

**Berg Kaprow Lewis**

Employment contracts

A contract of employment exists as soon as an applicant accepts your offer of employment. A clear, reasonable contract helps you to ensure that the employee understands what is expected, and to minimise the risk of disputes. At the same time, you need to understand what your contractual obligations are, and what terms you can (and cannot) enforce.

This briefing outlines:

- The basics of employment contracts.
- The content of the written statement.
- What else forms part of the contract.
- Key issues to consider.

1 The basics

1.1 A job applicant has a contract of employment as soon as **your offer** of employment is accepted.

A contract exists, regardless of whether anything is in writing.

- The written statement (see **1.2**) provides evidence of the contractual terms.
- The contract will also include other terms (see **1.3** to **1.5**).
- The contract can be conditional upon an employee providing you with evidence of suitability, such as adequate references, passing a medical examination, or completion of a probationary period.
- If the written statement sets out terms which differ from those agreed when the offer was made, it could mean that if tested, the original terms will apply.
This may be the case if the written documents have been signed and returned, and the signature was merely to acknowledge receipt.

1.2 You are legally obliged to provide every employee (full or part-time) with a **written statement**, covering a number of specified terms and conditions (see **2**).

- You must issue the statement within the first two months of employment.
- An employee whose employment terminates within two months must be issued with the written statement before termination, unless the employment continued for less than one month.
- An employee may complain to an employment tribunal if you fail to issue the statement on time (or if the statement is incomplete).
- There is no penalty against an employer who fails to issue a statement unless the failure is established in the course of other proceedings before a tribunal.

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In such a case the tribunal may award two or four weeks pay.

- Dismissing or penalising an employee for complaining to an employment tribunal can lead to heavy penalties.

1.3 Other documents may provide evidence of contractual terms. For example:

- A job offer letter or job description (but see **4.1** and **4.2**).
- Company handbooks and policy documents.

1.4 Custom and practice in your company may form part of the contract, even if it is not written down. The easiest way to protect yourself is to ensure that everything important is in writing.

- Make it clear what is not part of the contract (see **4**).

1.5 There are **legal constraints** on the content of the contract (see **3**).

- Some implied terms are included in every contract, even if they are not written down.
- Contracts cannot override certain statutory rights.

Working abroad

If an employee will be required to work outside the UK for more than one month, the written statement must also include:

- A How long** the employee will be required to work outside the UK.
- B** In what **currency** the employee is to be paid while abroad.
- C** What **additional remuneration** or benefits (if any) will be paid or provided.
- D** Any terms and conditions relating to the employee's **return** to the UK.

The employee must be given the written statement before leaving the UK, if the employee is due to leave the UK within two months of starting work.

An employee who does all of his or her work outside the UK can, in appropriate circumstances, have an employment relationship which is so closely connected with the UK, that he or she can be entitled to the same rights (eg unfair dismissal) as other workers whose work is predominantly in the UK.

1.6 You cannot **change** the employment contract unilaterally.

- Consult employees and get their agreement before making fundamental changes to their terms and conditions.
- Altering terms and conditions without the employee's consent is a breach of contract. This could lead to a complaint of constructive dismissal (unless the change is one that is clearly advantageous to the employee, such as a pay rise).
- If you wish to change any of the particulars in the written statement, you must notify the employee in writing. This must be done within a month of the date when the change takes effect.

2 Written statement

You can provide a single written statement covering all the terms; or a 'principal statement' (see **2.1**), together with further instalments covering the other specified terms and conditions (see **2.2–2.4**). The statement must cover all the specified terms and conditions, even if they do not apply.

2.1 The **principal statement** must contain:

- The names of the employer and employee.
- The date when the employment began.
- The date on which the employee's period of continuous employment began. This may include previous employment with a related employer.
- The employee's scale or rate of pay (or how it is calculated) and the intervals at which wages or salary will be paid.
- Information about working hours (starting and finishing times, system of shifts, night work, meal breaks, rest days, overtime and overtime payments, etc).
- Entitlement to annual holidays (including bank and public holidays) and holiday pay. This must provide enough information to work out the employee's entitlement to accrued holidays and holiday pay on the termination of employment.
- The employee's job title (or a brief description of the work for which the person was employed).
- The employee's place of work. If the employee is required or permitted to work in various places, the statement should include an indication to that effect and a note of the employer's address.

