

Starting out in business

A guide to employment law



Introduction

Starting a business can be daunting. There are so many things to keep on top of – accounts, marketing, IT and administration to name but a few. And that's before you factor in the day job! So it's not surprising that you may have decided to recruit someone to help you with some of these tasks.

In this guide, we have covered some of the key matters for you to be aware of when it comes to staffing your business.



**The
recruitment
process**

**Policies and
procedures**

**Termination:
Dismissal and
Resignations**

Documentation

**Statutory
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**How can
Wilson Browne
help you?**

The recruitment process

Employment Status

For employment law purposes, there are three statuses to be aware of:



Workers – a worker is any individual who works for an employer, whether under a contract of employment, or any other contract and undertakes to do personally any work or services, but does not qualify as an employee. This status has received a lot of attention in recent years given the emergence of the gig economy. Taxi drivers and couriers have been the focus of many ‘worker’ status cases.



Self-employed contractors – the self-employed do not have a contract of employment. The self-employed are more likely to be contracted to provide services over a certain period of time for a fee and be in business in their own right. They will also pay their own tax and National Insurance Contributions.



Employees – someone is an employee working under a contract of employment. This typically applies to those working set hours and days for which they receive a salary.

The first question you therefore need to answer is what status is right for your recruitment purposes? For example, do you need a casual worker who can refuse work if they don't fancy it that day or do you need someone who will be obliged to accept work when it's offered?

It's important that the status is correctly identified at the outset for a variety of reasons. Not least the different rights that are afforded to each. For example, the right not to be unfairly dismissed only applies to employees whereas minimum wage and holiday rights apply to both workers and employees.

Although the label applied to the relationship is important, it is not determinative of the status. Just because someone is labelled a “self-employed contractor” and treated as such for tax purposes it does not mean they are a self-employed contractor for employment law purposes! A number of tests have been developed for the purpose of identifying someone's correct status in law.

Ultimately, the decision will depend on what is happening in practice.

Current Vacancies

Paralegals – Kettering,

wilson browne

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NEXT FAMILY LAW
STAR?

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COULD YOU BE OUR
NEXT COMMERCIAL
LAW STAR?

Current Vacancies

The recruitment process continued

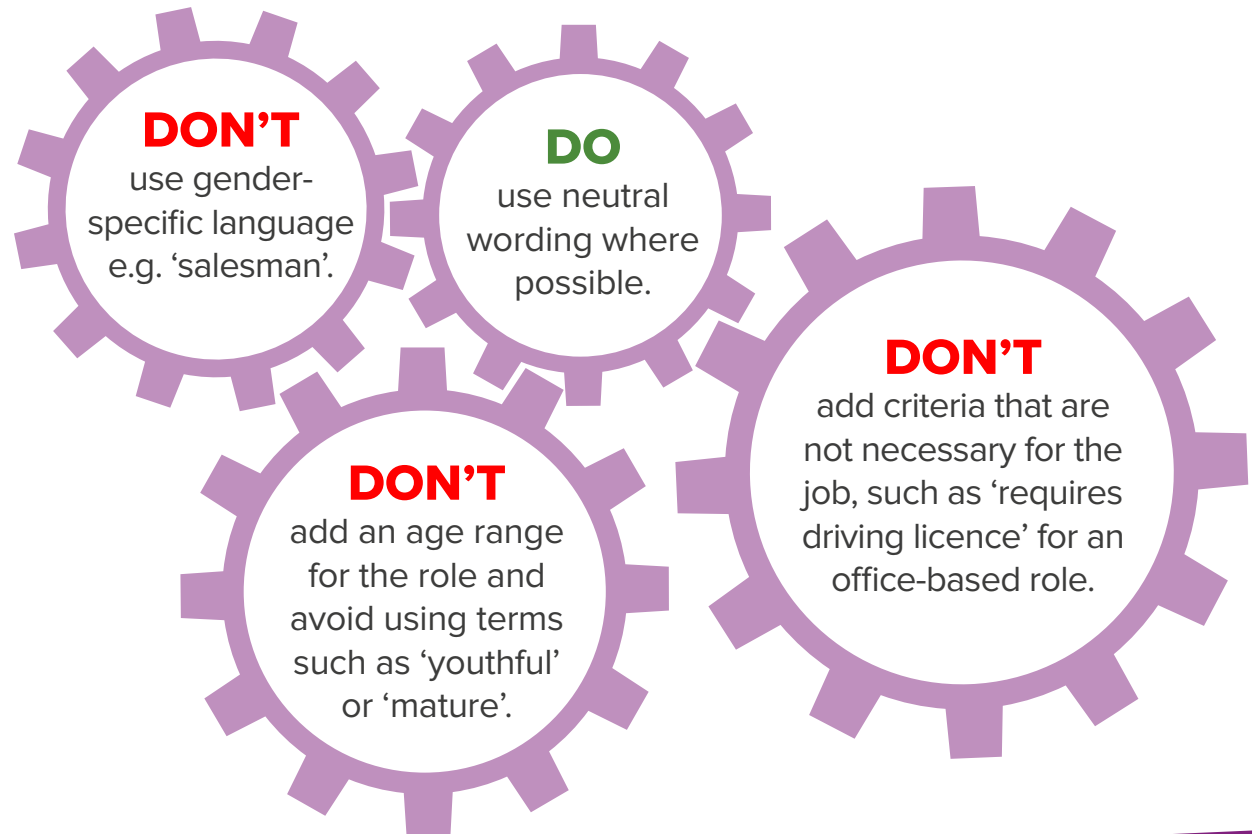
Advertisements

A key consideration for any advertisement is to ensure it is not discriminatory.

