

**Berg Kaprow Lewis**

Employment law: the basics

Employment law is a complex area that is full of pitfalls. Getting it right means keeping in touch with developments, thinking out your policies and implementing them with care. Getting it wrong is easier, but could be extremely expensive.

In this briefing we identify the main elements of current employment law likely to affect small to medium-sized businesses. It is intended as an introduction and an aide-memoire.

The briefing covers:

- Recruitment.
- Terms and conditions.
- Employee rights.
- What to do when things go wrong.

1 Recruitment

1.1 Do not allow **prejudice** (conscious or unconscious) to affect your decisions.

- Discrimination on a number of grounds is illegal. For example race, sex, age, disability, sexual orientation, religion or philosophical belief (see 4).
- Focus only on the requirements of the job when hiring people.
- Maintain records, so you can explain why you chose one candidate over another. Remember that applicants can request to see any interview notes.

1.2 A **contract of employment** exists as soon as a candidate accepts your offer of a job, whether it is in writing or not (see Employment contracts).

- Make it clear at the interview that you are not offering a job at that stage.
- In any job-offer letter, explain that the contract will be governed by written terms and conditions to be provided later.
- A contract can be conditional on the potential employee providing evidence of suitability — such as adequate references. If the condition is not met and the employee has not yet started work, the contract does not take effect.

1.3 You must provide a **written statement** of terms and conditions within the first two months of employment.

- This must cover specified areas including pay, working hours, holiday entitlement, job title (or job description) and place of work.

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- Include a statement that you reserve the right to amend the job description.
- Reserve the right to change your employee's place of work. Otherwise,

Mothers and babies

A pregnant woman has a number of rights:

- A** Paid **time off** for ante-natal care.
- B** 26 weeks' ordinary **maternity leave**, 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 (EWC) or regardless of length of service if the baby is expected on or after 1 April 2007.
 - You must pay SMP for 26 weeks but most, if not all of this, may be deductible from employer's NI contributions.
 - For babies expected on or after 1 April 2007, the payment period for SMP is extended to 39 weeks.
 - A woman who is ineligible for SMP but has paid enough NI can claim maternity allowance from JobCentre Plus.
- D** The right to up to 26 weeks unpaid **additional maternity leave** once her ordinary maternity leave finishes, provided that she has 26 weeks service by the end of the 15th week before the EWC or the baby is due on or after 1 April 2007.
- E** The right to **return to work** up to one year after having the baby.
- F** The right to claim automatic **unfair dismissal** and **sex discrimination** if she is dismissed for any reason to do with the pregnancy or childbirth.
 - Dismissing somebody is automatically unfair and discriminatory if the dismissal is due to pregnancy, or any reason to do with the pregnancy or childbirth.
 - If she is dismissed, you must give written reasons for the dismissal without having to be asked.

See Rights for working parents and carers.

you would be in breach of contract if the business was relocated.

- Make sure the disciplinary procedure conforms to the new statutory minimum requirements (see **Discipline and grievance issues**). The grounds for which employees can be dismissed include gross misconduct (see **Dismissing employees**) and being off work for a given period through ill health (but see **Discrimination**). The contract may state that in cases of summary dismissal (dismissal without notice) no compensation will be payable except for an amount for accrued holiday under the working time regulations.

1.4 You cannot **change the terms** of the contract unilaterally.

- Altering fundamental terms and conditions without the employee's consent can be a breach of contract. Unless the change benefits the employee you could be sued for constructive dismissal, breach of contract, or both.

