragmented Demands: Platform and Gig-Working in the UK

Debra Howcroft, Tony Dundon and Cristina Inversi

Abstract In the chapter by Howcroft, Dundon and Inversi, the nature of precarious work via digital platforms is examined from multiple sources of research. Platform work is variously defined and encompasses crowdwork, on-demand jobs, gig-economy tasks and on-call work. The spatial dynamic arising from platform technology is both global and local. Platforms connect individual workers, recruiting agents and end-users with increasing ease. This activity can occur at the global level for online work tasks, such as Amazon Mechanical Turk and Upwork. Equally, much activity is locally based on examples including food delivery or transportation services, purchased and ordered via a digital device or mobile application. As platform work opens up new and alternative streams of income generation, some workers rely on platforms for their primary earnings while others supplement this work with additional jobs. In terms of job quality and work equality, there are a number of concerns regarding the role, scope and functions of platforms as intermediary agents. These concerns are amplified in the context of governance and regulation, where power is clearly skewed to serve the interests of the platform. Therefore, in this chapter we contest the claim that platform workers constitute a new entrepreneurial class that has the freedom and flexibility to choose tasks. They are dependent on the power of platforms as intermediary agents, completing work activities that are increasingly precarious and fragmented.

Keywords Crowdworking · Gig · Control · Performance management · Job displacement · Social relations · Sham contracts · Gender

D. Howcroft · C. Inversi
Work & Equalities Institute,
The University of Manchester, Oxford Rd, Manchester M13 9PL, UK
e-mail: debra.howcroft@manchester.ac.uk

C. Inversi
e-mail: cristina.inversi@manchester.ac.uk

T. Dundon (✉)
Department of Work & Employment Studies, Kemmy Business School,
University of Limerick, Limerick, Ireland
e-mail: tony.dundon@ul.ie

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> The term "PLATFORM" is everywhere, buts it's not clear if it's a metaphor or a thing … This model of privatized governance is spreading. Production and distribution, services and the social: all have been "disrupted" by the rules of the platform … this now ubiquitous observation raises more questions than it answers
>
> Weatherby (2018)

11.1 Introduction and Context

The opening quote from Weatherby captures the spread of what commentators refer to as disruptive and innovative business models. The implications of platforms for corporate governance and labour market regulation are multifaceted. Concerns from various stakeholders including policy-makers, workers, labour market agents and trade unions ask what future these developments hold for employment, societal equality and work inequalities. While debates differ widely from those concerned with the consequences of widespread job precariousness due to digital platforms and artificial intelligence, to those who welcome the substitution of labour to ameliorate 'drudge work', there is mainstream agreement that digitalisation is driving social change.

This chapter concerns the nature of work that takes place via digital platforms, which has been variously described as 'gig-work', 'crowdworking' or 'on-demand work'. Platforms are heterogeneous with variable employment arrangements. As platform-based working opens up alternative streams of employment and multiple sources of income, some users rely on them for their primary earnings, while others combine platform work with other jobs to supplement inadequate income levels (Forde et al. 2017). Although many platforms insist they merely provide a 'matching service' that links people together in a two-sided market, they are far from neutral intermediaries in the work-effort bargain. The relationship is essentially a tripartite one between the 'platform', the 'worker' and the 'requester or client' of the work task. The nature of this relationship has implications for task control, social relationships at work, power and legitimacy. Added uncertainties include who exactly constitutes the employer and whether those engaged in work activities are classed as workers or independent contractors. It is debateable whether such work regimes provide new entrepreneurial opportunities for those who may be marginal to mainstream labour market jobs, or if platform-based work results in exploitative, precarious and insecure employment.

What we refer to as 'platform-based work' goes under various labels. '*On-demand'* gig-work may utilise smartphones and mobile apps while the work is locally executed (such as transportation or delivery services). *Crowdworking* has a broader remit and includes digital work tasks commissioned and carried out globally, regardless of geographical location. Capturing the diversity is recognised in various typologies (e.g. Forde et al. 2017; Howcroft and Bergvall-Kåreborn 2018). The analysis in this chapter provides a synthesis of various research streams by the authors (and others) concerned with issues such as fair work, technology, voice, decent work and gender inequalities. We refer to 'platform-based work' to capture activities based

on interactions that involve labour and are facilitated by digital technologies, with examples such as delivery and transportation services, time banks, technical competitions, online tasks and other forms of collaboration. The emergence of many of these platforms was initially associated with the so-called sharing economy. Framed as an alternative to capitalism and built on a narrative of collaboration and community, enthusiasts claim that it represents a form of disruptive innovation that is capable of re-allocating wealth across the value chain, enabling people to connect directly rather than relying on large corporations (Shirky 2010; Benkler 2006). Yet within a decade, the ideological bubble of the sharing economy has burst (Scholz 2017), only to be replaced with the much-maligned gig economy and associated concerns about employment sustainability in the longer term. Importantly, the employment status and working conditions of 'giggers', particularly those who have a strong physical presence such as delivery couriers and taxi drivers, have generated considerable media attention as well as concerns about the future and quality of work.

The chapter develops three arguments. First, while platforms are diverse and multifaceted, there is a commonality to the governance of work allocation that means platform workers remain dependent on the platform as a technological intermediary in order to secure earnings and work tasks. Therefore, platform work is a contested employment space. Second, given the diversity of platforms, the extent of job displacement arising from technological change suggested by commentators such as Brynjolfson and McAfee (2014) is often exaggerated given that many employers make choices that rely on cheap labour strategies. Finally, we argue that the positive narrative which suggests that platform-based work provides opportunities for the development of a new entrepreneurial class downplays or simply ignores the complexities that render work more precarious, augmenting social inequalities.

11.2 The Diversity of the Platform Labour Market

The expansion of digital-platform employment has raised issues about the erosion of the standard employment relationship (SER), with concerns of increased work precariousness (Stone and Arthur 2013; O'Sullivan et al. 2015; ILO 2016). Yet there is no acceptable definition of precarious work, which is often viewed as either temporary, non-permanent, lower paid or subject to some other short-term labour market characteristic that differs to a SER. Further examples include the insecurity of 'on-call' work, having to be ready and prepared for work but only when called upon to do so. Some scholars associate precariousness with 'outsider' labour market status (e.g. part-time, casual or insecure), compared to those who enjoy 'insider' job market privilege (e.g. security, voice, career progression) (Rueda 2007). However, features such as decent pay or career progression do not preclude such jobs having a degree of precariousness, or that part-time and other non-standard work patterns may not be de facto precarious (Grimshaw et al. 2017). In the USA, Bureau of Labor Statistics (2017) data shows that those in 'contingent' or 'alternative' employment were lower in 2017 (3.1%) than in 1995 (4.9%) or 2005 (4.1%). In other words, it is

not entirely evident that the SER is in a permanent state of erosion and full-time stable employment patterns are enduring across different liberal market economies (Stone and Arthur 2013). Furthermore, 'contingent', 'alternative' or 'precarious' may not necessarily relate to digital platform-type work.

Standing (2011) argues that an important frame of reference is the role (presence and/or absence) of several key features that can affect the job experience: the labour market, employment tasks, work skills, job reproduction, worker voice and representation. Grimshaw et al. (2017, 165) show that while the SER has remained relatively stable across the six countries in their study, they report a 'hollowing-out' or series of 'protective gaps' around job fairness, security, redistribution and a feminisation of the labour pool in response to market activation initiatives which have contributed to normalising flexibility, with risks of lower wages and fewer hours for workers (Rubery 2015).

With these issues in mind, precariousness in relation to platform work contains a number of key features which will be discussed next: the platform, recruitment and control, the labour pool, the employment contract, and digital performance management.

The Platform The term platform is used to describe the digital process that facilitates interaction between the 'worker', and the 'requester or client' of the work task. It comprises the technical infrastructure that enables activities to be globally distributed at low marginal cost. Platforms curate a two-sided market and so increasing peer-to-peer exchanges drives revenues as platforms value skim each transaction, which is a significant departure from traditional business models that seek to maximise revenue per transaction (Scholz 2017). This stimulates network effects, whereby value increases geometrically as the platform expands market share. First-mover advantage often leads to platforms becoming hard to displace as dominance becomes entrenched and they then capture a disproportionate market share. Network effects are increasingly centralising the internet, placing enormous concentrations of market power in the hands of few firms (Mazzucato 2018). These tend to be Silicon Valley technology companies, backed by large amounts of venture capital, with many developing explicit strategies to create monopolies (McCann 2014; Srnicek 2017). This combination of scale and corporate concentration represents a discontinuity from classic understandings of the power of capital (Scholz 2017).

