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NEWSMATTERS

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WELCOME TO THE SECOND NEWSLETTER FOR 2023

Our newsletter is issued to you to ensure that you can be kept up to date with employment issues. We offer helpful hints on how to handle situations within the workplace, but never be afraid to give us a call for both guidance and support. All newsletters are on the website www.workmattershr.co.uk ensuring easy access to current information just click on the newsletter you wish to view.

This Issue the focus is on 'Back to Basics'

Reviewing your Contracts of Employment

Reference Requests by the Employee – do I have to comply?

Statutory Redundancy Pay – points to note

And what are the new rules coming in to protect workers on maternity leave?

Non Compete reforms – What are the implications for employers?

Employers' safeguarding duties to remote workers

We think you'll find the articles interesting. Please call us on 01442 870742 to discuss any of these articles and see how we can help you and your business more effectively in the field of Human Resources. Alternatively have a look at our website www.workmattershr.co.uk and email us from there or on info@workmattershr.co.uk.

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REVIEWING YOUR CONTRACTS OF EMPLOYMENT

Employment contracts are the building blocks of the employment relationship. However, they are often not given the care or attention they deserve. Even if a full review of your contracts is a step too far it is worth giving them a regular health check. Focusing on achieving the 'three Cs' – compliance, commerciality and contemporary tone – means your contracts will capture the essence of your culture, reduce your risk exposure, increase your flexibility and even save costs.

A contract that isn't compliant is a risk to your business in many ways. From tribunal claims to reputation, compliance is the cornerstone of every contract. Employment contracts missing key compliance requirements could leave you open to claims for up to four weeks' pay per employee.

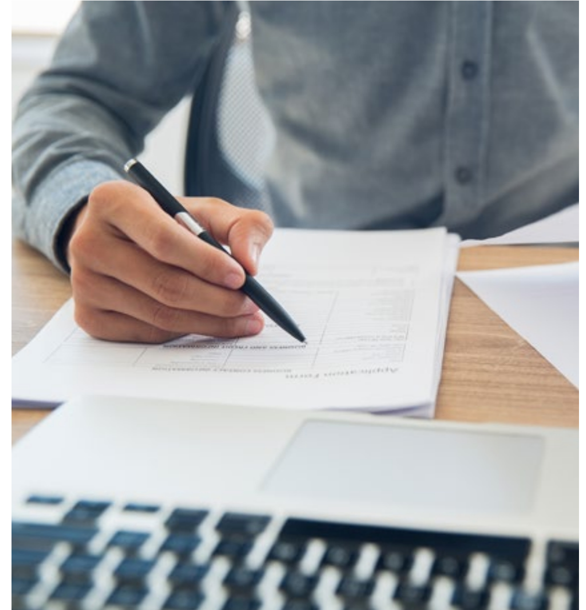
Here are our tips for some key areas to focus on:

- Do you have a signed contract on file for each employee? It would be difficult to hold an employee to terms contained in a document which you do not have any evidence of them agreeing to.
- Do your contracts comply with the requirements for written terms set out in section 1 Employment Rights Act 1996? These cover all the obvious areas such as pay, hours of work, place of work and holidays as well as less obvious areas such as trade union recognition and working outside the UK. More recently, they have been updated to also require the inclusion of details of training provision and paid leave.
- Do your contracts work for your business? Different businesses will have different areas of focus. For example, businesses with sales employees will want to consider including restrictive covenants to control the ability of leavers to take customers with them when they leave. Businesses with fluctuating demand will want to consider adding an express clause allowing them to place employees on short-time working or lay them off.
- Do your contracts give you control in key areas? Look for terms requiring employees to return company property; a right to suspend employees; a right to monitor employees and a right to deduct from wages for monies owed by the employee.
- Commerciality isn't just about saving cash, it's also about allowing yourself greater flexibility should you need it. Highlighted by the pandemic, including a layoff or short-time working clause can provide much-needed flexibility if you're experiencing difficult times and also helps avoid unnecessary redundancies. With a shift towards more remote working arrangements, you can also benefit from clauses that deal with flexibility and the circumstances when it might be withdrawn. The employee would usually need to expressly agree to any changes you decided you needed to carry out.

Work Matters (HR) Ltd Amberley, 18 Oakwood, Berkhamsted, Herts HP4 3NQ
T 01442 870742 M 07711 613153 E info@workmattershr.co.uk W www.workmattershr.co.uk

REFERENCE REQUESTS FOR AN EMPLOYEE – DO I HAVE TO COMPLY?

Employment references are generally sent direct to the prospective new employer of an ex-employee. They are not usually copied to the employee themselves.



If your ex-employee has asked for a copy then you can, if you wish, provide them with one. However, you are not obliged to do so. Employment references are regarded as personal data under the Data Protection Act 2018 and the General Data Protection Regulation (GDPR). Ordinarily, under subject access request rules, you are obliged to provide a copy of it on receipt of a request from the data subject (here, your ex-employee). But the Data Protection Act 2018 includes a specific exemption for confidential references given for the purposes of prospective or actual employment. This means that you do not have to provide a copy of the reference you have given to your ex-employee. The same exemption can also be used to refuse disclosure of references you have received from third parties.

