

Brabners

Community and Voluntary Services Cheshire East
Trustee Network Event

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Susan McKenzie | Solicitor

Introduction

Contact

Susan McKenzie

Solicitor

DD: 0151 600 3157

Email: susan.mckenzie@brabners.com



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Introduction

Agenda

- What basic documentation should I have in place when I employ staff?
- What are the issues we need to be alive to when engaging volunteers?
- "The contract says they are self-employed, we are safe from Employment Tribunal claims, aren't we?"
- Sessional workers and zero hours contracts- key issues
- You can sack anybody with less than two years' service, can't you?

What basic documentation should I have in place when I employ staff?

Written statement of particulars of employment – obligations on employers

- Certain minimum information must be given in writing
- Set out in Section 1 Employment Rights Act 1996 (ERA)
- Principal statement
- Supplementary statement
- Readily accessible document referred to in s 1 statement.

New starter documentation

- Offer letter
- Written contract
- Staff handbook
- Other policies/ agreements

Offer letter

- Not part of contract
- Conditional
- No detail of terms
- Withdrawal of offer

Contract of Employment

- Satisfy s.1 ERA 1996
- Fit contract to requirements of the job
- Refer to Staff Handbook
- Refer to other policies and agreements

Staff Handbook

- Non-contractual / contractual
- Effective management tool
- Provides certainty
- Guidance for employees
- Helps in any Tribunal claim
- Review at least once a year
- Issue to all employees

Next steps Staff Handbook- Bear Traps/ Tips

- Keep up to date
- Interaction with your structure- investigate/ disciplinary hearing/ appeal
- Flexibility- don't be overly prescriptive
- Employee awareness- e.g. harassment/ social media

Written Statement of Particulars of “Employment”

New requirements from 6 April 2020

- Who does it impact?
 - not just employees – all workers
 - anyone starting work on/ after 6 April 2020 (note, transitional provisions)
- Changes:
 - single statement (save for limited information)
 - on or before first day of employment
 - additional information
 - no minimum service required for written particulars

Written Statement of Particulars of “Employment”

New requirements from 6 April 2020

What additional information needs to be included?

- days of the week to be worked;
- any paid leave the worker is entitled to;
- details of any benefits provided by the employer;
- whether hours variable;
- probationary period; and
- any training provided by the employer which the worker is required to complete and any other required training in respect of which the employer will not bear the cost.

Written Statement of Particulars of “Employment”

Consequences of non-compliance

- Complaint to Employment Tribunal by employee (and worker who starts work on / after 6 April 2020):
 - failure to provide statement
 - inaccurate statement
 - incomplete statement
- Remedy:
 - Declaration;
 - Compensation – only if another successful substantive claim brought.

Written Statement of Particulars of “Employment”

Next steps

- Review current practice for issuing written terms
- Review contractual documentation
- Understand who is an employee or worker

What are the issues we need to be alive to when engaging volunteers?

Volunteers

Background

- Volunteering is a useful tool
- Need to properly define relationship between individual and charity
- Employment status- risk of being an employee or worker

Volunteers

Top tips

- Consider having a written volunteer agreement
- Don't make payments that could be viewed as wages
- Volunteers should not receive any benefits in kind
- Differentiate between paid staff and volunteers

Volunteers

Rights/ Obligations

- Volunteers don't have employment rights
- However, still treat consistently with respect and fairness
- Deal with complaints formally (separate volunteer specific policy)
- Comply with Data Protection and Health and Safety obligations

Volunteers

Rights/ Obligations

- Potential claims if get it wrong:
 - employment rights
 - workers rights, Working Time Regulations (WTR) etc.
 - National Minimum/ Living Wage
 - discrimination claims

“The contract says they are self-employed, we are safe from Employment Tribunal claims”

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- Tribunals and HMRC will look past labels and will instead focus on the day to day realities of the relationship
- No single test is conclusive

Three categories

- Employee
- Worker
- Self Employed Contractor

Why is status important?