The concept of platform is critical for three key reasons. Firstly, it enables platforms to claim they are a technology firm which enables the minimisation of regulatory obligations and associated operating costs. By adopting the role of 'matchmaker', platforms are able to renounce the responsibilities of a traditional employer (Healy et al. 2017), allowing them to minimise labour costs and run an asset-light business. Classifying workers as 'self-employed' enables platforms to avoid liability for accidents (e.g. with transportation workers) as blurred regulatory regimes assist in the dodging of consumer protection authorities. Furthermore, technology firm classification allows platforms to engage in 'regulatory arbitrage' (Felstiner 2011; Pollman and Barry 2017), such as avoiding taxi regulations that fix rates and cap the

supply on the road, enabling the flooding of lucrative, urban markets with part-time drivers during peak periods.

Secondly, platform identity is critical to venture capital which is drawn to technology firms and potential jackpot monopolies, creating extortionate market valuations. This is largely based on a 'growth-before-profit' model and is closely tied with expectations of (unknown) future performance. Platform-based firms are presently valued on average two to four times higher than companies with more traditional business models (Libert et al. 2016). The focus on growth without profits and a potentially high exit value shapes their business practices.

Finally, while platform technology is often equated with the app, it is far more complex as firms develop infrastructures that not only secure their market position, but also wipe out the competition. Taking Uber as an example, the platform mediates every digital interaction which enables the extraction of vast amounts of data, such as passenger behaviour, traffic flow, which enables digital market manipulation (Calo and Rosenblat 2017). With drivers, Uber seeks to gain advantage by restricting the amount of information available, as in the case of accepting a trip without prior knowledge of location or destination (known as blind ride acceptance) (Rosenblat and Stark 2016). If the trip is initially accepted and then later declined, this negatively impacts performance metrics. On other occasions, Uber are intentionally vague when presenting information. For example, the time-based supply algorithm, known as 'surge pricing', generates heat maps to indicate areas of high demand in order to attract drivers to a particular locale and adjust prices to reflect levels of demand (Cohen et al. 2016). The use of digital data to manage platform-based interactions is quite distinct from the traditional employment relationship, which raises questions about control, which is discussed next.

Recruitment and Control There are several common features concerning how platforms recruit workers and control work effort, which have an enduring legacy with earlier nineteenth-century capitalist labour market regulation. For example, workers often spend time in unproductive and unpaid labour as they search for work opportunities, or they have to wait to see if they are 'called' upon by client providers. The way the labour market functions across different platforms also regulates wage payment systems. Payment is highly casualised with many workers subject to piece-rate and/or payment-by-results system. Even when the work has been completed, if the standard is deemed unacceptable by the requester, they are entitled to withhold payment on some platforms. A further common characteristic is many platform workers have to supply their own equipment before they can carry out the work activity (e.g. a bike for Deliveroo workers, a car for Uber drivers, tools and equipment for DIY activities and a computer for performing online tasks). Workers supplying their own capital to access work alter the degree of risk and the nature of the employment contract. In this regard, platform labour utilisation resembles earlier phases of industrial capitalism and associated job insecurity, as opposed to high-tech working practices. Platforms as intermediaries have parallels with the concept of gangmasters connecting workers to end-users. Digitalised performance management conducted by platforms enables the monitoring of crudely designed metrics and feedback, which results in deactivat-

ing the worker from the platform if they fall below the artificially defined 'quality threshold'.

Concomitantly, platform diversity can be extensive. On some, workers offer services/products at a fixed price (e.g. a mobile app on iOS, dog-sitting on housemydog.com, or crafts on Etsy), while on others the requester sets the fee for fractalised work activity (e.g. translating a piece of text, writing software code). In terms of revenues, one aspect that can be assured is that the platform usually deducts a percentage of each transaction that takes place. Cumulatively, this represents a significant amount, for example, since 2008 Apple have generated around $26 bn from top slicing 30% of revenue from each app (Statista 2017).

The scale of platform working appears extensive, and there is a clear upwards trajectory. Surveys suggest there are nearly 5 million crowdworkers in the UK (Huws and Joyce 2016a), around 12% of the Swedish population is working in the gig economy (Huws and Joyce 2016b), and 18% of people in the Netherlands have tried to find work via a digital platform (Huws and Joyce 2016c). While numbers matter, of greater significance is the way in which some of the key attributes of crowdwork travel beyond digital platforms as capitalism continues its quest for new ways of extracting surplus value. As witnessed with outsourcing (see Taylor 2015), this model of organising is permeating more traditional forms of work, encroaching into areas of skilled labour (such as computer programming and legal advice) as tasks are digitally decomposed.

The Labour Pool From the perspective of capital, voluminous crowds can process large quantities of data in a short time frame, enabling the exploitation of geographical differences in skills and labour costs (Lehdonvirta 2016). Platform-based work is based on 'hyper-outsourced' efficiency (Srnicek 2017) as tasks are broken down into modules, ranging from microtasks to more complex projects, with the potential for further Taylorisation. As noted by Howe: '*breaking labour into little units, or modules, is one of the hallmarks of crowdsourcing*' (2008, 49).

Amazon's MTurk serves as an emblematic case of a microwork platform whereby human labour fills the gaps in computational systems and value is extracted by enterprises. This process has been described as 'heteromation' (Ekbia and Nardi 2014): compared with automation whereby human intervention is replaced by technology, heteromation pushes critical tasks to humans as indispensable mediators. Technology is capable of automating many tasks, but capital is reluctant to automate when low-cost human labour is far cheaper for firms who are driven by short-term profit maximisation. Online task completion is predominantly targeted towards individuals, with little opportunity for collective working, but there are examples of collective identities and community spaces for labour solidarity; for example, Deliveroo riders congregating at known locations can engender informal social dialogue. Platform-based working also includes more highly-skilled, higher-paid work, but remuneration is comparatively lower than the bricks-and-mortar equivalent. Across skill levels, the availability of a lower cost workforce attracts consumers, but much of this is enabled

by questionable cost-minimisation strategies such as regulatory arbitrage and bogus 'self-employment' categorisation.

When requesters initiate the posting of work activities and assignments, specifying seemingly simple tasks for an unknowable crowd can be open to misinterpretation. The more fragmented the task, the greater the need to integrate the collective labour process (Hyman 1987). This has led to the growth of two key areas. The first focuses on analysing workflows, with a view to improving quality and cost. The second development concerns the emergence of intermediary firms who manage the process that takes place between requesters and workers. These firms offer services (e.g. assistance in the specification of tasks, inspecting quality and authorising payment) to help ensure that employing a low-cost digital workforce remains viable, particularly for large-scale corporations who do not wish to negate the benefits with costly workforce management. Filtering processes are not uncommon, whereby workers sourced on one platform provide labour for another (e.g. Casting Words source their entire workforce from MTurk); this highlights the complex layers of sourcing and the creation of low-cost value chains. Mediator firms also obscure the identity of large corporations, sidestepping corporate social responsibility and potential concerns associated with using crowdwork platforms.

The Employment Contract In terms of the employment contract, the majority of platforms classify external contributors as 'independent contactors' (Berg 2016; Healy et al. 2017) with self-employed status. This provides tax advantages for platforms and alleviates the regulatory requirements of paying minimum wage (Felstiner 2011), while workers shoulder personal liabilities. Leveraging the rhetoric of the sharing economy, some commentators claim this facilitates 'micro-entrepreneurship': 'People who are empowered to make or save money by offering their existing assets or services to other people' (Botsman 2015). However, as numerous platforms morph into monopolies, eliminating small businesses and eroding more traditional sources of work (e.g. taxi firms and Uber), it seems unlikely that platform-based working is nurturing enterprise.

As platform-based working outpaces regulation, the key legal challenge concerns bogus self-employment classification (Cherry 2016), which represents a process of legal engineering that shifts risk onto workers who are unprotected by minimum-wage legislation or any other workplace entitlements. In the following section, we assess some of the practical consequences of legal issues and cases concerning contract status. Aware of the shifting legal landscape, some platforms have adopted specific procedures to avoid triggering statutory definitions of employment, for example, by preventing continuous work with one client (Lehdonvitra 2016) or by re-classifying their workers as contractors (e.g. Shyp, Eden, Instacart) to avoid compensatory claims (Sundararajan 2016). Deliveroo encourages managers to use particular forms of language (known as 'Do and Don't says') as a means of emphasising self-employment status: riders work 'with' rather than 'for' Deliveroo; they wear a 'kit' rather than 'uniform'; and rider 'invoices' instead of 'payslips' are distributed fortnightly (Butler 2017a).

