

employees

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 draws a distinction between employees and those who are genuinely self-employed. Employees are generally under closer, more direct control of 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. To further complicate matters, a different category known as *workers* are eligible to claim certain employment rights.

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 also have the benefit of English statutory protection. Even where a different jurisdiction is specified in the contract, certain mandatory rights can not be excluded.

The contract of employment/service agreement

A contract of employment can be oral or in writing. 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 those listed below.

1 Certainty

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

2 Protection of the company after termination of employment

This is particularly necessary for senior or key employees. For example, if that employee left and set up in competition, untold damage could be inflicted upon your company from loss of business. You can reduce 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 customer's and/or competing with the employer's business. Carefully drafted restrictive covenants will normally be enforceable whereas covenants that are not specifically tailored for the company are highly likely to be unenforceable.

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

- 1 *Restrictive covenants* – these are the only method of restricting employees from certain activities, for example, competing with the company, once their employment has ended.
- 2 *“Garden leave” clause* – this clause can be used in conjunction with or as an alternative to restrictive covenants clauses and enables you to require 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.
- 3 *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.
- 4 *Confidentiality clause* – this is important for all employees but particularly for senior or key employees – this is particularly important when seeking to protect confidential information after the termination of employment.
- 5 *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:

- 1 *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. In addition to having a policy which all employees are familiar with, it is important that all managers are trained in how to implement it.
- 2 *Health & Safety* – it is a legal requirement to have such a policy so that all employees are aware of their health & safety obligations.
- 3 *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.
- 4 *Family friendly policies* – many employees 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.
- 5 *Data protection* – employees have certain rights concerning the data kept about them and you should set out how you will handle this data.
- 6 *Whistle-blowing* – in view of legislation giving special protection to whistle-blowers, it is wise to have a policy dealing with this subject.
- 7 *Internet/email/social media* – there has been a rise in the number of employees who abuse their right to use email/the internet at work, or use social media inappropriately. It is increasingly important to have a policy

dealing with this.

8 *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:

- o A right not to be unfairly dismissed – this is generally subject to an employee satisfying a qualifying service requirement of two years' 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 £74,000, or a year's salary if this is lower.
- o 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.
- o A right not to be discriminated against – this right is engaged in nine main areas (or "protected characteristics"): race, sex, gender re-assignment, marital and civil partnership, pregnancy and maternity, disability, sexual orientation, religion and age. Each protected characteristic 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. 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.
- o A right to receive equal pay for work of equal value.
- o A right for fixed-term and part-time employees to enjoy equally favourable terms and conditions as comparable with full-time employees.
- o Mothers have extensive rights to maternity leave and pay. Fathers have more limited rights to paternity leave and pay, but these were extended in 2011 to allow fathers to take additional paternity leave where the mother has returned to work. Both parents have rights to take unpaid parental leave. There are similar rights for adoptive parents. There are further, more radical, changes in the pipeline which are likely to take effect in 2015.
- o 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. As from April 2014 this right will be extended to all employees with a minimum of six month's service.
- o A right to a minimum wage.
- o A requirement not to work over an average of 48 hours a week (subject to certain criteria and with prescribed exceptions).
- o An entitlement to minimum daily and weekly rest periods (subject to certain criteria and with prescribed exceptions).
- o An entitlement to a minimum annual amount of paid holiday.
- o Protection of employment in particular circumstances, for example, potentially on the sale of a business.
- o Statutory regulations governing health and safety at work and sick pay
- o Some of these rights – notably discrimination protection, the minimum wage and the regulations on working time, statutory holidays and health and safety also apply to other workers who do not have employment status

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.

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Immigration considerations

When setting up a business in the UK, it is vital to ensure that staff are entitled to live and work here, regardless of the business vehicle used. Failure to do so can lead to costly delays, particularly where such individuals are key to setting up operations at the start.

Employers must check that all staff are entitled to work in the UK before they commence employment and can be subject to significant civil and criminal penalties if they fail to do so or if they knowingly employ staff in breach of immigration law.

Depending on their nationality, staff may already have an automatic right to live and work in the UK. Alternatively they may require permission (usually in the form of a visa). The type of visa they will require will depend on the length and purpose of their visit. We have outlined the most common immigration categories and routes of entry to the UK below.

British nationals and persons settled permanently in the UK

British nationals and persons who have settled permanently in the UK (otherwise known as permanent residence holders) are legally entitled to work here without restriction. This means in an employed or self-employed capacity, for any length of time and for any employer they chose.