- Implied obligations between employer and employee
- Some core legal protections only apply to employees
- ACAS Code
- TUPE
- Tax
- Health and Safety
- GDPR

Who is an employee?

- Section 230(1) Employment Rights Act 1996 defines an **employee** as:

"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".

- Section 230(2) Employment Rights Act 1996 defines a **contract of employment** as:

"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

Who is a worker?

Section 230(3) Employment Rights Act 1996 defines a **worker** as:

“an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

*(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to **do or perform personally** any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*

and any reference to a worker’s contract shall be construed accordingly.”

Who is a worker?

- What does this definition mean?
 - workers are not entitled to the whole range of employment rights
 - they are nevertheless not fully "independent"
 - workers enjoy some protection, e.g.
 - national minimum/ living wage
 - annual leave
 - protection from discrimination

Who is a self employed contractor?

- Anyone who is neither an employee, nor a worker, will be self-employed for employment law purposes.

Factors indicating employment status

- Mutual obligations
- Personal service
- Control
- Other activities
- Nature and length of the engagement
- Pay and benefits
- Integration
- Facilities and equipment
- Financial risk
- Taxation
- Description by the parties

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Sessional workers and zero hours contracts- key issues

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Definitions?

- Sessional/ casual/ seasonal work contracts:
 - an individual supplies labour/ services to another under an irregular or informal working arrangement
- Zero hours contracts:
 - contracts under which an employer offers no guaranteed hours to a worker
 - a type of casual worker contract

Sessional workers and zero hours contracts- key issues

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 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to **do or perform personally** any work or services **for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;***
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Sessional workers and zero hours contracts- key issues

Who is a “worker”?

- Even if an individual working under a zero hours or casual/ sessional worker contract is identified as an independent contractor they will not be a self employed contractor if they fulfil the worker or employee definition
- Tribunals will look at:
 - the definitions of worker and employee
 - the contract; and
 - the reality of the circumstances
- Employment status can change over time

Sessional workers and zero hours contracts- key issues

Working time and holidays

- 48 hour limit working week
- Daily and weekly rest periods
- 5.6 weeks' annual leave (holiday):
 - entitlement
 - pay

Sessional workers and zero hours contracts- key issues

Sick pay and Pensions

- If worker is a “Qualifying employee” could be entitled to SSP
- Eligibility for pension depends upon rules of relevant scheme.
- Auto- enrolment- complex eligibility requirements

“You can sack anybody with less than two years’ service”

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Why do employers need to be alive to this?

- Easy to get caught out
- A number of dismissal-related claims can be brought without qualifying service:
 - some cases of automatically unfair dismissal
 - discrimination

“You can sack anybody with less than two years’ service”

No qualifying period

- Some cases of automatically unfair dismissal, e.g.
 - for making a protected disclosure (whistleblowing) *
 - for reasons connected with pregnancy, childbirth, maternity, paternity, adoption etc.
 - for a health and safety reason *
 - for asserting a statutory right
 - for taking part in industrial action

* also no cap on compensation

“You can sack anybody with less than two years’ service”

Discrimination

- Dismissal as a result of one of the 9 protected characteristics
(*Equality Act 2010*)
- The cost of getting it wrong?
 - no cap on compensation
 - injury to feelings
 - individual liability

“You can sack anybody with less than two years’ service”

The cost of getting it wrong

- Management time
- Poor employee relations
- Legal costs
- Awards
- Reputational damage

Thank you

Any questions?

Want more?

Employment Law Update – What's happening in 2020?

- Manchester– 3 March 2020, 08:30 - 10:00
- Liverpool – 5 March 2020, 08:30 - 10:00
- Preston– 11 March 2020, 08:30 - 10:00

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Contact Us

Liverpool Office

Horton House
Exchange Flags
Liverpool L2 3YL

T: +44 (0)151 600 3000

Manchester Office

55 King Street
Manchester
M2 4LQ

T: +44 (0)161 836 8800

Preston Office

7-8 Chapel Street
Preston
PR1 8AN

T: +44 (0)1772 823 921

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