Digital Performance Management The regulatory context whereby the platform-owner is absolved of responsibility for transactions has led to a growing literature on 'digital trust' (Sundararajan 2016), as online recommendation systems are now being applied to evaluate workers. While the brand and reputation of platforms remains pivotal in creating market share, it is assumed that digital ratings can be used as a substitute for regulatory consumer protection. This is viewed positively by some, who argue that digital reputation systems operate as an 'invisible hand' that rewards good workers while punishing poor ones (Goldman 2011, 53). Many platforms base their success on rapid scalability of low-cost labour, yet this model of lean efficiency unravels when confronted with direct assessment of the quality of the labour process. Constructing a legitimate reputation while reliant on a self-employed workforce means that direct managerial control is replaced with software algorithms, which are bestowed with legitimacy and impartiality (Gillespie 2014) and thus seen to provide a semblance of quality assurance. Taking Uber as an example, it has developed numerous algorithms which serve as a proxy for management. This form of 'algorithmic management' (Lee et al. 2015) plays a prime role in the employment relationship and provides microlevel assessment of interactions with minimal intervention from the platform. Metrics are displayed on an assemblage of digital devices on the dashboard and include number of trips, number of hours online, fares per hour, acceptance rate, and driver overall rating, all of which are compared with 'top drivers' (Rosenblat and Stark 2016). Internal algorithms are augmented with customer evaluations of job performance to provide a veneer of quality assurance and which also feed into workforce management.

11.3 Implications for Labour and Employment Relations

There are numerous implications for work and employment arising from the increasing utilisation of digitalised platform work and gig-economy practices more broadly. In this section, we synthesise our own and others' empirical research to trace a number of implications related to issues of equality and the consequences for labour. These are 'job displacement' issues of digital platform work; 'digitalised social relations' (*including emotional labour, stress, communications, well-being and pay*); 'sham contracts' of bogus self-employed status; and gender equality implications.

Job Displacement One of the wider debates concerns how societies will deal with mass job displacement arising from new forms of automation. This includes the changes arising from platform work along with other forms of technological innovation such as artificial intelligence. We have cautioned elsewhere that these claims are both speculative and exaggerated (Dundon and Howcroft 2018). The idea that technological advancement will result in a jobless future and improve the quality of life has been an enduring debate. Marx viewed automation as a tool to help liberate workers (McKelvey 2014), while in the 1930s the economist John Maynard Keynes (1930) suggested that technology will support extended leisure time and a working

week of around 15 h for all. As noted, contemporary scholars continue this debate, with Brynjolfson and McAfee (2014) predicting extensive job displacement in key areas, while also noting the potential for job growth through new technological skills.

These speculative debates are flawed. Platforms have an undercurrent of job precariousness and economic insecurity across numerous occupations, including not only those at the lower end of the labour market, but also those concerned with high-end skills and professional services. For many employees working in occupations associated with digital work and the gig economy, they work long hours and encounter fragmented income (Grimshaw et al. 2017). If anything, there is an argument that technology has been leveraged by employers to create new constraints through the digitalisation of life rather than liberate people from the drudgery of work. In recognition of this, there are attempts to re-balance work-life boundaries: for example, in France, labour laws have been introduced to protect workers from emails and digital communications outside of office hours (Koslowski 2016). While these changes are to be welcomed, unfortunately they fail to deal with the ways in which technology poses a greater threat to the quality rather than quantity of work (Spencer 2018), and ignore how it is associated with the growth of insecure, episodic, intensive and low-paid work.

Of particular significance is the capacities of employers to opt for cheap labour utilisation strategies instead of invest in technology. The shift to financialised capitalism means corporations are often driven by short-termism and diversification (Batt and Appelbaum 2013). A corollary is that managers face pressures for financial returns demanded by shareholders which can divert investments away from core business activities, with returns sought from other rent-seeking activities such as cheap labour rather than longer-term technology capital (Cushen and Thompson 2016). Consequently, the option for corporations to utilise technology does not necessarily lead to implementation. Of the US companies that could benefit from advanced digitalisation and robotics, it has been estimated that only 10% have opted to do so (Frey and Osborne 2017).

11.3.1 Digitised Social Relations: Emotional Labour, Stress, Communications, Well-being and Pay

Related to debates surrounding the labour displacement thesis summarised above are issues concerning the quality of social relations and well-being of those engaged in platform work. These issues relate to *inter alia* managerial and technological forms of communication, issues about employee well-being, stress and pay equity. An argument here is that platform work mirrors the characteristics associated with zero hours and precarious employment: low- and unpaid work; waiting around for job allocation or on-call work resulting in unproductive time; and on-demand jobs, all have high levels of dependence on employers (clients) and platform governance structures (de Stefano 2016; Aloisi 2016; Graham et al. 2017).

Several studies point to the issues of long hours and emotional stress for many engaged in platform work. For example, on MTurk workers fear refusing tasks since this might affect their rating (Bergvall-Kåreborn and Howcroft 2014). For some workers contracted via intermediary agencies, these issues can be even more acute, with evidence that workers can be blocked from the platform in order to improve the rating of the intermediary agency (Huws et al. 2018). Lack of control over the working environment and future work allocation can lead to added stress and emotional exhaustion for workers. Having to manage one's online history becomes critical in platform work, even though ratings are not necessarily impartial or free from collusion or retaliation (Ge et al. 2016; Slee 2015). It becomes the individual's responsibility to ensure they have high customer and client ratings from previous work in order to attract future work. This can involve investing personal time in updating profiles, job histories and skills expertise even though there is no guarantee of future work. Some platforms use client rating and personal profile activity systems to filter and exclude workers from certain jobs, rendering future employment increasingly precarious. Such technological control intensifies surveillance and diminishes job autonomy, while enabling enhanced oversight by the platform-owner. Workers become functionaries in an 'algorithmically mediated work environment' of evaluation by both the platform and its customers (Ekbia and Nardi 2014). Technology is a carrier of particular socio-economic interests (Wajcman 2006), and questions have been raised concerning the extent to which customers are qualified to provide a fair and objective evaluation, given that negative reviews serve as disciplinary instruments. In a study of ridesharing, research showed a differential understanding among passengers as to exactly what ratings meant to workers in reality (Raval and Dourish 2016). Few consumers realised the implications of how seemingly high scores (for instance, rating an Uber drivers 4.6 out of a maximum of 5) could result in potential deactivation from the platform and loss of earnings.

Other social relationship problems include a lack of communication and transparency regarding work allocation. Many employees often spend large amounts of time searching and waiting for work tasks, which may fail to materialise. Preliminary findings from our case study research (DelivCo) point to poor communication from management and inaccurate information disseminated to workers via the technology (Dundon and Inversi 2017). For example, workers complained about management scheduling of peak periods which informs workers of the time and geographical location for optimal earnings. However, riders explained that 'more often than not', peak periods are miscalculated. The effect was an over-supply of riders logging-on to the app for work, resulting in riders being 'switched-on' but with no deliveries assigned to them and no prospect of pay. One worker explained:

> They don't have any good mechanism to tell us when to work … Sometimes you went to work on a day and time that was predicted as extremely high demand and you would be just sat there doing nothing … people want to work when there is lots of orders and they [management] don't do really a good job informing us when that is.

The communication problems were noted in ways other than technological control of work scheduling. In DelivCo, many riders were unaware that there was a company

office in the city in which they worked. None of the respondents had ever met or spoken with a manager to discuss any work-related matters: all interactions were via email or app.

Further social relations issues associated with platform work concern worker well-being. Research by Graham et al. (2017, 8) found that employees expressed mental health and well-being problems due to social isolation and lone working. While the opportunities to work from home may be presented as advantageous, many felt that they were physically and mentally detached with a lack of face-to-face interaction with other human beings. Unsocial and long hours were common due to the need for a speedy response to clients; many of whom are based across different time zones. As a result, over half of the respondents (55%) in the survey reported overwork and long hours. 'Statistical discrimination' was also in evidence with platform workers in low- and middle-income countries disadvantaged for work tasks compared to those in higher-income labour market economies. This form of discrimination occurs when users of digital platforms make assumptions that because a worker is from a low- or middle-income country (e.g. Philippines and Nigeria), the quality of their work will be lower than that of platform workers based in advanced or higher-income nations (e.g. South Africa and USA). Those who are new to platform work and from lower-income countries earned disproportionally less than more experienced or higher-income country residents (Graham et al. 2017, 8).

Wage uncertainty and discrimination are also apparent. Research by the International Labour Organization (ILO 2016; Berg 2016) showed that employees in a number of non-standard jobs can face a wage penalty by as much as 30%. The nature of platform work means that the vast majority may even bypass regulatory labour standards (e.g. working time, health and safety). The ILO research examined two platforms in particular: MTurk and CrowdFlower. They found that around 40% of employees regularly worked seven days a week, with over half the sample reporting they worked in excess of 10 h on at least one day in the previous month. Around 60% said they work on digital platforms for supplementary income, with earnings varying by country and platform. Workers earned on average between $0.94 and $5.5 per hour: US platform workers earned the most, with a median of $4.65; in India, the median hourly rate was $1.77 (Berg 2016, 11). Furthermore, pay is not always guaranteed. For example, in the case of MTurk, a 'mandatory satisfaction' clause in the terms and conditions gives the requester the authority to reject work completed without justification or payment; at the same time, they can access the work without forfeiting ownership (Bergvall-Kåreborn and Howcroft 2014).

