

LAUNCH

It is a well worn phrase, but your people – the business’ employees – are your most important asset. Combined with the dramatic increase in the amount of new legislation affecting employees, this means that you must understand your obligations and then decide upon the best way to reward, motivate and retain your employees.

Who is an employee?

English law recognises various categories of worker. Leaving aside some kinds of workers who enjoy a particular status, workers may generally be divided into those who are employees and those who are genuinely self-employed. Employees are generally under closer, more direct control by their employer whereas the self-employed tend to operate on a “freelance” and more flexible basis. This distinction also significantly affects an individual’s legal rights and tax status.

Whether an individual is an employee or self-employed depends on the circumstances of each case and can be a complicated legal issue. The remainder of this section deals with employees only.

The employment relationship is governed by both contractual and statutory rights. Even where an employer is a non-UK company, the contract of employment of an employee who works in England may be governed by English law (subject to any express provision to the contrary) and the employee may have the benefit of

employees

English statutory protection. Even where a different jurisdiction is specified in the contract, certain mandatory rights cannot be excluded.

The contract of employment/service agreement

A contract of employment can be oral or written. A company’s contract of employment for its directors needs to be tailored to reflect a director’s dual role of employee and officeholder. These contracts of employment are commonly known as “service agreements”. Service agreements are also commonly used for other senior or key employees.

It is essential that all your employees have a written contract of employment and that all your directors have a written service agreement. The reasons for this are numerous but include the following.

Certainty

Without a written document, disputes can arise as to the terms.

Protection of the company after termination of employment

This is particularly necessary for senior or key employees. For example, if a key employee left and set up in competition, untold damage could potentially be inflicted upon your company from loss of business. You can minimise the risk of those potential losses by having a written contract containing carefully drafted clauses protecting confidential information and restricting certain

activities after the employment has terminated, for example, preventing the employee dealing with customers and/or competing with the employer's business. Carefully drafted restrictive covenants stand a good chance of being enforceable whereas covenants that are not specifically tailored for the company are likely to be unenforceable.

Statutory requirement

In addition there are statutory provisions which require some information to be in writing. In particular, the Employment Rights Act 1996 requires that all employees should be given a written statement of some specific terms of their employment within two months of commencing employment.

Clauses to include in contracts/ service agreements to protect the company

The following are additional clauses which should be contained in service agreements and in the contracts of employment for your key or senior staff.

- Restrictive covenants – these are the only method of restricting employees from certain activities, for example, competing with the company once their employment has ended.
- “Garden leave” clause – this clause can be used in conjunction with or as an alternative to restrictive covenants and requires the employee to remain at home during his/her notice period. It is useful in preventing an employee working for a competitor during the notice period.
- Pay in lieu of notice clause – this clause is essential when seeking to rely upon post-termination clauses such as restrictive covenants/confidentiality clauses – it also has significant taxation and other consequences.
- Confidentiality clause – this is important for all employees but particularly for senior or key employees – it is particularly important when seeking to protect confidential information after the termination of employment.
- Intellectual property clauses – for all employees who are likely to invent, design, create technology or make discoveries.

Procedures

Disciplinary and grievance procedures – all employers are required to comply with statutory minimum grievance and disciplinary procedures. The bare legal minimum is set out in the Employment Act 2002. The procedures we recommend are slightly fuller. They are based on the ACAS Code of Practice which is used by employment tribunals when assessing whether an employer has treated an employee fairly.

Policies and rules

The following are policies and rules that we strongly recommend you introduce:

- Equal opportunities, including a harassment policy – this policy sets out the company's position as an equal opportunities employer in that it aims to treat all staff and job applicants equally regardless of, for example, their sex, race, religion, sexual orientation, age or disabilities. In addition to having a policy with which all employees are familiar, it is important that all managers are trained in how to implement it.
- Health and safety – it is a legal requirement to have such a policy so that all employees are aware of their health and safety obligations.
- Maternity/paternity/parental/adoption leave – employees ought to be able to refer to a document which explains their rights concerning maternity/paternity/parental/adoption leave and pay.
- Family friendly policies – certain employees (including parents of children under six) have a legal right to request flexible working arrangements. There are statutory procedures that need to be followed and it is helpful to have these set out in a policy.
- Data protection – employees have certain rights concerning the data kept about them on record and you should set out how you will handle this data.
- Whistle-blowing – it is wise to have a policy dealing with this.
- Internet/email – there has been a rise in the number of employees who abuse their right to use email/the internet at work. It is increasingly important to have a policy dealing with this.