2 Hours, leave and pay

2.1 You must comply with **statutory requirements** on working hours and leave (see **Working time regulations**).

- Most employees are entitled to work a 48 hour maximum average working week. Each employee can voluntarily agree to disapply the rules. Pressuring workers to agree to disapply the limit (eg by making it clear that only 'hard workers' will be promoted) is a breach of the working time regulations.
- Any agreement must be in writing and signed by the worker.
- Employers may consult on and agree a system of annualised hours whereby the total number of hours worked do not exceed an average of 48 hours per week over a period of one year. This means that employees have to work their annual quota first before becoming entitled to overtime.
- There are detailed regulations on minimum rest periods.
- Employees are entitled to a minimum of four weeks' paid leave a year.
- Employees can also be entitled to maternity leave, paternity leave, adoption leave, parental leave and leave for family reasons. Parental leave and leave for family reasons are unpaid, and there are limits on how much can be taken and when (see **Rights for working parents and carers**).
- A parent or carer with a child under six or

“Apart from careful recruitment, probably the best methods of preventing legal disputes with your employees are training and regular performance appraisals.”
Liz Trumper,
management consultant

“Set up basic HR systems to save time and to help protect yourself against unwittingly breaking the law.”
Neil Thomson,
T>Learning and Development

a child with disabilities under 18 has the right to make a request for flexible working (see **The law on flexible working**). From April 2007, this is also likely to apply to employees who look after a dependant adult.

- Part-time workers have the right to be treated no less favourably than full-timers. So, for instance, part-timers are entitled to holiday on a pro rata basis.

2.2 Employees have the right to the **national minimum wage**. This stands at £5.35 an hour for staff aged 22 and over.

- There is a lower minimum wage of £4.45 for those aged 18 to 21, and employees aged 16 and 17 — excluding apprentices — must be paid at least £3.30 an hour.

2.3 Employer's National Insurance (NI) contributions are payable on employees' pay and taxable benefits (see **Tax and NI**).

2.4 You must deduct your **employees' tax and NI** contributions from their wages, and pay them to HM Revenue & Customs under PAYE (Pay As You Earn). See **Payroll**.

2.5 You also have to account for employees' tax and NI on most **benefits in kind**.

- Some benefits are free of tax and NI (see **Remuneration**).

2.6 In general, you may not make **deductions** from an employee's wage packet unless you are required by law to do so, are recovering an overpayment of wages or have the employee's written agreement beforehand.

3 Employee rights

Employees have some rights which are implied (but not spelt out) in their contracts (see **Employment contracts**). They also have rights which the contract cannot override.

3.1 Employers must not take any action which might undermine the relationship of '**trust and confidence**' with their employees.

- Employees have reciprocal obligations to serve the employer honestly and faithfully and to work with due diligence and care.

3.2 Employers must provide a secure, safe and healthy **working environment**.

3.3 Employees have the right to belong (or not to belong) to a **trade union**.

- Unions must be recognised (in businesses with 21 or more employees) where a specified percentage of the workforce votes for recognition.

3.4 Employees are entitled to a reasonable degree of **privacy**.

- In particular, the circumstances under which employers may monitor phone calls, emails or Internet use are regulated under the Data Protection Act and the Regulation of Investigatory Powers Act.

3.5 Employees are entitled to **protection against discrimination** (see 4).

3.6 Employees are entitled to **blow the whistle** on their employer's wrongdoings.

- If they are subsequently sacked or demoted, they can sue for full compensation — there is no monetary limit — for any losses incurred.

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

- This must show total gross pay, deductions and net pay.
- Deductions (eg pension contributions and union subscriptions) must be itemised.

3.8 All employees with more than one month's service are entitled to a **notice period** (see **Dismissing employees**).

- The statutory minimum is one week (after one month's service), rising to two weeks after two years, with a maximum of 12 weeks after 12 years.

3.9 Most employees are entitled to keep their jobs even if the **business changes hands**.

- In most cases, sackings would constitute unfair dismissal under the TUPE Regulations (see **Redundancy**).

3.10 Employees are also entitled to have **discipline and grievance** issues dealt with using the statutory (three-step) procedure.

4 Discrimination

4.1 Treating someone less favourably because of their race, sex, age, disability, pregnancy, sexual orientation, religion, philosophical belief, membership or non-membership of a trade union, marital status (including same sex civil partnerships) or part-time status is **illegal**.