Sham Contracts and Bogus Self-Employed As noted earlier, one of the central debates surrounding gig-work concerns the employment status of workers as defined by the terms of conditions of the platform. In the UK, this is ambiguous as platform-based workers are not legally defined as 'employees' or 'workers' and are often classified as 'independent contractors' or 'suppliers in business' and part of a 'supplier agreement'. The latter creates uncertainties for workers and the absence of social protections plague those working in the gig economy with various legal challenges emerging in numerous jurisdictions.

The argument presented here is that those working on platforms are workers and the crafting of legal contracts which circumnavigate employment law simply undermines workers' rights. There is a strong narrative that goes hand-in-hand with the legal claims: the terms 'sham contract' and 'bogus self-employed' are strongly evidenced in our own and other research. The business model is based on a shift in responsibility and risk from the corporation to the individual and workers live that tension, resulting in a growing 'crisis of attachment' (McCann 2014). For example, payment for platform-based tasks is often controlled by an intermediary agency which sources the worker for a client. In many of these cases, workers are not paid until the final end-user is satisfied, or even after the intermediary has been paid.

Further legal decisions have gone some way to verify the status of such work as falling under a sham contract. For example, in the case of *Szilagyi*,[1] the Court of Appeal found that a so-called partnership relationship was a 'sham'. It commented that in reality these individuals were in fact (and in law) employees. Importantly—and directly related to gig business arrangement—the logic was recognised by the Supreme Court in the *Autoclenz*[2] case, based on a recognition of the *'imbalance in bargaining power between employers and employees'* given that the latter often have little choice other than to accept the terms offered by the employing organisation (Bogg 2012). Crucially for common law jurisdictions, these cases recognise the prevalence of the realities of the employment relationship over the express written contractual agreement between the parties.

The same principles have been evidenced in numerous legal proceedings in the UK challenging the definition of a 'worker' for those engaged in platform work. For example, in *Aslam and others versus Uber BV and others*,[3] an Employment Tribunal rejected the claim that Uber was a platform for self-employed drivers and customers. Its decision was that drivers are workers willing to accept work when the app was tuned on. The judge commented that Uber resorted to 'fictions', 'twisted language' and 'brand new terminology' in an attempt to mask reality (Dundon et al. 2017, 22). In other legal cases (e.g. *Dewhurst vs. Citysprint*),[4] so-called self-employed cycle couriers were deemed to be 'workers' and, importantly, the rationale was based on an evidential '*inequality of bargaining power*' between the parties. Further, in the home of Uber, the Californian Labor Commission determined that drivers are not independent contractors and are employees (Kaine 2015).

However, the situation is far from clear and the contract status of those who labour under platform business models remains uncertain. Despite decisions in favour of Uber workers in the UK and California cases, the Fair Work Commission in Australia did not reach the same conclusion, ruling that Uber drivers are not employees but 'independent contractors' (Guzman 2018). In the UK, the takeaway delivery service

[1] *Protectacoat Firthglow Ltd. versus Szilagyi* (2009) EWCA Civ 98 CA.

[2] *Autoclenz Ltd. versus Belcher & Ors* (2011) UKSC 41.

[3] Case *Aslam versus Uber BV* (2017) IRLR 4 (28 October 2016) then confirmed by the Employment Appeal Tribunal judgment of Judge Eady on 10 November 2017 *Uber B.V. and Others versus Mr Y Aslam and Others* (2017) UKEAT/0056/17/DA.

[4] *Dewhurst versus Citysprint UK* Ltd. (2017) ET/220512/2016.

Deliveroo won a case not to pay statutory minimum wages and holiday pay to riders in a ruling by the Central Arbitration Committee (CAC) of ACAS, who concluded that riders are self-employed because they have the right to substitute others to do the work for them (Butler 2017b). The decision effectively damaged the claim by the Independent Workers Union of Great Britain (IWGB) to recognise Deliveroo riders for the purpose of collective bargaining. While these early decisions may well be indicative of the regulatory climate, many cases are still pending and a clearer legal picture will emerge in the near future. Indeed, the British High Court has given permission to the IWGB to appeal the Deliveroo CAC decision, suggesting that even if riders are not employees or workers, that may not be grounds to restrict or deny the right to bargain collectively.

Notwithstanding the legal-technical accuracies of such cases, the reality of peoples' working lives remains contested. In our own research, for example, the day-to-day experiences of delivery couriers utilising smartphone technologies can result in zero hours-type work arrangements (Dundon and Inversi 2017). Analysis of contractual documents at the DelivCo case found a multitude of different pay structures across geographical locations, which may point to variable contract agreements of different categories of suppliers. For instance, in Manchester and some areas within London, riders were paid an hourly rate (£6.50) plus a delivery fee (50 p during the week and £1 on Friday, Saturday and Sunday) with the possibility of guaranteed working hours through the allocation of working time slots by the company. However, there are inconsistencies as in some other regions (Birmingham, Brighton, and in Camden and Kentish Town areas of London) riders received only delivery drop fees, with no hourly rate and no allocation of time slots. The findings echo the 'sham' contract and 'bogus self-employment' reality of much platform work. One DelivCo worker from the Brighton area commented:

> This is the most precarious form of work. Not only we are like on a Zero Hours Contract, but if we do turn up for work we are not even guaranteed to get paid. We just sit there waiting at the company's will and they will give us work if they want to.

One policy response to such legal status debates is the report of the UK government-commissioned Taylor Review (2017) which proposes the renaming of 'workers' to 'dependent contractors'. While analysis of the implications of the Taylor Review is as yet limited, it may be argued that a 'dependent contractor' is 'reinventing the wheel', given that the judiciary in the UK has been calling for greater clarity to the existing definition of a 'worker' which Taylor falls short of recommending (Dundon et al. 2017, 22–23). In other areas, Taylor proposes rights for agency workers to request a 'direct' contract of employment, where they have been placed with the same hirer for 12 months, and for those on zero hours contracts to request a contract that better reflects the actual hours worked where they have been in post for the same period. The impact of the Taylor Review recommendations is unknown, and the UK government is yet to make a full response, although a first endorsement of the (very light) proposals made in the Review has been expressed through the document 'Good Work: a response to the Taylor Review of Modern Working Practices' (2018).

The Gender Gap Given that many platforms have international reach, it could be assumed that this form of working may offer new opportunities to women by providing flexibility for those with care obligations and offering paid work for those with limited access to the formal economy. However, gendered promises of freedom and flexibility are situated in a context where around 60% of the world's population—many of them women in low- and middle-income countries—still lack internet access (OECD 2017). Significantly, the gendered implications of platform work are evident from women's disproportional representation in non-standard forms of employment and solo self-employment.

While the nature of digital interactions suggests that online platforms may be gender-blind, research has revealed a gender pay gap that mirrors traditional organisations (Adams and Berg 2017). Gender pay differentials operate regardless of feedback scores, experience, occupational category, working hours and educational attainment, which suggests gender inequality is embedded in the operation of platforms (Barzilay and Ben-David 2017). While platform-based work affects both men and women, there are different implications for women, particularly those with caring responsibilities (Howcroft and Rubery 2018). More men than women are undertaking platform work as an additional source of income, but when women are carers these jobs are likely to represent the main source of income. Therefore, the insecurity surrounding low and intermittent pay, the high proportion of working time spent looking for work, as well as exclusion from social protection and employment standards, matters more to women.

11.4 Conclusion

This chapter has reviewed multiple sources of evidence and drawn on aspects of our own fieldwork to investigate various aspects of platform work. While platform work may well offer gains for some workers, caution is needed when debating the extent of the alleged benefits and the universal nature of the desired claims. An ongoing concern is that digitalisation (and technology more broadly) is not neutral: it is developed, shaped and adopted (or rejected) based on the drive for profit maximisation, as well as broader socio-economic reasons. It is essentially capitalist technology that serves the interests of the class that owns and controls it (Cockburn 1985). While platforms offer new spaces and opportunities for working, the current implementation of platform-based work predominantly utilises technology to enable the codification and regulation of skills to control and reduce the costs of labour. Platform work and the associated labour processes are deeply embedded within relations of power, augmenting existing inequalities in the labour market and wider society. However, this is not fixed and is subject to contestation with evidence emerging of resistance to the power of corporate platforms.

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Chapter 12
Between the Profit Imperative and Worker Welfare: Can Responsible Companies Stem the Expansion of Precarious Work?

Lorraine Ryan, Juliet McMahon and Thomas Turner

Abstract This chapter will assess the societal implications of zero hours work and the ethical responsibilities of employers and governments towards workers as citizens. Many companies have sophisticated corporate social responsibility (CSR) policies which enunciate socially caring values that include the dignity and well-being of their employees. Yet the growth in zero hours work in companies with trumpeted CSR credentials indicates an uncomfortable contradiction between rhetoric and reality in the treatment of employees as valued stakeholders. Governments are responsible for protecting the rights of citizens at work. However, lack of regulation around zero hours work in many countries emphasises the tensions between the profit imperative of market economies and the states' obligation to citizens in affording them decent work. If precarity is being normalised in certain sectors this has significant implications for wider society and vulnerable workers' standard of living, rights at work, family life and citizenship engagement. We examine whether the normalisation of zero hours type work undermines workers as citizens and legitimises the creation of denizens. The chapter considers the responsibilities and obligations of employers and the state towards the provision of decent work for all citizens.