- Company rules – this document suggests various rules and regulations that employees should follow. This should be tailored to the needs of your company.

Employees' statutory rights

An employee's statutory rights are diverse, but significant ones include:

- **A right not to be unfairly dismissed** – this is generally subject to an employee satisfying a qualifying service requirement of one year's continuous employment (subject to certain exceptions). Employees unfairly dismissed have a number of remedies, one of which is compensation. There are various levels of compensation, the main one being a compensatory award which is currently capped at £60,600.
- **A right to a redundancy payment** (subject to certain eligibility requirements) – this is generally subject to an employee satisfying a qualifying service requirement of two years' continuous employment.
- **A right not to be discriminated against** – this right is engaged in six main areas (or strands): race, sex, disability, sexual orientation, religion and age. Each strand has slightly different rules but all prohibit direct and indirect discrimination, harassment and victimisation. In relation to disability, there is also a duty on employers to make reasonable adjustments to accommodate the needs of a disabled employee. In relation to age, unlike in the US, workers of any age are protected but there is a wider range of exemptions, including one relating to retirement. It is important to be aware that, unlike for unfair dismissal, there is no qualifying period of service for bringing a discrimination claim and no upper limit on the compensation that can be awarded.
- **A right to receive equal pay for work of equal value.**
- **A right for fixed-term and part-time employees to enjoy equally favourable terms and conditions as comparable with full-time employees.**
- **Mothers have extensive rights to maternity leave and pay. Fathers have more limited rights to paternity leave and pay but these are likely to be extended in 2009. Both parents have rights to take unpaid parental leave. There are similar rights for adoptive parents.**
- **A right to request flexible working** – available to parents of children under six (or eighteen if the child is disabled) and to carers of adults.
- **A right to a minimum wage.**
- **A requirement not to work over an average of 48 hours a week (subject to certain criteria and with prescribed exceptions).**
- **An entitlement to minimum daily and weekly rest periods (subject to certain criteria and with prescribed exceptions).**
- **An entitlement to a minimum annual amount of paid holiday.**
- **Protection of employment in particular circumstances, for example, potentially on the sale of a business.**
- **Statutory regulations governing health and safety at work and sick pay.**

Please note that the pace of development in employment law is such that some of what is described in the section above is liable to change.

Work permits

If a UK business or overseas business established in the UK wishes to employ someone in the UK who is not a national of a European Community country, then generally it must apply to the Home Office for a work permit to be granted for that person. It can be a criminal offence to employ an individual in breach of work permit regulations.

Health and safety and insurance

An employer is under a duty to have regard to the safety of its employees and is also usually liable for accidents caused by acts of employees where they are acting in the course of their employment. In general, an employer owes duties to its own employees, members of the public who are affected by the activities of the employer and other employees working on the employer's premises.

The Employers' Liability (Compulsory Insurance) Act 1969 obliges an employer to maintain insurance against certain liabilities, for example, liability for bodily injury or disease sustained by employees and arising out of their employment in the UK. An insurance company will issue an annual certificate which must be displayed at the place of work.

Some steps to take

- Ensure that all employees have written contracts of employment and that all directors of the company have written service agreements.
- Ensure that employment contracts and service agreements contain adequate provisions to protect the company after the termination of the employment of key or senior staff.
- Introduce a disciplinary procedure.
- Introduce a comprehensive range of policies and rules to regulate the way in which the company deals with matters set out under the “policies and rules” section earlier in this chapter.
- Ensure that you are aware of the range of employees’ statutory rights.

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