■ 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.

“Discrimination is a tricky area. The danger zones include recruitment, promotion and dismissal. Discrimination case awards are unlimited.”
Julie Curran,
Clarke Wilmott
solicitors

- 4.2 Indirect discrimination** occurs if you impose a 'provision, criterion or practice' which members of one sex or one racial group are much less likely to be able to comply with, and which cannot be objectively justified.
- 4.3** If you treat someone less favourably because of their actions (or potential actions) in connection with discrimination proceedings, it could count as **victimisation**.
- 4.4** When dealing with **people with disabilities**, you must be prepared to make 'reasonable adjustments' to enable them to work.
- In some circumstances, you may be justified in refusing to make adjustments.
 - All businesses are now covered by this law.
- 4.5** As an employer, **you are responsible** not only for any discrimination which you practise, but also for any practised by your employees.
- Be prepared to investigate complaints thoroughly and impartially. If the complaint is justified, be ready to offer redress and change your policies.

5 Sickness

- 5.1** You must pay **statutory sick pay (SSP)** to qualifying employees for up to 28 weeks).
- Employees qualify from the fourth day of incapacity onwards.
 - They must earn more than the lower earnings limit of £84 a week.
 - They must be aged between 16 and 65.
 - You can withhold SSP under certain circumstances.
- See Sickness issues and SSP.
- 5.2** Many employers pay **higher levels** of sick pay.
- It is common to continue with full pay for a given period, often up to six months.
- 5.3** If an employee's continued or repeated absences are causing problems, in certain circumstances you can end their **employment**.
- The employee might take you to an employment tribunal, so you must be able to prove your actions were reasonable.

6 Disciplinary issues

- 6.1** Make sure you have **discipline and grievance** procedures in place which conform to statutory requirements (see **Discipline and grievance issues**).
- Basic information on disciplinary and grievance issues must be included in your employees' written terms and conditions.
 - Make sure employees know what offences merit disciplinary action, and apply the rules consistently.
 - Disciplinary actions should also follow the Acas Code of Practice.
- 6.2** If you have to **dismiss** an employee, you may have to prove that you had good cause and acted reasonably.
- Good cause might include persistent or gross misconduct, incompetence or a legal bar on that employee doing that job.
 - Inability to do the job because of frequent or prolonged absences due to sickness or injury might be grounds for dismissal.
 - Redundancy might also be grounds for dismissal. But the reason must be genuine and the selection fair. Redundancy processes and timescales are carefully prescribed, and it is essential to follow them (see **Redundancy**).
- 6.3** **Unlawful dismissal** could land you in front of an employment tribunal (see **Employment tribunals**).
- It is illegal to dismiss anyone on grounds of race, sex, disability, sexual orientation, pregnancy or age. There is no statutory upper limit on the amount of compensation that can be awarded in such cases.
 - You can have a normal retirement age (of at least 65) but must consider requests from employees who want to work after this age.
- 6.4** An employee can claim **unfair dismissal** if he or she has been dismissed for an 'unfair' reason or if unfair procedures are followed. In general, they must have one year's service and be under retirement age (but see **Dismissing employees**).
- If you have breached a fundamental term of the employment contract, or made it impossible for employees to do their job, they can sue for 'constructive' (unfair) dismissal.
 - Employees must raise a grievance first and you have 28 days to respond.
 - The basic award can be up to £9,300 and compensation for financial loss up to a maximum of £66,600.

Expert contributors

Thanks to **Chris Seaton** (Burgess Salmon solicitors, 0117 939 2000); **Ciaran Dunne** (Workplacelaw Network, 0870 777 8881); **Martin Warren** (Eversheds, 029 2047 1147).

Further help

There are other Directors' Briefing titles that can help you. These briefings are referred to in the text by name, such as **Discipline and grievance issues**.

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