Keywords Zero hours · Precarious · Denizens · Corporate social responsibility · Social citizenship · State regulation · Employers

12.1 Introduction

A relative lacuna in the literature on precarious work is the assessment of the societal implications of zero hours work and the ethical responsibilities of employers and governments towards workers as citizens. Many companies have sophisticated corporate social responsibility (CSR) policies which enunciate socially caring val-

L. Ryan (✉) · J. McMahon · T. Turner
Department of Work & Employment Studies, Kemmy Business School, University of Limerick, Limerick, Ireland
e-mail: Lorraine.t.ryan@ul.ie

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ues that include the dignity and well-being of their employees. Yet the growth in zero hours work in companies with trumpeted CSR credentials indicates an uncomfortable contradiction between rhetoric and reality in the treatment of employees as valued stakeholders. Governments are responsible for protecting the rights of citizens at work. However, lack of regulation around zero hours work in many countries emphasises the tensions between the profit imperative of market economies and the states' obligation to citizens in affording them decent work. The potential expansion of precarious type work has significant implications for wider society and vulnerable workers' standard of living, rights at work, family life and citizenship engagement. Here, we suggest that the normalisation of zero hours type work undermines workers as citizens and legitimises the creation of second-class citizens.

Our primary focus in this chapter is the capacity of the state and employers to address the issue of precarious type work in a market society particularly the actions of the latter through the espousal of employees as valued stakeholders. If precarious work is becoming normalised as some suggest what does this mean for society and perhaps more importantly what are the roles of the state and employers in stemming the expansion of precarious work and the consequent erosion of citizenship? A pertinent issue in this regard is whether the policies and practices of large multinational companies emblematic of the contemporary globalised economy can help limit the use of zero hours type work and provide workers with the means to engage fully as citizens. In an ideal world, it might be argued that the responsibilities and obligations of the state and employers are the provision of decent work for all citizens.

12.2 Work in a Modern Context

Work has long been recognised as fundamental to a sense of identity and status within modern society (Noon and Blyton 2007). An individual's experience of work is inextricably linked to their economic, physical and psychological welfare as human beings and impacts other aspects of their lives such as family, community, political views and activities. The centrality of work in contemporary societies is underscored by the number of human rights associated with work and employment. The right to work is enshrined in the Universal Declaration of Human Rights (Article 23) which states that 'everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment' (United Nations 1948). Other human rights associated with work activity include rights to liberty, dignity, equality, property ownership, rights to form and join unions and rights to a standard of living and social security. Such rights are grounded in beliefs about humanity and social progress and are the 'foundation of freedom, justice and peace in the world' (United Nations 1948).

These rights are generally protected in democratic countries by a constitution or other legislative instrument, and the state has an obligation to citizens to protect such rights. With rights come responsibilities and for citizens, this means respecting societal laws, respecting the rights of others and paying taxes (including income

taxes). The exercise and protection of these rights and responsibilities are critical to economic life and the overall well-being of society. The concept of social citizenship encompasses these notions of rights and duties with respect to the state and participation in civil society (Turner 2016). One of the basic assumptions of citizenship is that 'almost all adults would be steadily employed, earning wages and paying taxes, and the government would ensure the care of the vulnerable such as the unemployable, the old, the sick and disabled' (Colin and Palier 2015, 29). The state thus plays a crucial role both as a regulator of employment relations in the labour market and as an employer providing public goods and services. The state also plays a key role in the provision of welfare support to individuals who either cannot or do not work full-time in paid employment (O'Sullivan et al. 2017). The economic and welfare public policies pursued by the modern state shape the environments within which work is situated and influence the operation of the labour market.

The state must necessarily attempt to balance the imperatives of accumulation and the welfare of workers as citizens (O'Sullivan et al. 2017). The role of the state with regard to accumulation is to focus on competitiveness and economic performance. Business is central to any modern economy, and the state must endeavour to nurture and support enterprise in order to provide work and sustain economic life. From a liberal market economy (LME), perspective competitiveness is best achieved when labour regulations and interference in the market are minimal. This allows employers to utilise labour in a flexible and cost-efficient manner and exert control over the labour process. Thus, state policies in LMEs involve limited regulations around minimum wages, employment law, trade union representation and collective bargaining preferring instead to grant employers the freedom to engage and dispense with labour as needed in pursuit of profit. The social element of the employment relationship, however, means that the state has a critical responsibility to protect the needs of workers in order to foster citizenship and social equity. In the face of intensifying global competition, it is often difficult to balance economic and labour policies to simultaneously meet the needs of both workers and corporations. In commercial firms and corporations, the welfare of workers is secondary to the imperatives for profit maximisation. State regulations or policies that are seen to curtail labour flexibility and encroach on the prerogative of management may run the risk of losing firms and jobs to more loosely regulated countries. Yet those that support unrestrained employer led flexibility and freedom risk compromising the quality of work available to citizens. This jeopardises the protection of worker rights enshrined in social citizenship in favour of the economic dictates of business market imperatives. It could be argued that ultimately this liberalism poses a long-term threat to the wider social fabric of society whereby fundamental elements of citizenship such as access to education, income security, pensions and economic and psychological well-being are at risk of being eroded. Indeed, it can be argued that 'market criteria increasingly determine the relationship between the citizenry, the state and the civil society in which the citizen is embedded' (Turner 2016, 681; Standing 2014; Lea 2013).

12.3 Characteristics of Precarious Work

To understand the core features of precarious type work, it is useful to contrast it with the standard employment relationship (SER). The SER has been described by Kalleberg (2009) as one where a worker is employed full-time by a particular employer at the employers' place of work and has opportunities to progress upwards within an internal labour market (Kalleberg 2009, 3). The SER remains a dominant form of employment in many OECD countries (ILO forthcoming), and the most common type of contract in Europe still is permanent full-time employment, accounting for more than half of total employment. However, the SER appears to be in decline in most countries, and in some, the share is not much higher than 50% of all employment (Broughton et al. 2016, 59). Full-time standard-type jobs are being replaced by alternative forms of work such as part-time work, gig work, self-employment, casual and zero hours work (Walters 1996). Furthermore, interpreting figures on tenure as evidence of limited casualisation is questionable as the conditions of employment are weakening and becoming more insecure for many workers and have the character of being casual in all but name (Standing 2008, 24).

Essentially, zero hours work (or on-call work) is a form of work where employers do not guarantee regular hours. In many jurisdictions, zero hours workers fall outside the status of 'employee' and thus are excluded from employment rights which are contingent upon such status. Thus, this form of work exemplifies many of the characteristics associated with precariousness such as low pay, job insecurity and very limited social and employment rights protection (Blanchflower et al. 2017; Broughton et al. 2016; Eurofound 2015). Zero hours work exacerbates precarity and presents a real risk to citizenship in a number of ways. Employees who work in an on-call contractual arrangement have little or no security of tenure and a lack of predictability regarding a number of hours and levels of pay. While some workers with no guaranteed hours may earn high pay on an hourly basis, their work may still be precarious in terms of predictability, tenure and access to protective legislation. Workers employed in zero hours work have difficulty both from temporal and cost aspects in participating in activities associated with citizenship (education, social welfare, having a family, access to housing, pension planning, etc.) and are excluded from important benefits of work such as training and development, holidays, sick pay and often maternity leave. Zero hours work exemplifies what Standing (2008) refers to as an emergent 'systemic insecurity' for workers where much of the risk in the employment relationship is being transferred from employers and the state to individual workers who must accept risks as part of personal responsibility.

As the boundaries of firms are configured in pursuit of leaner more adaptable organisation forms, there is a corresponding emergence of an 'on-demand' labour market (often termed the 'gig' economy). These practices indicate a casualisation of work and signal a move away from regular quasi-permanent employment to short-term work arrangements (Standing 2008). Internationally, across the USA, New Zealand and other countries, the apparent rise in zero hours work has received much (mostly negative) attention (Kalleberg 2009; Lambert 2008). A number of multina-

tionals such as McDonalds, Abercrombie and Fitch, Uber and Sports Direct have been the subject of the media and law enforcement attention over their use of such contracts (Pickavance 2014). In general, zero hours work tends to be situated in low-income sectors such as hospitality, care work and the retail sector. Those most likely to engage in zero hours or on-call work in these sectors are typically groups already identified as vulnerable in society such as minorities, migrants, people with disabilities, women, younger and older workers. Such groups even outside the workplace often experience discrimination and other barriers to full integration as citizens in society. Their disproportionate representation in precarious type employment acts to inhibit engagement in the work sphere and thus embeds their status as second-class citizens in society. These minority groups risk becoming labelled as outsiders in society and the influence of the work sphere serves to emphasise this marginalisation. Any degradation or worsening of conditions in the employment relationship is thus likely to undermine their quality of life and any prospects of contributing to society as full citizens.