Anti-discrimination laws are not dependent on any length of service – they apply even before an employment relationship arises.

There are a number of 'do's' and 'don'ts' which can help to avoid inadvertent discrimination when advertising a vacancy, including those shown below:

It often makes sense to ask a person familiar with employment law to check your job adverts before publishing.



The recruitment process continued

Interviews

As with advertising, there are key 'do's' and 'don'ts' to keep in mind when interviewing candidates:

- 1. Don't ask discriminatory questions:** Organisations are prohibited from discriminating against job applicants on the basis of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, or sexual orientation. Therefore, you should avoid asking questions that could be perceived as discriminatory, such as questions about a candidate's age, marital status, or plans to have children.
- 2. Don't ask about health or disability:** Questions about an applicant's health or disability are generally not allowed, except in limited circumstances.
- 3. Do focus on job-related qualifications:** When interviewing candidates, make sure to focus on the job-related qualifications that are required for the position. Questions should be designed to assess a candidate's ability to perform the duties of the job and should not delve into personal information or characteristics that are not relevant to the role.
- 4. Do offer reasonable accommodations:** If a candidate has a disability and requires reasonable accommodations for the interview process an organisation has a duty to make them. This may include making adjustments to the interview format, providing additional time or breaks, or offering assistive technology.
- 5. Do be transparent and clear when asking questions at the interview:** Make sure interview questions are transparent and clear. Candidates should have a clear understanding of the job requirements and what is expected of them, as well as any relevant policies or procedures that apply to the position.
- 6. Do keep records:** Organisations should keep records of their recruitment and selection process - this includes interview questions and notes. This can help to demonstrate that the process was fair and transparent, which can be useful in the event of a legal challenge.
- 7. Do provide feedback:** Regardless of whether a candidate is successful or not, it is important to provide them with feedback on their interview performance. This can help them to improve their skills and can also help to maintain a positive reputation for your organisation.





The recruitment process continued

The Job Offer

Key things to keep in mind when providing a job offer to a candidate include:

1. **Confirm in writing:** confirm the job offer and key terms (start date, job title, place of work and salary) in writing. Normally, the individual would be issued with a separate contract to sign on or before their first day. However, if the job offer letter is to act as the entire contract (i.e. no separate contract), the letter must include all terms that organisations are required, by law, as well as any contractual policies or procedures. Either way, the letter should make it clear whether it comprises the contract or whether a separate contract will be issued.
2. **Unconditional job offers:** if a job offer is made unconditionally, once accepted, it is legally binding on both sides: any withdrawal of that offer must be in accordance with the terms of the contract, failing which the individual can take action for breach of contract. If the individual changes their mind after accepting an unconditional job offer, you may also have a cause of action.
3. **Conditional job offers:** most offers are made subject to certain conditions being met, typically background checks, references, or qualifications. Any conditions must be clearly stated in the offer letter and if not met, the offer may be revoked. If the conditions are met, any subsequent change of mind (by either party) can lead to claims.
4. **Criminal background checks:** The Disclosure and Barring Service (DBS) carries out these checks. Other organisations may also wish to carry out DBS checks – however, their ability to require these checks is severely limited due to data protection laws, The Rehabilitation of Offenders Act 1974 and the DBS checking regime. If DBS checks are done, any information about the alleged commission/commission of a criminal offence can only be processed if there is a legitimate basis.
5. **Set a deadline...** For the candidate to respond to the job offer. This allows the employer to make alternative arrangements if the candidate does not accept and helps avoid delays in the recruitment process.
6. **Comply with legal requirements:** organisations must comply with legal requirements, such as right-to-work checks. They have a duty to prevent illegal working in the UK, and failure to carry out the prescribed checks and keep the appropriate records can result in criminal prosecutions, fines or other penalties. These checks should be carried out against all workers/employees prior to them starting their role.

