



Beginning the Employment Relationship

Winckworth
Sherwood



Winckworth Sherwood Employment Guide

This guide is the first of a three part series of our whistle-stop tour of UK employment law outlining some of the key concepts in UK employment law and what they mean practically for UK employers. We hope that growing businesses and multinational organisations setting up in the UK, in particular, will find our guides useful.

This guide looks at some of the key issues and concepts when taking on staff covering employment status, the recruitment process and putting a contract of employment in place.

While we refer to the UK throughout this guide for ease, there are in fact different legal systems in the UK. This guide concerns English employment law. Please note that this guide is not a comprehensive summary of all legal requirements and guidance; rather it highlights some of the key legal areas UK employers should be aware of. Specific legal advice should be taken about particular circumstances. The information is correct as of May 2023.

If you would like to discuss anything raised in this guide, our experienced employment team is here to help. Their contact details can be found at the end of this guide.

For more information, please visit: [wslaw.co.uk/employment](https://www.wslaw.co.uk/employment).

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One of the first questions employers need to consider is on what basis they employ or engage staff. Individuals working in the UK are broadly classified into three categories:

1. Employees
2. Workers
3. Self-employed/Independent contractors

A person's employment status dictates their rights and entitlements and also spells out what their employer's responsibilities are towards them.

This table sets out the differences between some of the employment rights of employees, workers and independent contractors.

RIGHTS	EMPLOYEE	WORKER	SELF EMPLOYED
Unfair Dismissal	✓	✗	✗
Discrimination	✓	✓	✓
Statutory Sick Pay	✓	✓	✗
Holiday Pay	✓	✓	✗
National Minimum Wage	✓	✓	✗
Redundancy Pay	✓	✗	✗
Statutory Minimum Notice Periods on Termination	✓	✗	✗

Employment Status

EMPLOYEES

The majority of individuals working in the UK are employees.

An “employee” is someone who works under an employment contract. For an individual to be considered an employee, there needs to be:

- 1 Personal Service – the individual is required to personally perform the work for the employer, i.e. they cannot provide a substitute or subcontract their service obligations.
- 2 Mutuality of Obligation – the employer is obliged to provide work to the individual and the individual is obliged to accept that work and perform the work offered.
- 3 Control – the employer has ultimate authority over the individual in the performance of his or her work. For example, the employer would be able to:
 - direct how, when and where the work is done
 - monitor the individual’s attendance
 - determine when holiday is to be taken
 - be in charge of disciplining the individual.

WORKERS

The worker category is an intermediate class of protected worker, who on the one hand fails to reach the high threshold necessary to qualify as an employee but on the other hand cannot be regarded as carrying on a business in their own right.

A “worker” is someone who, like an employee, has to personally perform work for the employer. However, there is no obligation on the employer to provide work to the individual and if work is offered to the individual, they are not obliged to accept the work offered by the employer.

Someone is likely to be a worker if they occasionally do work for the employer i.e. they are engaged on a “casual” or “zero hours” basis.

For example, a retail employer may have a pool of workers who it can call on when work becomes available, but there is no obligation on the worker to accept it.

SELF-EMPLOYED/INDEPENDENT CONTRACTORS



Individuals who are carrying on business genuinely on their own account are self-employed. This means that they are responsible for accounting for their own tax to the UK tax authority, His Majesty's Revenue and Customs (HMRC); they can appoint a substitute to undertake the work in their place; they can decide when and how they work and they are not under the direct supervision of the organisation.

AGENCY STAFF

One way that employees and workers might be engaged is through agency working. Here an employment agency provides agency workers to an employer. Once an agency worker performs the same role (be this on one or more assignments) for the same employer for 12 weeks, the agency worker will have all the basic rights of employment enjoyed by an employee or worker who has been recruited directly by the employer.



The Recruitment Process

TOP TIPS

Our top tips for a recruitment process are:

- 1 Ensure that all staff involved in the recruitment process have had equal opportunities training.
- 2 Compile a job description and ensure that all requirements can be objectively justified by reference to the job in question and do not indirectly discriminate against any groups of employees, for example, consider whether any requirements for dress are necessary for the job in question.
- 3 Ensure that the job advertisement does not discriminate, for example, by advertising for a waitress – instead advertise for “waiting staff” or “waiters and waitresses”.
- 4 For the shortlisting and interview process, mark all candidates consistently against selection criteria based on the job description. Reasonable adjustments may need to be made to the interview process for any candidates who have a disability. Candidates should be asked the same questions during interview and care should be taken not to ask any questions concerning their personal life (except in limited circumstances).
- 5 Keep a paper trail throughout the process.