12.4 Citizenship and Decent Work

A fundamental tenet of citizenship is that it encompasses 'membership' of a community (Fudge 2005). A citizen can be defined as one who 'by birth or naturalisation, is resident in a territory where he or she has full rights of participation (legally, politically, socially and culturally)' (Turner 2016). Bosniak (2002) suggests that citizenship is conventionally interpreted in at least three different senses: as status, as rights and as democratic engagement and notes that status, in particular, is critical to membership of a community. Those who do not have citizenship status are essentially outsiders and do not enjoy the rights associated with citizenship. From a legal perspective citizenship is akin to nationality, and it is the status of citizenship that confers rights to individuals including rights to participate in a democratic society and welfare protection. Having decent work is inextricably linked to the exercise of many of the rights associated with citizenship (Shklar 1991). Decent work can be defined as that which is productive and delivers a fair income, security in the workplace and freedom for people to express their concerns, organise and participate in the decisions that affect their lives (ILO 2015). Having decent work is seen as a fundamental condition for people to have a place in society and to achieve their potential (Bellace 2011). As most people spend a great part of their lives in the workplace, their experience of work is likely to influence the extent to which there is a positive or negative spillover into democratic participation (Schur 2003; Pateman 1970). For example, trade unions and the process of collective bargaining shift the firm's authority structure in a more participatory direction allowing workers as a collective to negotiate the terms and conditions of their employment. Such collective participatory actions by union members in the workplace are possibly complementary to the development of a wider positive democratic culture. Those employed on zero hours contracts and other precarious work arrangements are unlikely to be covered

by collective bargaining arrangements (ILO, forthcoming) and arguably less exposed to the possibilities of democratic participation and collective action (see Turner et al. 2018).

Precarious workers are effectively denizens created by erosion of post-war social citizenship to a situation where 'the precariat may be regarded as the bottom rung of the ladder of denizenship' (Turner 2016, 683). Denizenship is the status of being a resident non-citizen or a subject rather than a citizen, in essence, the epitome of second-class status. This is inherently troubling for democracy as a political system based on equality of rights, freedoms and representation for all people. With the dominance of the market over civil society in the neoliberal phase of modern capitalism, citizens come increasingly to resemble denizens (Turner 2016). The rise of precarious work plays a crucial role in this as it diminishes the social rights of citizenship. Evidence shows such precarious work is isolating growing numbers of workers into 'the margins' (Vosko 2010) where they have limited access to employment rights, job stability, welfare, education and housing—all privileges associated with citizenship (O'Sullivan et al. 2017; Blanchflower et al. 2017). Precarious workers are clearly at risk of becoming 'denizens' and 'second-class' people even in ostensibly mainstream democratic societies (Benton 2014). It appears that decent work is a crucial element of citizenship in relation to status, rights and engagement. The erosion of decent work and the rise of precarious work increase societal inequality as greater numbers of individuals become trapped in denizenship status. Precarious forms of employment blur the employment status of individuals in some cases to the extent that their status is non-existent. This lack of clarity on employment status makes it difficult for such individuals to access rights enshrined in protective employment legislation which is generally based on the SER. The absence of status and low level of rights coupled with the low likelihood that such workers will be covered by collective bargaining makes it difficult for them to fully engage democratically in the workplace and wider society.

12.5 State Regulation and Precarious Work

In modern industrial society, the state is a pivotal and influential force in determining the shape of the labour market primarily through its role as regulator of the industrial relations environment and a provider of social protection (Wallace et al. 2013; Kauppinen 1997). In recent times, the economic doctrine that the most competitive economies are those in which there is minimal institutional regulation has strongly influenced state approaches to regulation of the labour market (Rubery 2015; Bellace 2011). Concomitantly, there has been a combined shift towards globalism and neoliberalism in which the deregulation of labour markets is a core tenet (Fudge 2005). Neoliberalism is exemplified by a rise in LMEs which typically adopt labour market policies that are characterised by minimal regulation or deregulation of the employment relationship and a decrease in political support for collective representation of workers. This minimalist regulation/deregulation of labour markets as well

as other state policies such as privatisation and outsourcing has created a disconnect in the work-security nexus (Walters 1996) and been a driver of precarious jobs (Carré et al. 2012; Kalleberg 2012; Prosser 2016). The absence of strong statutory regulation either through employment law or through institutional support for collective bargaining in LMEs has significant implications for workers especially those employed in precarious work.

A second issue facing precarious workers on the margins is that state regulation of the employment relationship tends to be focused on workers with a standard employment relationship even in newly industrialising countries, creating an insider/outsider pattern between those in standard and non-standard work (Arnold and Bongiovi 2013; Vosko 2010). Those employed on full-time permanent type contracts are generally protected by a raft of legislation and in many cases by collective bargaining agreements. In contrast, workers in alternative forms of work (e.g. part-time and temporary contracts) have less protection and sparse coverage by collective agreements. Finally, the most marginal (e.g. casual, on-call/zero hours) workers are normally outside the scope of any collective agreements or representation and represent the most at risk group in the labour market.

One response to the emergence of the insider/outsider segmentation of the labour market has been a call for states to reduce perceived 'over-protection' of insiders (i.e. those with stable secure standard employment relationships in order free up access to jobs for those on the margins (European Commission 2011). However, it has been argued that this approach would undermine employment standards for all workers and in particular those whom it purports to serve—the unemployed and marginalised (Rubery 2015; Walters 1996). Dismantling of the SER is synonymous with employers' ability to hire or fire workers and increase or lower wages in line with business performance (Arnold and Bongiovi 2013). While such developments are often touted under the rubric of increased worker flexibility within the discourse of neoliberalism, equally they can be viewed as a long-term fragmentation of work with a corresponding diminution in the quality of work and the lives of workers. Rather than abandoning the SER and associated regulation Rubery (2015) argues that states should look to extend and reinforce SER-type relationships with corresponding regulation to include those on non-standard work arrangements. Similarly, Standing (2008) calls for the introduction of a universal core of rights for all workers engaged in all types of work.

International bodies such as the OECD have argued that 'good quality' jobs are necessary for sustainable and inclusive growth as well as for workers' well-being. At EU level, one of the core principles of the new European Pillar of Social Rights centres on the quality of work and employment. However, all the evidence points to an imbalance whereby the imperatives of accumulation continue to take precedence over rights of citizens at work, and there appears to be little state appetite to redress this imbalance through stronger regulation. For example, in many countries, a debate is currently underway around the apparent increased use of zero hours contracts, particularly on whether they should be regulated further and what form and content such regulation would assume (Adams et al. 2015; CIPD 2013). This has prompted governments in many countries to focus attention on the issue. However, to date state

responses could best be described as 'light touch' across many jurisdictions (ILO forthcoming). Indeed, Arnold and Bongivoi (2013) identify an absence of explicit state involvement to improve a lot of workers or state policies that actively undermine worker security as a key factor in the spread of what they term informalisation of labour markets to the developed world and the institutionalisation of informalisation in developing countries. Thus, nation states are effectively devolving responsibility for decent work to employers. In effect, they are letting employers 'off the hook' (Rubery 2015), and evidence demonstrates that concomitant with weak regulation is a rise in employers' use of zero hours work (ONS 2017).

In any analysis of the role of the state in addressing precarious work, it is important to recognise the actions of the state as an employer in its own right. The economic crisis in 2008 forced governments to focus on cost reductions among their own workforces. In many cases, this has been reflected in increased outsourcing and subcontracting of services to private sector organisations that utilise zero hours contracts. There is also some evidence of the direct use of zero hours/contingent work by public sector organisations (ILO forthcoming). In Ireland, a recent study found evidence of third level lecturers, schoolteachers and health care staff working on a casual/on-call basis (O'Sullivan et al. 2015). It appears that states, particularly in difficult economic circumstances, tend to resort to the use of cheap labour alternatives reducing the appetite and likelihood for robust regulation.