EEA and Swiss nationals

In general, nationals from the European Economic Area (EEA) may live and work in the UK without restriction. Nationals from Switzerland enjoy similar rights to EEA nationals. Such persons may enter the UK on the basis of their passport/identity card and do not require a visa. They may if they wish apply for a registration certificate to confirm their right of residence under European law but this is not obligatory. Their family members who are not themselves EEA or Swiss nationals must apply for an EEA family permit (a type of visa) before travelling to the UK. They should apply for a residence card or residence stamp as appropriate once inside.

Nationals of Bulgaria and Romania are currently subject to special arrangements. They may come to the United Kingdom to live or be self-employed but will need to support themselves and their family without recourse to public funds. If they wish to be employed they must seek permission from the UK Border Agency (UKBA) for the first twelve months of their stay. Thereafter they may continue to work without restriction and may apply for a registration certificate confirming their status. Their non-EEA family members are also subject to particular controls. These special arrangements are due to end on 31 December 2013.

Non-EEA Nationals

Non-EEA and non-Swiss nationals will require permission to work in the UK. Summarised below are the schemes most commonly relied on by such nationals.

The points-based scheme

The points-based system is divided into five tiers, which are in turn divided into sub-tiers.

Tier 1

Tier 1 is the highly skilled tier that is aimed at individuals who will contribute to the UK's productivity and growth. Tier 1 consists of four main categories – exceptional talent, entrepreneur, investor, and graduate entrepreneur. The Tier 1 (General) and Tier 1 (Post-study work) routes were closed to new applicants with effect from 6 April 2011 and 6 April 2012 respectively.

Tier 1 (Exceptional Talent)

This is limited to 1,000 people per year of exceptional talent—the scientists, academics and artists who have achieved international recognition, or are likely to do so. Applicants must be endorsed by a designated competent body and are exempt from English language and maintenance requirements. Tier 1 (Exceptional Talent) will be an appropriate immigration route only in a very limited number of cases. Leave is granted for an initial period of three years and four months and may be extended for a further two years.

Tier 1 (Entrepreneur)

This is aimed at persons who are setting up or being actively involved in the running of one or more businesses in the UK. Applicants must have £200,000 (or in certain circumstances £50,000) held in a regulated financial institution and available to invest in a UK business. They must also satisfy English language and maintenance requirements. Leave is granted for an initial period of three years and four months and may be extended for a further two years, provided that the applicant satisfies further requirements, including evidencing that the investment was made within a prescribed period.

Tier 1 (Investor)

This is aimed at high net worth individuals who can make a substantial financial investment in the UK. Applicants must hold at least £1,000,000 in a regulated financial institution and the monies must be freely transferable to the UK. Alternatively applicants may have personal assets exceeding £2,000,000 and access to a loan of £1,000,000 from a financial institution regulated by the FSA, which is disposable in the UK. The monies should be invested in the UK within a prescribed manner and timeframe. There is an exemption from the English language and maintenance funds requirements. Leave is granted for an initial period of three years and four months and may be extended for a further two years

Tier 1 (Graduate Entrepreneur)

This allows non-European MBA and other graduates to extend their stay after graduation to establish one or more businesses in the UK. It also allows overseas graduates who have been identified by UK Trade Investment as elite global graduate entrepreneurs who intend on establishing one or more businesses in the UK. Further details are beyond the scope of this note.

Tier 2 - Skilled migrants with a job offer

Tier 2 allows employers to sponsor skilled migrants in order to fill posts which cannot be filled by EEA nationals or settled workers. In the majority of cases employers will rely on the General and Intra-company transfer sub-tiers of Tier 2. Employers must register as a licensed sponsor. Once registered, they are permitted to issue eligible migrants with Certificates of Sponsorship (“CoS”). Migrants may then use the CoS to apply for leave to remain.

Tier 2 (General)

This allows employers to sponsor skilled migrants in order to fill posts which cannot be filled by EEA nationals or settled workers. Unless the role is on the published shortage occupation list, in most cases an employer must advertise the post to demonstrate there is not a suitable resident worker willing to perform the role - known as the “resident labour market test” - prior to issuing a CoS. The potential applicant must then score sufficient points to qualify. Points are awarded on the basis of their future expected earnings, qualifications, English language skills; and available maintenance funds. There is a cap of 20,700 on the number of Tier 2 (General) migrants who can come into the UK from abroad with an annual salary of less than £152,100. There is no cap on the number of migrants with an annual salary of £152,100 or above. Leave to remain is granted for an initial period of three years plus one month or the time given on the CoS plus one months, whichever is shorter. Extensions may be granted for a further three year period.