The exemption applies to confidential references so it would be a good idea to mark any references you give as 'confidential' to avoid any argument that they are not caught by this exemption. Remember, when giving references, that they should be true and accurate.

The employee could obtain a copy of the reference by other means. The fact that you don't disclose it does not stop the new employer from disclosing it on request. It could also later become disclosable as part of any legal proceedings which the ex-employee might bring if they believe that they have suffered loss as a result of the reference.

STATUTORY REDUNDANCY PAY – POINTS TO NOTE?

The statutory redundancy ready reckoner (www.gov.uk/calculate-your-redundancy-pay) is very useful for employers and employees alike when calculating redundancy pay. There are, however, a few pointers that are worth considering when you are making your calculations:

- The statutory minimum notice period is relevant. This is the minimum amount of notice employees are entitled to receive as a matter of law. The employer generally has to give one week's notice for each year of employment up to a maximum of 12 weeks after 12 years.
- If you make an employee redundant and pay them in lieu of notice then they can add on what would have been their statutory minimum notice period to the length of service used to calculate their redundancy pay. If this period of time would mean that they would tip over to an additional year of employment then this needs to be taken into account when looking at the redundancy payment due.
- In a similar way, if you are paying in lieu of notice you also need to take account of any birthdays which might take place between the date of redundancy and the date when the employee's statutory notice entitlement would have expired. The relevant age to input into the redundancy calculator would be the higher age which would have been reached by the end of the statutory minimum notice period.
- If your employees do not have normal working hours so your calculation of a week's pay is based on a 12 week average, remember that any weeks where the employee wasn't paid must be discounted and you will need to look back further to put together 12 weeks to average.

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AND WHAT ARE THE NEW RULES COMING IN TO PROTECT WORKERS ON MATERNITY LEAVE?

The Protection from Redundancy (Pregnancy and Family Leave) Bill is moving forward at a time when businesses are understaffed, either as a result of difficulty hiring or staffing reductions, so it is understandable that allowing more flexibility across the board and providing some employees with additional entitlements may be difficult to accommodate.

“There has been a lot of inactivity on certain bills since many were included in the queen’s speech in 2019; however, they now seem to suddenly be moving at pace. It’s crucial that workplaces are flexible and family friendly so employers should get the relevant advice on how to successfully make the required adaptations for staff as they come into force,”

The bill, which is well on its way through the House of Lords, would make amendments to the Employment Rights Act 1996.

Under regulation 10 of the Maternity and Paternity Leave Regulations 1999, employers have an obligation to offer suitable alternative employment, where a vacancy exists, to a parent who is on maternity leave if their job is at risk of redundancy.

The protection currently provided is only good for the duration of maternity leave. But under the proposed new rules, the window of time during which a worker is exempt from being laid off would be extended to safeguard pregnant employees from the time they disclose their pregnancy to their employer until 18 months after the baby is born.

The secretary of state would have the authority to introduce provisions to extend the current protection from redundancy to periods during or after pregnancy or after periods of maternity, adoption or shared parental leave if the bill were to pass in its current form.

What employers need to do?

While it is unclear when the new rights will come into force, employers may want to anticipate them by providing such protection from redundancy during and after an individual has taken these types of leave; for example, for six months after the employee returned from leave. “A woman on maternity leave whose job is being made redundant is entitled to be offered alternative employment with their employer or an associated employer, in any suitable vacancy available that offers work appropriate for her and terms not substantially worse than her previous job,”.

Under the current rules, “employers are obliged to offer them a suitable alternative vacancy where one exists in priority to anyone else who is provisionally selected for redundancy”.

“The government has said that protection will start from the point at which the employee tells their employer that they are pregnant. Therefore, a woman who takes the maximum maternity leave of 52 weeks will get over a year’s additional protection,”.

This will increase the number of people who are “eligible” to receive priority in a redundancy situation, she explains, which “employers may find challenging to manage, especially if more than one person included in the provisional selection has the right to be offered an alternative role available”.

“That might occur where two women are pregnant or on maternity leave and one man is on shared parental leave. The employer will need to decide which of these three people it offers the alternative job. It will need to act fairly,”.

One option is to conduct a competitive interview and choose the top candidate out of the three, while a second option is to offer the position to the person with the highest redundancy pooling score.

NON-COMPETE REFORMS: WHAT ARE THE IMPLICATIONS FOR EMPLOYERS?

The Government has announced significant employment law reforms. The measures are the first in a series of post-Brexit regulatory changes as part of its smarter regulation agenda.

When parliamentary time allows, the government intends to legislate to limit the length of non-compete clauses to three months, providing employees with more flexibility to join a competitor or start up a rival business after they have left a job.

This reform would require significant changes to employment contracts, confidentiality agreements and staff handbooks. General market practice is often for senior and highly valuable employees to be restricted from competing with their former employer for anywhere between six and 12 months, post termination of employment.