2.2 The principal statement or some other **readily accessible** documents must also include:

➡ Employment law is complex and is changing rapidly. This briefing reflects our understanding of the basic legal position as known at the last update. Obtain legal advice on your own specific circumstances and check whether any relevant rules have changed.

➡ The Law Society's 'Lawyers For Your Business' initiative can provide you with a free information pack and a free half-hour consultation with a participating firm of solicitors (020 7405 9075; www.lfbyb.lawsociety.org.uk).

➡ Acas publish a guide called 'Contracts of employment' (0870 242 9090 or www.acas.org.uk).

➡ Visit the 'Employing People' section of the Business Link website to create a statement of employment online (www.businesslink.gov.uk).

“Although there is no financial penalty for an employer who does not provide a written statement, such a failure can put an employer in a very bad light in an employment tribunal claim.”
Paul Lambdin, Stevens & Bolton solicitors

- Information on discipline (see **2.3**) and grievances (see **2.4**).
- Any terms and conditions relating to incapacity for work due to sickness or injury, including any provision for sick pay (other than statutory sick pay).
- Any terms and conditions relating to pensions and pension schemes, including if the pension scheme is 'contracted out'.
- The length of notice which the employee is obliged to give and entitled to receive to terminate the contract of employment.
- The intended period of employment or the date when it will end (unless permanent).
- Any collective agreements which directly affect the terms and conditions of the employee's employment.

2.3 The statement must include a note on **disciplinary** rules, including:

- What the rules and procedures are. These must comply with statutory minimum requirements (See **Discipline and grievance issues**).

2.4 The statement must include a note on your **grievance** procedure, including:

- The individual (by name or job title) the employee should contact with any employment grievance, and how to do so.
- What procedures will be followed if a grievance is raised formally. These procedures must also comply with statutory minimum requirements.

3 Other contractual terms

Every contract includes implied terms, whether they are written down or not (see **3.1** and **3.2**). In addition, no contract can override certain statutory rights (see **3.3**). Employers have a duty in some cases to provide employees with proper information concerning their rights.

3.1 Employers must:

- Provide a secure, safe and healthy working environment which includes providing safe working methods and appropriate health and safety training.
- Not take any action which may undermine the relationship of 'trust and confidence' with their employees.
- Ensure that an employee's grievances will be promptly and properly dealt with.

3.2 Employees must:

- Serve the employer honestly and faithfully.

- Not compete with the employer's business.
- Not divulge confidential information (see **5.7**).
- Obey reasonable and lawful instructions.
- Work with due diligence and skill and take reasonable care of the employer's property.

3.3 Employees' **statutory rights** include:

- A minimum period of notice.
 - Rights under anti-discrimination laws (see **Discrimination**).
 - The right to be, or not to be, a member of any particular trade union.
 - Rights under legislation relating to working time and pay.
- Contractual terms which attempt to override these rights may be void and unenforceable.

In addition, various laws restrict who you can employ. For example, there are restrictions on employing children. If you are in any doubt, ask your legal adviser.

4 Non-contractual terms

4.1 Any **job offer** can become a contractual obligation.

- Make it clear at any interview that you are not offering a job at that stage.
- Ensure that any job offer letter states that the contract will be governed by written terms and conditions to be provided later.
- Include a written statement of terms and conditions with your letter of employment, to clear up possible misunderstandings.

4.2 Provide **job descriptions** which allow you the maximum flexibility.

- Include a statement that you reserve the right to amend or add to job descriptions. For example, to accommodate any restructuring of the business, changes in working methods, advances in technology, introduction of shift working, and so on.
- Reserve the right to change the employee's place of work. If you do not, you may be in breach of contract if the business is relocated and you try to get employees to move to new premises. Even if you do this, an employee may be able to claim a 'place of work' redundancy.

