

Employment law

Although the laws covering employment are extensive, the main issues for small and start-up businesses are fairly straightforward.

By sticking to a few rules, you can avoid most of the pitfalls and prevent problems arising. This briefing focuses on four key areas:

- Employment contracts.
- Discrimination.
- Sickness.
- Dismissals.

1 Employment contracts

1.1 Every **employee** has a contract of employment, either in writing, oral or implied. You should assume that everyone who works for you is an employee, unless you have good reason to think otherwise.

- Partners in a partnership are not employees, but salaried partners may be.
- Consultants and sub-contractors may not be employees, even if taxed under PAYE.

1.2 The terms of the contract are governed by what you have **agreed** with the employee.

The terms will usually be covered by:

- The letter you send making a job offer.
- The written statement you give an employee.
- The implied terms of the contract.

1.3 You need to seek **agreement** with employees if you want to make significant changes to their contracts.

- Terms and conditions of employment cannot usually be changed to the employee's detriment if all or part of a business is sold or contracted out.

2 Terms and technicalities

2.1 You must give each person you employ (full-time or part-time) a **written statement** of the main terms of the employment.

- A new employee must be provided with a written statement of employment particulars within two months, as must any existing employee who asks for one.

2.2 The written statement **must include** a number of specific details:

- Names of employer and employee.
- Date the employment started.
- Job title and description of main duties.
- Place of work.
- Pay rate and how often paid.
- Hours of work.
- Holiday entitlement (days and pay).
- Date the employment will end (unless the employment is permanent).
- Notice periods.
- Sick pay and pension arrangements.
- Grievance and disciplinary procedures.
- Details of any collective agreement which affect the employees.

2.3 The written statement can refer to **other documents** (eg a disciplinary manual).

- These other documents must be made available for the employee to read.

Hours and leave

- A** With certain exceptions, employees have the right to a maximum working week of no more than **48 hours**, normally averaged over a 17-week period.
- Workers who agree to work more than 48 hours a week must sign a written agreement to do so.
 - Employers must keep records and must not press workers to sign opt-out forms.
- B** All workers are entitled to 5.6 weeks' **annual leave** pro rata.
- C** Both male and female employees have a right to take different types of **time off** for the birth and care of their children.
- Birth or adoption entitles each parent or carer to 13 weeks' unpaid leave during the early years of a child's life.
 - Mothers have a right to ordinary and additional maternity leave, regardless of length of service.
 - Fathers (or those with responsibility for bringing up children) who have worked for you continuously for at least 26 weeks by the end of the 15th week before the baby is due can take up to two weeks' paid paternity leave and can take up to 26 weeks additional paternity leave. The Mother must have returned to their work before the additional leave can be taken.
 - One member of a couple who adopts a child can take up to 39 weeks' paid ordinary adoption leave and 13 weeks' unpaid additional adoption leave, if they have worked for you continuously for at least 26 weeks by the time the child is matched, he or she is entitled to take 26 weeks' additional adoption providing the first member of the couple has returned to work.
- D** An employee who is a parent or carer of a child under 16 or a disabled child under 18, or a carer of a dependent adult, has a statutory right to make a request for **flexible working**.
- You must 'consider seriously' any request and may only refuse an application if there is a clear business reason.
- E** All employees are entitled to **dependant care leave**.
- Workers can take 'reasonable', unpaid

time off to deal with an emergency involving a dependant.

2.4 Some **common sense terms** are implied.

- The employer must ensure employees' health and safety at work, have a safety policy and carry out risk assessments.
- You must treat employees with respect. Harassment, bad language or humiliating treatment may lead to claims for constructive dismissal and discrimination.
- Employees must obey reasonable instructions, use skill and care in their work, and act faithfully and honestly.

2.5 Put all the important terms **in writing**.

Without a written agreement, you will lose three advantages:

- Flexibility (eg the ability to move an employee to a different job).
- Certainty (eg if anything is unclear, this could lead to disputes).
- Protection when an employee leaves (eg terms preventing former employees from revealing confidential information).

3 Discrimination

3.1 It is illegal to treat someone less **favourably**

on the basis of their race, sex or gender reassignment, age, disability, sexual orientation, religion, philosophical belief, membership or non-membership of a trade union, marital or civil partnership status, pregnancy, maternity care responsibilities or part-time status.

- By law, you can no longer retire employees - they may choose to work beyond the age of 65 or the default retirement age previously set by your business.

3.2 Requirements or **conditions** of employment should not discriminate against any group.

- Do not advertise or ask interview questions in a manner that discriminates.

3.3 Men and women are entitled to **equal pay** for similar work, or work of the same value.

- Promotion and training opportunities must also be non-discriminatory.

3.4 **Positive discrimination** (eg in favour of women) is also likely to be illegal, because it is discriminating against someone else. Training may be an exception.

Ask Acas, your solicitor or your local business support organisation for advice when drawing up a written contract. Acas offers free advice on employment issues (08457 47 47 47 or www.acas.org.uk).

Go to the Business Link website at www.businesslink.gov.uk for more information on employment law.

3.5 You can be responsible for discrimination practised **by employees**, including sexual harassment or racial abuse.

3.6 Employment tribunals can award unlimited **compensation** to victims of discrimination.

4 Sickness

Workers are entitled to statutory sick pay (SSP), usually after four or more days' sickness.

4.1 SSP is the **minimum level** of payment you must make to any qualifying worker.

- SSP is payable for up to 28 weeks for any one period of sickness.
- The current payment is £81.60 per week subject to income tax and employee's NI.
- Many employers pay higher sick pay.

Handle with care

A pregnant woman has a number of rights:

A Paid **time off** for ante-natal care.