12.6 Employers and the Market Context

Much of the focus on precarious work has centred on the responsibility of states as legislators to regulate the labour market often disregarding the possible role and responsibilities of employers. An analysis of the labour practices of employers needs to be grounded in an understanding of the free market context in which firms function. Employers endeavour to maximise efficiency and outputs to ensure the maximum return on investment for shareholders (Wallace et al. 2013). In a system characterised by free competition and profit maximisation generating profit is the overriding purpose of commercial organisations. Survival and expansion depend on the rational and efficient exploitation of all the factors of production including labour in the search for stable and continuous profit. Labour, like any other factor of production, must be obtained and utilised as cheaply as possible, particularly in the context of expanding global markets where the price for labour is pushed downwards as a result of ever-intensifying competition and weak regulation. Economic relations dominate all other considerations, and labour is bought and dispensed with like any other factor or commodity. Consequently Friedman (1970) argued that the only ethical obligation of the entrepreneur is to maximise profits subject to conformity to legal requirements. The sole social responsibility of business according to Friedman (1962, 133) is to use its resources to increase profits so long as it engages in open and free competition without deception or fraud. From this perspective, the employer's duty to the owners and shareholders is the pursuit of maximum profit. A firm that puts the eth-

ical considerations of other stakeholders such as employees first and the business second could undermine the overall welfare of the firm and its shareholders/owners and even its employees (Van Meerhaeghe 2006). Yet in this extreme reductionist view of the economy and society of a capitalist market system, the scope to act as a moral agent appears to be severely curtailed by economic imperatives. These views legitimate the emergence of current technological developments combined with new forms of employment such as the 'gig' economy and facilitate the return to a re-commodification and re-casualisation of labour typical of nineteenth century style employment practices which maximise the extraction of labour power at the minimum price and risk to the employer (Standing 2008). Labour legislation where it exists is often insufficient in regulating such work particularly on-call and zero hours work practices as it is generally predicated on the assumption of the traditional employment relationship, structured around an employer who agrees to provide work and an employee who agrees to accept it on a regular, ongoing basis. Zero hours and on-call work are unstructured resulting in numerous 'loopholes' and 'grey areas' in legislation governing the status and rights of workers (O'Sullivan et al. 2015; Collins et al. 2012; Freedland 2006).

Yet the market view of the relationship between employer and employees as solely an economic exchange subservient to the imperative of profit maximisation ignores the core substantive social and ethical aspects of the relationship. Ethical considerations can arise over what constitutes a fair day's wage, the effort levels required from employees and how employees are treated (Thompson 1989; Salamon 1987, 48). As organisations are essentially hierarchical structures of power, the relationship between management and employees is essentially one of domination and subordination with the possibility for coercive and unethical behaviour (D'Art and Turner 2006; Edwards 1995; Wheeler 1989; Brannen 1983). This understanding of the employment relationship focuses not just on the economic exchange but also on social relations as a potential ethical nexus in an organisation. Arguably employers have an ethical obligation to uphold the rights of the workers they employ and to foster worker welfare. Workers are reliant on employers to provide decent work to safeguard their ability to participate fully as citizens in society. As providers of work employers play a critical role in shaping the design and quality of jobs, the strategies pursued to ensure efficient and profitable organisations and consequently the treatment of workers as providers of labour. Employers shape workers' experience of work which is directly related to individuals' fundamental human rights to work and earn a living, to liberty, dignity and arguably equality of treatment. Experiences at work are also critical in fostering democratic behaviours. Thus, employers have an ethical obligation to protect these rights. Indeed, many well-known companies such as McDonalds and Sports Direct have sophisticated corporate social responsibility (CSR) policies which enunciate socially caring values that include the dignity and well-being of their employees. Yet such employers have also been found to widely utilise zero hours contracts and other forms of precarious work.

The rationale often used by many firms is that the realities of the market dictate that reducing costs and increasing profits are critical to survival and commercial success. Major changes in recent decades in terms of consumer demand, techno-

logical advances and increased competition are used to justify and implement the use of flexible working hours and precarious type working arrangements. Yet many highly profitable organisations strategically choose work arrangements such as zero hours contracts and on-call work rather than standard employment conditions that result in workers being classed as independent contractors rather than employees. The outcome of this for workers is they are excluded from the benefits and rights enjoyed by employees such as holiday rights, minimum pay, redundancy and protection from unfair dismissal. Examples of companies who have utilised these work arrangements include Deliveroo, McDonalds, Uber, Amazon, Ryanair and Sports Direct. Certainly, not all workers can or want to work permanent full-time jobs, a core argument frequently promulgated by employers in defence of precarious work. There are other work arrangements, however, such as regular part-time, flexi-time, annualised hours and overtime that can provide the necessary level of flexibility to both employers and workers that do not incur the level of precarity created by zero hours contracts and on-call work and do not encroach on workers' rights as citizens. In terms of status, rights and democratic engagement, the spread of such precarious work arrangements are detrimental to the ability of workers to enjoy the benefits of citizenship given the centrality of work to this domain. Thus, it could be argued that employers play an active role in the creation of denizens when deciding to utilise such work arrangements. This raises significant ethical issues especially for those profitable global corporations that increasingly affect the shape of domestic labour markets in developed and developing countries.

12.7 Corporate Responsibility and Precarious Work

For multinational corporations being perceived as socially responsible is an important consideration as citizens, and many consumers expect a level of ethical engagement with society. An organisation that is seen to behave unethically may run the risk of losing customers, incurring a poor reputation and unsettling investors. It is beneficial for organisations to appear to behave ethically so that consumers can purchase goods and services with a relatively clear conscience and stakeholders can be confident in their investments. Ethical behaviour in organisations can be argued to have an economic, as well as moral rationale and organisations spend significant time, money and marketing effort on publicly appearing to behave ethically in relation to environmental and social issues. Strategically firms may strive to behave ethically in a bid to increase long-term profits and stakeholder investment through a positive public image usually created through mission statements and ethically responsible policies. The ethical treatment of workers and the endorsement of workers' rights forms a key part of this. An organisations' corporate social responsibility policy can be taken as a set of principles and rules that guide the norms and actions of management and employees. However, in a free market economy corporations are compelled to act in the interests of a small number of stakeholders (notably, senior managers and equity holders) and arguably are incapable of delivering outcomes that are beneficial to

society as a whole (Fleming and Jones 2013; Parker 2002). This presents a paradox where companies are allowed to self-determine ethical standards through CSR policies in the absence of any checks or external constraints. Most companies extol the value and importance of their employees through their policies and statements. Phrases such as 'most valued asset', 'dignity and respect' and 'commitment to our people' permeate many corporations' statements. Yet the actions of many employers directly contradict the values espoused in their policies towards employees. There are as Ditlev-Simonsen (2010) observes no guarantees that ethical corporate activities relate or follow from CSR policies. The nature of work in a market economy dictates that self-regulation of companies in the form of CSR is insufficient to counteract the imbalance of power inherent in the employment relationship and protect workers' rights. Companies can emphasise the importance and value of their employees while simultaneously exploiting such workers and thwarting their employment rights through the use of zero hours work practices. While there are some situations where workers benefit from the flexibility associated with zero hours work, these are a minority of cases often cited by employers to mask the reality of the extent of the problems associated with zero hours work. In general, precarious type work is characterised by low pay, unpredictability, lack of control, poor work-life balance, fear of speaking up, poorer health outcomes and an inability to enjoy the multitude of human rights directly associated with decent work (O'Sullivan et al. 2015; ILO forthcoming). Alternatively, an ethical employment contract for workers in large multinationals and downstream subsidiaries already exists in the form of standard employment relationships with decent pay rates, working conditions and quality of work. In challenging economic circumstances for some small and medium firms (particularly domestic) avowed ethical values can be undermined by market imperatives which dictate that costs, control and employer autonomy are more critical to corporate success and profitability than ethical obligations to workers. Such firms may be compelled to implement cost-reducing strategies including labour costs when faced with competitors making widespread use of flexible work practices. Yet many multinationals with super high profits are also found to engage in the provision of precarious type work such as McDonalds, Amazon and Ryanair. In practice, these global multinational firms act to normalise and legitimise precarious work with potentially devastating impacts on citizenship and society.

McDonalds is perhaps the epitome of a successful, highly profitable, global, multinational capitalist enterprise and provides an example of the use and normalisation of substandard work arrangements. Established in 1955 by Ray Kroc, it now has over 36,000 outlets worldwide and almost two million employees, generating billions in profits. Its global significance is evident in one of its products, the Big Mac being used by The Economist, as an 'index' to compare the purchasing power parity of different currencies worldwide. The CSR statements claim McDonalds is a company 'guided by core values' and 'commitment to our people'. Throughout its statements on CSR, the company emphasises 'fairness, honesty, integrity, respecting human rights and treating employees with fairness'. Particularly pertinent to our discussion here is that the company claims it is committed to 'conducting our activities in a manner that respects human rights as set out in the United Nations Universal Declaration of

Human Rights'. These are the same rights that are encompassed in social citizenship and are central to participation in society.

Employees in McDonalds work in a low skilled, low paid, Taylorist environment, and Royle (2005, 10) notes 'the violation of employee's rights is commonplace in many outlets around the world'. The company has been criticised with accusations of slave labour, exploitation of foreign and young workers, health and safety breaches and many other breaches of employment rights (Royle 2000). Most recently, the company has been highlighted as being the 'biggest zero hours employer' in Britain (The Guardian 2013). This resulted in strikes by workers in the UK seeking an end to zero hours contracts in their quest for a living wage. In New Zealand, the extensive use of zero hours contracts by McDonalds was instrumental in raising awareness of zero hours contracts and promoting public and political debate around the issue (The Guardian 2016). The extensive employment of zero hours contracts and the industrial conflict with employees in relation to their use would seem diametrically opposed to the CSR statements of McDonalds that espouse 'honesty, integrity, respecting human rights and treating employees with fairness'. This appears to confirm Fleming and Jones's (2013) observation that CSR policies are rarely a sincere attempt to ameliorate the negative effects of business on society but rather function as a component of a public relations strategy designed to convince important audiences (such as governments and employees) that corporations can simultaneously make super profits and be an unmitigated good for society. The realities of the market create a perennial tension between the quest for profitability and the provision of decent work. The profit imperative rooted in liberal market economies often constrains the extent to which employers as a stakeholder group can stem the use of precarious work.