Non-compete clauses of 12 months (and occasionally more) have been found by the courts to be enforceable where they go no further than necessary to protect a legitimate business interest, such as workforce stability and goodwill. They are typically used where standard confidentiality and non-solicitation obligations would not provide sufficient protection to a business given the value of the knowledge and relationships of the individual in question. Investors in UK companies expect senior and valuable staff to be prevented from misusing confidential information and customer connections to protect the value of their investment.

The announcement comes two and a half years after the Government consulted on measures to reform post-termination non-compete clauses in contracts of employment.

The Government says the proposed reform will give up to five million UK workers enhanced freedom to change jobs, with a larger pool of talent operating in the labour market. The Government also believes that this change will boost the wider UK economy, by supporting employers to grow their businesses, widening the talent pool and improving the quality of candidates they can hire. At present, the evidence for this is unclear.

Other methods of restraining departing employees will remain available to employers, including using paid notice periods, garden leave or non-solicitation and non-dealing restrictions.

The Government’ s announcement suggests that this legislation will apply to employees, and it is currently unclear whether non-compete provisions for LLP members and employees who are also shareholders or stock option holders (and so often restricted under separate corporate agreements) would also be captured.

It is also not clear whether these reforms will have retrospective effect, and if so whether longer non-compete clauses will be automatically deemed to be limited to three months, or will be considered wholly unenforceable unless amended in line with the planned new legislation.

The intended reform falls short of other proposed changes being seen around the world; for example, the Federal Trade Commission’ s in the US to ban non-compete clauses between employers and workers altogether, which was one of the potential reforms on which the UK Government had consulted. It is unclear from the policy paper when we might expect these changes to come into effect, but the Government intends to legislate ‘when parliamentary time allows’ .

This reform will be the first time that the UK legislates on this topic (as there is currently no applicable EU or UK legislation that deals with this legal regime). It will be a significant risk issue for organisations that currently rely on these restrictions to protect their business interests.

EMPLOYERS' SAFEGUARDING DUTIES TO REMOTE WORKERS

What responsibilities does an organisation have when it comes to protecting employees' health, safety and wellbeing when they work from home?

It's been three years since we first heard the 'stay at home, protect the NHS' mantra from the Government, and post lockdown has seen the continuance of employees working from home. Now, perhaps, is a good time for organisations to carry out some housekeeping. A review of working from home policies and practices is now prudent to ensure, as far as reasonably practicable, that staff are kept safe and well while working remotely.

A duty of care is the core of the employment relationship. Businesses are legally obliged to ensure a safe place of work. When working from home, this will, of course, include the employee's domestic premises.

Employers are caught by both statutory law and common law health and safety obligations. Such obligations are far reaching and apply to their employees when working at home. The logistics of this can be resource demanding, but, nonetheless, are a reality. HR teams can do a lot in supporting the company in delivering and superintending a 'safe place of work', even if remote.

The Health and Safety at Work etc Act 1974 is clear: an employer is responsible for an employee's welfare, health and safety. This includes "the provision and maintenance of a working environment for employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work".

Risk assessments

To appraise risk, a suitable and sufficient risk assessment should be carried out of all those work activities undertaken by the home worker, including display screen equipment, first aid and fire safety. This is a strict duty on employers and the cornerstone of health and safety management. In fact, prosecution of health and safety cases often involves a failure to carry out a suitable and sufficient risk assessment.

Acas usefully advocates that businesses that are unable to carry out a full risk assessment provide employees with information on working safely at home, and could require them to carry out a self assessment of their workspace and equipment. A plain policy to guide this process may prove invaluable.

At common law, employers have a duty to take reasonable care of the health and safety of their employees and others whom it might be reasonably foreseen could be harmed because of their activities. Organisations must provide and maintain a safe place of work, a safe system of work and safe plant and machinery. And they can be vicariously liable for the negligent acts of their employees while working in the course of their employment.

Health and wellbeing

Acas says employers can help to reduce stress on employees by: making sure they know what is expected when working from home; helping them feel trusted and supported; agreeing regular contact; helping them avoid feeling left out and lonely; letting them know how to report IT issues; and explaining how to get help with their mental health.

Government guidance recommends the encouragement towards the creation of space, time and opportunities for connection, in addition to the maintenance of effective channels of virtual communication. Initiatives to keep in touch and maintain communication channels are imperative. Isolation should be broken down as much as possible. Teams and colleagues should be encouraged to maintain contact and have regular catch ups.

Employers are responsible for the equipment they supply and all normal safeguards should be maintained. Any domestic supply of electricity, including electrical sockets, remains the employee's responsibility and they ought to be reminded of this.

All accidents or injuries at work must be reported to the employer. Moreover, Acas urges businesses to look out for signs of domestic abuse, respond appropriately, support any employee experiencing domestic abuse and keep a record of incidents, reports and any action taken. Again, clear policy will assist here.

Overall, due diligence on the employer's part is key.

Thank you for taking the time to read our Newsletter which I hope you found informative An e-newsletter will be sent on a regular basis to help keep you up to date with current legislation changes, as well as giving you some helpful hints and tips to help your business run smoothly.

In the meantime please contact us if we can be of service to you or your company.

Have an enjoyable quarter and we look forward to issuing you with our next newsletter in September 2023.

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