4.3 Make it clear if you intend **benefits** to be non-contractual (and therefore easier to amend or withdraw).

For example discretionary bonuses, private health insurance or dress down on Fridays.

“If your employment contracts don't set out a notice period, senior employees will often be able to claim more than the statutory maximum of 12 weeks' notice if they are dismissed. But if they resign they will never have to give more than a week's notice.”

Tim Russell,
Norton Rose
solicitors

“A written statement of terms of employment may not in itself be a contract of employment (unless that was clearly the intention of the parties). However, it will always be useful evidence of the contractual terms.”

Jim Givens,
HR Management
Solutions

“The protection of confidential information, goodwill and customer connection is possible but there need to be very carefully drafted written terms to achieve this.”

Paul Lambdin,
Stevens & Bolton
solicitors

- Identify them as 'non-contractual benefits' in the written statement. Explicitly state that you reserve the right to alter or withdraw them.
- If employees come to have 'reasonable' expectations of receiving a benefit, an employment tribunal or court is likely to interpret it as a contractual entitlement.
- It is good practice to give reasonable notice of your intention to withdraw or alter any benefits, and to discuss your plans with employees.

4.4 Give yourself some **flexibility** on disciplinary rules and procedures.

- You must comply with statutory procedural requirements, and follow the Acas code.
- Make it plain you intend to be consistent in dealing with problems. But reserve the right to enter the discipline process at different stages, depending on the offence.
- Give some examples of how offences might be handled, but make it plain they are only examples.

5 Common issues

5.1 There are legal restrictions on **working hours**.

- There are detailed regulations regarding minimum daily rest periods, rest breaks, minimum weekly rest periods, maximum weekly hours, paid holidays and health assessments for night workers. These regulations are complex and you should take legal advice if you have particular concerns on these points. See **Working time regulations**.

5.2 Entitlement to **annual holiday** must be set out in the written statement.

- Employees are entitled to a minimum of four weeks' paid annual leave.

5.3 In general, you are not entitled to make **deductions** from an employee's pay packet unless you have a prior written arrangement or you are required to do so by law.

5.4 Dismissing an employee may give rise to a claim for **unfair dismissal** or breach of contract or both.

- Make sure the contract clearly states the grounds on which you can terminate the employee's employment without notice or with a payment in lieu of notice. Even in cases of gross misconduct,

you must comply with the statutory requirements and follow a fair procedure.

See **Dismissing employees** and **Employment tribunals**.

5.5 **Benefits** must be provided on a basis that does not discriminate, either directly or indirectly, between employees on the grounds of sex, race, disability, sexual orientation, religion or philosophical belief, or between part-time and full-time employees. This applies whether they are contractual or non-contractual.

- The terms and conditions on which they are provided should be spelt out clearly and unequivocally.
- Even discretionary payments can lead to a claim of unlawful discrimination. See **Remuneration and Discrimination**.

5.6 The employer normally owns the rights to any **intellectual property** created by an employee in the course of employment. This should be written into the contract.

5.7 **Confidentiality** clauses should be included in the contracts of directors and other senior employees with access to sensitive information.

- Employees are under an implied duty not to divulge trade secrets, both during employment and after it has ended. Set out clearly what you consider to be confidential in the written employment contract.

5.8 Preventing **ex-employees** from competing with you is difficult.

- To prevent an ex-employee from setting up in business as a competitor, express terms will need to be included in the contract. To be valid, any such restriction must only be for a specified period, and must only cover a specified geographical area.
- You may also want to include restrictions preventing ex-employees from targeting your customers or recruiting senior staff.
- If challenged, it will be up to you to prove that restrictions go no further than is necessary to protect your legitimate business interests. You will not be able to enforce any 'post-termination clauses' if you are in breach of contract.

Consider taking legal advice if you are planning to amend your employment contracts, or have any specific concerns that need to be covered.

Expert contributors

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Further help

There are other Directors' Briefing titles that can help you. These briefings are referred to in the text by name, such as **Dismissing employees** and **Employment tribunals**.

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