Yet, despite the mainstream economic perspective, many employers are willing to pay wages above the market equilibrium rate. The incomplete and open-ended nature of the employment contract in a market society in relation to effort levels and productivity creates significant possibilities in the labour process (D'Art and Turner 2006). Even after its purchase, labour power unlike other factors of production remains a potential, not a realised asset (Storey 1980, 57). No employment contract can specify precisely in advance the exact amount of effort to be expended (Edwards 1986, 32). This indeterminate nature of the contract provides an efficiency rationale for employers to raise wages and working conditions above the equilibrium rate to avoid these problems and incentivise workers to go beyond contract (Thompson 2004; Edwards 1986; Fox 1974). Moreover, workers often acquire skills and knowledge of an idiosyncratic nature that are specific to the firm pertaining to equipment, processes and communications that act to ensure efficient production in the firm (Williamson et al. 1975). Efficiency wages can minimise labour turnover as workers are less likely to quit, reducing the cost of replacement including search, recruitment and training costs (Akerlof and Yellen 1990). Consequently, it may be in the interests of employers either individually or in the aggregate, to offer wages and conditions above the equilibrium or competitive level to their employees because it increases their productivity and efficiency (Gregory and Romer 1991; Akerlof and Yellen 1990). Indeed, the evidence from a large survey of Irish firms indicated that they avoided imposing wage cuts or wage freezes in order to maintain worker effort levels

and morale and to retain the best employees (Keeney and Lawless 2010). Finally, employers may pay wages above the market clearing rate due to sociological factors such as norms of fairness, reciprocity, custom and practice, commitment and firm loyalty. Experimental evidence supports the relationship between increased levels of reciprocity, effort levels and higher wages and consequent large efficiency gains (Fehr et al. 1997; Berg et al. 1995).

However, this 'efficiency-wage theory' may be less evident in the low-wage sector in the absence of minimum wages as employers become 'trapped in a "productive system" that competes on low cost rather than quality' (McLaughlin 2009, 329). In this scenario, good employers will be driven out of the market creating a race to the bottom not just for workers but also for consumers in terms of the quality of goods and services delivered. Nonetheless, some employers and firms do provide a level of decent work for their employees even if the motivation arises from reputational and efficiency considerations. In Ireland, for example, a number of well-known firms including discount supermarkets Aldi and Lidl have committed to paying employees the living wage rate. Other employers in the retail sector such as Primark and Tesco have agreed banded hours arrangements through collective bargaining which provide guaranteed minimum hours if workers have regularly been working a particular number for a specified period of time. These examples are all very profitable firms operating in a sector where zero hours work tends to proliferate. Indeed, utilising zero hours contracts may be justified on narrow economic and profit criteria in the short term, but this is not always simple or unambiguous in its effects on firms in the long run. Examples from the UK of firms actively choosing not to employ zero hours contracts include Halfords, Barclays and Selfridges (Adams and Prassl 2018). Reasons cited for this choice are the importance for business of retention, commitment and engagement from employees. There are suggestions from a number of countries (ILO forthcoming) that on-call work can have a damaging impact on business in the long term as it can undermine staff morale, reduce workforce productivity and erode trust across the organisation which can result in poor integration of workers and a negative impact on potential innovation and competitiveness. The scope for zero hours practices to maximise profit for firms in the long run is limited particularly in the context of recovering economies and tighter labour markets. The provision of decent work can maximise the potential of labour input in the firm as well as being important for individuals, the state and society in the longer term. Even in low-skill, low-wage sectors it is possible for employers to provide a living wage and security of hours and maintain profitability. Such initiatives, however, are largely voluntary and unlikely to be used by those employers who choose to avail of precarious work arrangements. For a more systematic approach to the provision of decent work, the role of the state is central to provide regulatory mechanisms to ensure that workers' rights are upheld and their ability to participate fully as citizens in society is not hindered by exclusion from decent work.

12.8 Discussion

Precarious work is a growing concern in a number of countries, particularly liberal market economies. Arguably, the traditional standard employment relationship is gradually being eroded, and associated core elements of decent work such as security of income, social protection, social integration and equality of opportunities are diminishing. If increasing numbers of workers are employed in uncertain, unstable and high-risk work the implications for society are far-reaching. A growth in zero hours and on-call work arrangements is likely to have negative economic and psychosocial outcomes for workers and society. Zero hours and on-call work are detrimental to workers' legal employment status, erodes workers' rights and curtails their capacity for democratic engagement. These work arrangements threaten each facet of citizenship and ultimately erode the values vital to a democratic society. Legitimising and normalising zero hours type work is also likely in the long term to be an economic cost to the state. A greater number of workers on low wages will require additional income supports from the state. The costs of increased numbers of citizens engaged in precarious work must then be borne by the individual in the first instance and by the state through lower revenue returns and increased spending on social welfare. Although the behaviour of firms in a free market economy is primarily governed by the imperative of profit maximisation, there is nevertheless a social character to the employment exchange and related ethical responsibilities such as respecting the status, rights and participation of workers as stakeholders in the firm and safeguarding their participation as full citizens in society. The exchange is inextricably linked to individual and societal well-being. By using on-call and zero hours practices, many firms avoid the costs and constraints associated with the standard employment relationship.

Work we argue is central to citizenship, and the state has a duty to ensure vulnerable workers are protected while employers have an ethical obligation to provide decent work and meaningful jobs to enable workers to participate fully in society. The state has a central role in the regulation of the employment relationship and in the elimination of the worst sorts of precarious work such as zero hours contracts. However, lack of regulation around zero hours work in many countries emphasises the tensions between the profit imperative of market economies and the states' obligation to citizens in affording them decent work. The absence of strong statutory regulation of precarious type work either through employment law or through institutional support for collective bargaining is characteristic of many liberal market economies such as the UK and Ireland. Given the constraints of the market and the primacy of profits, state regulation is essential to stem the tide of precarious work and the consequent erosion of citizenship. The greater the spread of precarious work practices the more legitimate and normalised these practices become. Employers, in general, are more likely to be held accountable in a way that goes beyond unfettered and vacuous corporate ethical policies by rigorous state regulation such as a reinforcement and extension of standard employment-type relationships alongside higher

legal minimum standards to protect precarious workers (Rubery 2015; Fleming and Jones 2013).

Many large employers at least nominally acknowledge their ethical responsibility towards employees and pledge in their human resource policies to protect the dignity of workers and treat them in a fair and respectful manner. Such policies usually emphasise the importance of workers to the company and their central role as valued assets. In practice, however, many firms fail to live up to these aspirations. The case of McDonalds illustrates the paradox of a company with espoused ethical policies advocating the dignity and well-being of its employees while offering zero hours contracts to workers. Such work practices sit uneasily alongside formal corporate ethical policies that aim to encourage an inclusive ethical environment that treats employees as valuable stakeholders in the firm. Examples of companies with corporate ethical policies that emphasise the importance of employees while simultaneously making widespread use of zero hours, on-call and other precarious work practices are relatively common. Many of these highly profitable companies portray a public image of responsible ethical corporate behaviour while simultaneously aggressively exploiting and marginalising the labour input into the business. Companies can bask in the knowledge that their corporate ethical policies can help to benefit sales, company performance and a positive public image yet baulk at utilising work practices that genuinely reflect the importance of protecting the dignity, respect and rights of workers. More egregiously such ethical policies can act to obscure the essential role of decent work in socialising workers to participate as democratic citizens in society.

The rationale used by such firms for resorting to zero hours contracts is that the realities of the market dictate that reducing costs and increasing profits are critical to survival and commercial success. Despite the documented erosion of working conditions associated with precarious type work, the majority of employers still offer the standard employment contract to their employees. There are strong economic arguments based on efficiency and productivity grounds to provide employees with good quality work and conditions. Indeed, the economic logic for using zero hours contracts is often dubious and in the long run may be inefficient and costly. International bodies such as the OECD have recognised the importance of 'good quality' jobs and the European Pillar of Social Rights at EU level emphasises the importance of quality of work and employment. However, if state regulation in individual states is light touch and marginal and employers actively circumvent the creation of decent work, it is unclear how this will be achieved. In the meantime, the erosion of workers' rights and status arising from the proliferation of zero hours work presents a very real threat to citizenship. From a civic and democratic perspective, our main argument here is that it is imperative that states eliminate or at least limit the corrosive effects of precarious type work and avoid the emergence of a new class of denizens.

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