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Tier 2 (Intra-company transfers)

This is aimed at multi-national companies who wish to transfer staff from overseas to a branch or subsidiary in the UK. It is divided into four categories. *Long term staff/short term staff* – these categories allow skilled employees who have been employed by the overseas business for 12 months prior to transfer to fill a post in the UK that cannot be filled by a new recruit from the resident workforce. *Graduate trainee* – this category permits employees who have been employed by the overseas business for three months prior to transfer to be transferred to the UK as part of a structured graduate trainee programme. *Skills transfer* – this category permits new recruits to join the UK branch to learn or impart specialist skills or knowledge. Length of stay can be between six months and nine years depending on the category, salary and extensions applied for.

Tier 3 - Low-skilled workers

This tier is intended to fill shortages in low-skilled posts and is currently suspended.

Tier 4 - Students

This tier relates to student visas and is beyond the scope of this note.

Tier 5 - Temporary Workers

This tier is available to workers who wish to work on a temporary basis (between 12 – 24 months) in the UK. Applicant must have a job offer from a licensed sponsor, a valid certificate of sponsorship and sufficient points to be eligible.

Other schemes

UK Ancestry

This is available to commonwealth citizens, one of whose grandparents was born in the UK (including the Channel Islands and the Isle of Man). They must plan to work in the UK and be able to support themselves and their dependants without recourse to public funds.

Turkish Citizens

Turkish citizens are eligible to enter the UK to establish themselves in business under the European Community Association Agreement with Turkey. In addition those who are currently legally employed in the United Kingdom may enjoy further rights including the entitlement to change employers within the same occupation after three years and to work in any type of employment for any employer after four years.

Business Visitors

This is a short-stay category (up to 6 months in most cases). Business visitors are limited in terms of the activities they may carry out whilst in the UK. Aside from limited permissible activities, business visitors should not be “working” ie, interfacing or supplying goods or services to clients whilst in the UK. If they do, they should be sponsored under Tier 2. Permissible business visitor activities include but are not limited to:

- o Attending meetings or conferences
- o Arranging deals
- o Conducting site visits
- o Undertaking fact finding missions
- o Installing and erecting machinery too heavy to deliver in one piece on behalf of a foreign manufacturer

Visitors who are visa nationals will be required to arrange a visa before travelling in this category. Non-visa nationals should be prepared to provide proof on entry that they normally live, work and are paid abroad; that they

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do not wish to transfer their base to the UK; and that they can meet the cost of a return journey. This may require a letter of support from their overseas employer.

Posted workers

Swiss nationals or Swiss companies conducting business in the UK may send non EEA or non-Swiss employees to the UK to work for up to 90 days without needing to apply for a work permit. Those employees must have been working for the individual or company in Switzerland or in an EEA member state for a reasonable period of time and will require posted workers authorisation.

Sole representatives of overseas firms

This scheme permits senior employees of overseas companies to establish a wholly owned subsidiary or register a branch in the UK. Leave is granted for an initial period of two years.

Visa and Further Leave to Remain Applications

Visa applications are made at the British Embassy or Consulate in the applicant's normal country of residence. Together with their application, applicants must now supply biometric information (ie, fingerprints) and have a digital photograph taken of themselves. Information can be found on the UK visas website: www.ukvisas.gov.uk. Sometimes applicants may apply under the schemes described above without leaving the UK. This will depend on whether or not they are permitted to "switch" from their current immigration category whilst in country. Application forms and guidance can be found on www.ukba.homeoffice.gov.uk.

Settlement in the UK

After spending five years in certain immigration categories in the UK, individuals and their dependants are eligible to settle permanently in the UK (this is sometimes referred to as permanent residence or indefinite leave to remain). Applicants will be tested on their knowledge of language and life in the UK. After a further 12-month period they may apply for British citizenship at the discretion of the UKBA. Not all immigration categories mentioned in this guidance lead to permanent residence and applicants should check in each case.

Preventing illegal working

It is the responsibility of the employer to ensure that its employees are entitled to work in the UK. Breaches of the immigration rules can lead to fines for failing to make adequate checks or to criminal sanctions where an employer has knowingly employed illegal workers. In order to protect themselves from fines, employers must check and retain copies of original documents showing that an employee is entitled to work in the UK prior to the employee starting work. The UKBA has issued guidance on the types of documents or combinations of documents, which will suffice. Where employees enjoy only limited leave to remain, these checks must be repeated every 12 months. Permit checking will not assist an employer who "knowingly" employs illegal workers however.

Please note the information provided above is for guidance purposes only. Given that the UKBA introduces frequent changes to the immigration rules, employers and applicants are advised to take advice in relation to each separate application to avoid potential breaches of immigration law. In addition the summaries provided here only cover the key aspects of these schemes and applicants should check the exact requirements of each scheme.

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.

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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

- o Ensure that all employees have written contracts of employment and that all directors of the company have written service agreements.
- o 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.
- o Introduce a disciplinary procedure.
- o 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.
- o Ensure that you are aware of the range of employees' and workers' statutory rights.

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