B 26 weeks' statutory **ordinary maternity leave** and 26 week's additional maternity leave (AML), during which all her contractual rights (except remuneration) continue.

- It is illegal to let a woman return to work within two weeks of childbirth, or within four weeks, if the work is in a factory.

C Statutory **maternity pay** (SMP), if she has completed 26 weeks' service by the end of the 15th week before the expected week of childbirth.

- You must pay SMP for 39 weeks. SMP is not payable for the last 13 weeks of AML.
- Some SMP may be deductible from your employer's NI contributions. Phone the HMRC employers' helpline for details (08457 143 143).
- Women who are ineligible for SMP can claim maternity allowance from Jobcentre Plus based on their recent employment and earnings record.

D The right to claim **unfair dismissal**, if she is dismissed for any reason to do with the pregnancy or childbirth.

- If she is dismissed, you must give written reasons, without having to be asked.

If your company's arrangements are more generous than the statutory minimum, you can offset your payments against the SSP you would have had to pay.

- You may be able to reclaim the extra from HMRC if the SSP is more than 13 per cent of your gross NI contributions in any month. Check to see if you can recover what you have paid using the SSP calculator on the HMRC website (www.hmrc.gov.uk).

4.2 Most workers who are unfit to work will **qualify** for SSP.

- They must earn more than the NI lower earnings limit (£97 a week).
- Part-timers, full-timers and agency workers qualify, as length of service is irrelevant.

4.3 The 'fit note' is issued by doctors and indicates whether an individual is:

- Not fit for work.
- May be fit for work.

A 'may be fit for work' statement would be given if the doctor believes your worker's health condition may allow them to work, if you give them appropriate support.

4.4 You can **withhold SSP** if you reasonably suspect the worker is not ill.

- A worker who has recently drawn a statutory benefit (eg incapacity or maternity benefit) may not qualify.

4.5 If you want to stop paying SSP to someone who has been away more than four times in a year, seek an **adjudication** from HMRC Medical Services.

- You need the worker's written consent. A refusal may justify stopping SSP.

5 Dismissals

5.1 If the contract of employment does not specify a **notice period**, an employee is entitled to a 'reasonable period of notice'. In either case, the employee is entitled to at least the statutory minimum notice period of one week after one month's employment. After this, entitlement increases at the rate of one extra week per year, to a maximum of 12 weeks after 12 years' employment.

5.2 If you dismiss an employee without the right notice, this will be **wrongful dismissal**.

- The employee is usually entitled to normal remuneration (both salary and benefits) during the notice period. This applies even if you wish to end the employment immediately, unless there was gross misconduct or the employee suffers no financial loss (eg by immediately starting a new job at a better rate of pay) or if you have reserved the contractual right to pay salary in lieu of notice without benefits.

5.3 If an employer breaches the contract, the employee may be able to resign immediately and claim **constructive dismissal** if the breach was material, going to the root of the contract.

- For example, if you reduce pay without agreement, or tell the employee to resign.

5.4 An employee (even a part-timer) with one year's continuous service who is dismissed without a fair reason and reasonable treatment can claim **unfair dismissal**.

- From 6 April 2009, you have been required to act 'fairly and reasonably' when dismissing an employee (or carrying out any other disciplinary procedure).

Acas has produced a Code of Practice on Disciplinary and Grievance Procedures that provides practical guidance and principles to help you act fairly (www.acas.org.uk/index.aspx?articleid=2174).

- If a dismissal is unfair, an employee can ask the tribunal to order re-employment or award compensation. The basic award is £12,000 (depending on age and length of service) and compensation for financial loss up to a maximum of £68,400.
- If you unreasonably failed to follow the Acas Code, the compensation awarded against you (if you unfairly dismissed an employee) can be increased by 25 per cent. Equally an employee that unreasonably failed to follow the code could have any compensation reduced by 25 per cent.

Where possible, seek professional advice before dismissing an employee.

5.5 If an employee chooses to leave your business, as opposed to being asked to leave, you can usually require him or her to work out the full **notice period**.

- If the employee refuses to work out the notice period, he or she will not be entitled to be paid for it.
- If you insist the employee must stop work immediately, or before the notice period

ends, you must still pay what would have been earned during the notice period.

- If you both agree that the employment should end straight away, no further payment needs to be made.

5.6 Employees who are made **redundant** are not entitled to claim redundancy pay until they have over two years' service.

- Tax is not payable in respect of statutory redundancy pay.
- Payments to an employee in lieu of notice used to be tax-free (under £30,000). Check with your legal adviser.
- Avoid claims that a redundancy is unfair dismissal by ensuring that it is genuine. In general, the job must have disappeared.
- The employer must also select employees for redundancy on a fair and objective basis, after reasonable consultation, and with adequate notice and a fair appeals procedure.
- You are no longer entitled to 'retire employees' and you can only make them redundant after a fair procedure as outlined above.

6 Other rights

6.1 Employees have the right to the **national minimum wage** which stands at £6.08 for employees aged 21 and over.

- There is a lower minimum wage of £4.98 for those aged 18 to 20, £3.68 for those aged 16 and 17 and £2.60 for apprentices under the age of 19, or older but in the first year of their apprenticeship.
- Casual staff, agency staff and home workers also have a right to this wage.
- Service charges, tips, gratuities and cover charges paid to a worker through payroll do not count towards national minimum wage.

6.2 Each employee must get a **pay statement**.

- This must show total gross pay, deductions and net pay.
- Deductions must be itemised. Apart from income tax and National Insurance (NI), deductions can only be made with the employee's agreement or to correct previous overpayments.

6.3 When a business is transferred to a **new owner**, all employee rights usually remain.

6.4 **Trade unions** and their members have extra rights (eg time off for union duties).

Expert contributors

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