RIGHT TO WORK IN THE UK

An employer needs to check that all individuals it plans to employ have the right to work in the UK. If it fails to do so it can be liable to pay a civil penalty which is currently up to £20,000 for each employee who does not have the right to work in the UK. Where an employer knowingly employs someone who does not have the right to work in the UK, it commits a criminal offence.

The checks an employer must undertake depend on the nationality and right to work the person has. In line with Home Office guidance, the employer has to satisfy itself that:

- The person presenting the documents matches the details provided and that documents are valid and genuine
- Those subject to immigration control provide evidence of their immigration status, a share code and permission to submit an employee check through the Home Office’s Employer Checking Service
- Those subject to immigration control who cannot provide a share code as they have a pending application, appeal or administrative review provide evidence of this and their permission to submit an employee check through the Home Office’s Employer Checking Service
- The documents match up with the job application

The employer must take copies of the documents, make a note of when these checks were made and keep these for two years after the employee has left employment. If the employee is subject to immigration control, they must not allow the employee to commence work until they receive confirmation from the Home Office of their right to work.

Data Protection

Employers must comply with data protection legislation which is designed to safeguard the collection, storage, use, destruction and transfer of employee personal data held by the employer. This duty applies before the employment relationship has actually begun (for example, in relation to a job applicant's CV and job application form), as well as during the employment relationship (for example, salary information, appraisals and any monitoring of employees' e-mails) and after it has ended (for example, in relation to providing a reference for a former employee).

Personal data of a particular individual is data that, directly or indirectly, can be used to identify that individual, for example, entry card information. Data protection laws cover electronic personal data as well as manual records containing personal data that are stored in a relevant filing system, for example, an employee's HR file.

The data protection legislation outlines **six principles** that all employers must adhere to in relation to personal data, namely data must be:

- 1 Processed lawfully, fairly and in a transparent manner.
- 2 Collected only for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes.
- 3 Adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed.
- 4 Accurate and, where necessary, kept up to date.
- 5 Kept only as long as necessary for the purposes that the employer has told the employee about.
- 6 Kept securely.

Employers are required to provide privacy notices to all employees and job applicants setting out a number of points including:

- What personal data is collected
- The purposes of, and the legal basis for, processing the employees' personal data
- Who the personal data is shared with
- The retention periods which apply
- Whether there will be any international transfers of the data
- The employees' rights as data subjects including their right to lodge a complaint with the Information Commissioner's Office (the UK regulator)

Employees have a number of rights under the data protection legislation such as the right to access their personal data and the right to correct and update the personal data held by their employer.

Contracts with third party data processors, such as benefits providers and payroll administrators, need to be compliant with data protection laws.

Breach of data protection laws by an

employer can lead to it incurring heavy fines (up to the greater of £17.5 million or 4% of total worldwide annual turnover) as well as facing reputational damage.



Contract of Employment

UK law requires that employees and workers receive a written statement of terms on or before the first day of employment. This does not include any terms relating to pensions, training entitlement provided by the employer, collective agreements and certain information about disciplinary and grievance procedures, which may be provided within the first two months of employment.

This applies to all contracts, including short-term arrangements and those on a "zero hours" basis.

Minimum Terms of Employment

The majority of written terms have to be provided in one single document including matters such as the employee's start date, job title, salary, working hours, place of work and holiday entitlement. Exceptions to the single document rule are particulars relating to incapacity and sick pay, pensions, any training entitlement provided by the employer and notice periods, which can be provided in other documents provided they are reasonably accessible and those documents are referred to in the principal statement itself.

In addition to the minimum terms required by law to be included in the contract of employment, it is common practice to include other terms in the written contract, such as a probationary period to test out an employee's work, post-termination restrictive covenants to protect the employer's interests, and any other terms which have been agreed between the parties, for example, bonus arrangements or additional benefits.

We recommend legal advice is taken regarding the drafting of the contract of employment since a comprehensive and well drafted contract ensures both parties are clear about their respective obligations, which avoids disputes later in the relationship.

Employees are legally entitled, subject to certain conditions, to a number of key minimum benefits including those outlined below:

WAGES



A national minimum wage (NMW) applies for all workers over compulsory school leaving age. From April 2023 the National living wage applies to workers aged 23 and over and the standard adult rate applies to workers aged 21 to 22. The current NMW rates are:

- £10.42 for workers aged 23 and over
- £10.18 for workers aged 21-22
- £7.49 for workers aged 18-20
- £5.28 for workers aged 16-17
- £5.28 for apprentices

Employers must give employees itemised pay slips at or before the time at which wages are paid.

They must, among other things, give details of the gross and net wages and the amount and purpose of any deductions from those sums.

Employers can only make deductions from wages if the deduction is required by statute (for example, deductions for income tax); the employee has expressly authorised the deduction; or the deduction is provided for by a term of the employment contract.

HOURS OF WORK



Workers must not work more than an average of 48 hours per week unless they have agreed an appropriate opt-out from this restriction.

All workers must be given the following rest periods unless they are exempt, in which case compensatory rest will usually have to be given:

- 11 hours' uninterrupted rest per day
- 24 hours' uninterrupted rest per week (or 48 hours' uninterrupted rest per fortnight)
- a rest break of 20 minutes when working more than six hours per day

There are different obligations in relation to night-time workers, young workers and certain "special case" workers; (a limited group of workers such as the armed services and police).

HOLIDAY



Full-time workers are entitled to a minimum of 28 days' holiday a year (inclusive of the eight Public and Bank Holidays in the UK). For part-time workers the amount of holiday should be pro-rated.

Employers sometimes provide more generous holiday entitlement and also request that employees take their holiday at specified times, for example, if their office closes over the Christmas period.

Employees cannot be paid in lieu of untaken statutory holiday except on termination of employment.

SICK PAY



Employers are required to pay statutory sick pay (SSP) to workers who are off work due to illness or injury, after the third day of absence (subject to certain qualifications).

NOTICE PERIODS



There are statutory minimum notice provisions for terminating an employee's contract of employment. These require:

- After one month's employment an employee must give one week's notice
- After one month's employment an employer must give one week's notice during the first two years of employment, increasing by one week per year of service up to a maximum of 12 weeks' notice after 12 years' employment

There is no obligation to agree notice periods in excess of the statutory minimum notice periods, although in certain sectors it is typical for the employer and the employee to agree longer periods of notice.

PENSIONS



All UK employers must automatically enrol eligible employees (called “jobholders”) into a pension scheme which meets certain specific standards.

Jobholders are individuals who are:

- Working in Great Britain under an employment contract
- Not already a member of their employer’s pension scheme
- Over the age of 22
- Under the state pension age
- Earning at least £10,000 per year

The minimum pension contributions for jobholders are:

Employer Minimum Contribution	Staff Contribution	Total Minimum Contribution
3%	5%	8%

A jobholder can opt out of the pension scheme in which they have been auto-enrolled.

When starting the employment relationship, care needs to be taken to ensure that employees are provided with at least the minimum statutory terms.

Our Team



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Louise is a trusted advisor to UK businesses advising on all aspects of employment law from drafting contracts of employment to defending Tribunal claims. She gets to know her client, listens to them and uses her experience and commercial nous to create solutions to meet her client's needs. Louise values all of her client relationships, providing prompt, collaborative and pragmatic advice.



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Beth advises both employees and employers on a breadth of employment law matters. Her work involves dealing with a mix of contentious and non-contentious issues, including Employment Tribunal claims and independent workplace investigations. Beth routinely works with clients in relation to strategic advice and negotiations to secure successful settlements in departure situations across a wide range of sectors. She also advises many corporate employers on matters including contracts, day-to day HR queries, whistleblowing, investigations and Data Protection issues (including privacy notices and data sharing agreements).



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Suliat provides assistance to the Employment Department in both continuous and non-contentious matters. After completing her LPC, she gained a vast amount of experience in employment litigation and supporting employers with Tribunal claims.

“Excellent expertise, commercialism and cross border coordination on complex employment matters.”

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