Documentation

Contract

The cornerstone document for any business relationship is the contract. When it comes to staff, the key contracts are:

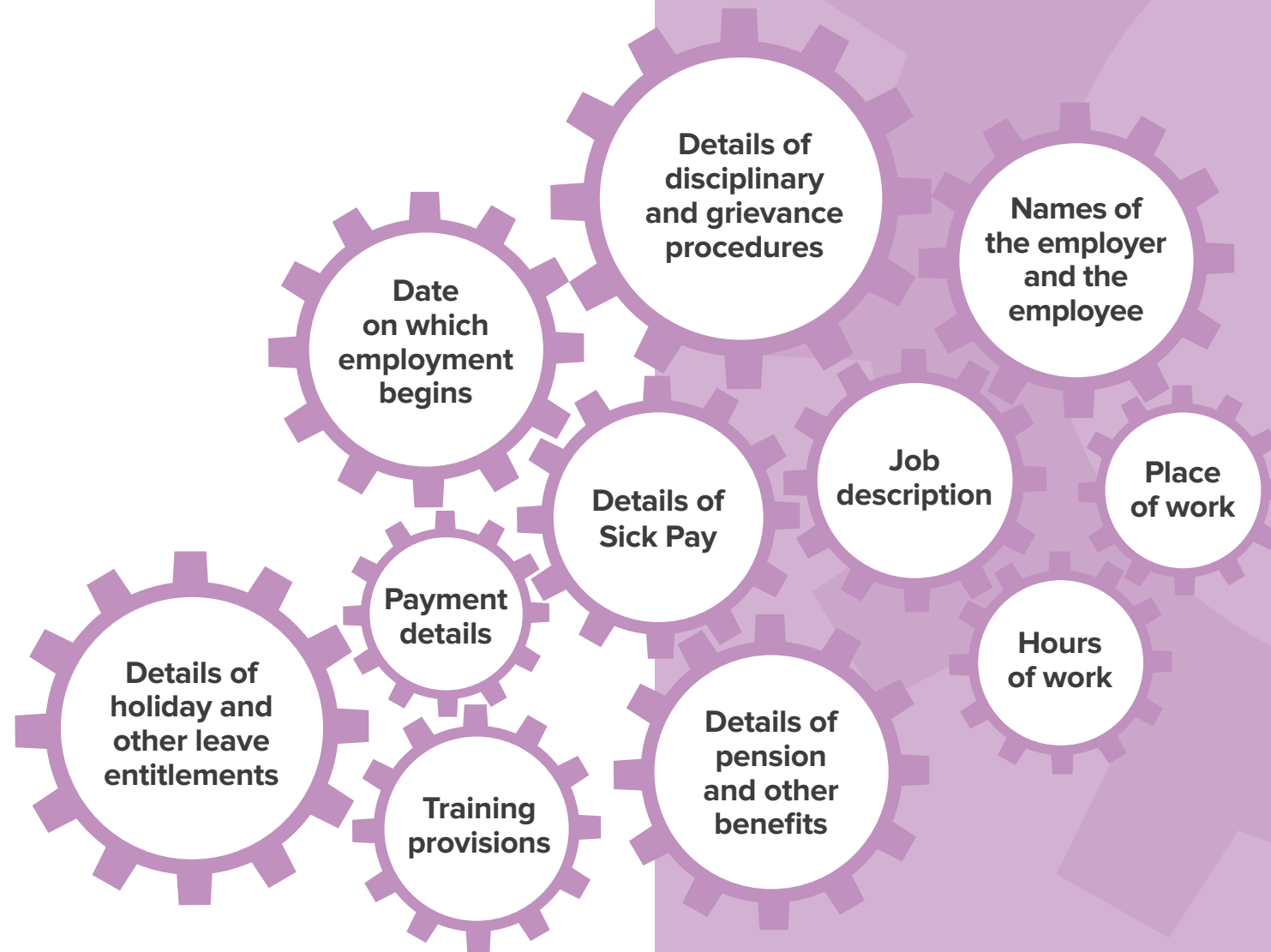
- consultancy/self-employment/casual worker agreements/contracts (self-employed and workers), and/or
- contracts of employment (employees).

Every employer in England and Wales is obliged to provide its employees and workers with a written statement containing minimum information in relation to their terms and conditions of employment.

The required terms include (but are not limited to) the parties' details, pay, hours of work, place of work, probationary period, benefits, collective agreements and notice. Beware of using any contract templates that were produced before the law changed in April 2020 – those contracts are likely to be out of date and not legally compliant.

This statement must be provided on or before the first day that the employee or worker starts work. Some of the required information can, instead, be included in a reasonably accessible document which is referred to in the contract – typically, a policy or procedure. Care should be taken to ensure that policies and procedures are not unintentionally contractually incorporated.

For more information on policies and procedures, please see page 9.



Documentation continued

Types of contract

There are various types of contract. The most basic contract (also known as a section 1 statement or section 1. Particulars of Employment) includes those terms that are required by the law.

They are, therefore, generally reserved for very junior employees and often limited to use in certain industries. Employers will often issue contracts which include more than just the terms required by law in order to protect their business.

Most common, optional terms include:

- Restrictive covenants/non-compete clauses
- Confidential information
- Company property
- The right to make a payment in lieu
- The right to place an employee on Garden leave
- The right to implement short-time working and/or lay-off
- The right to make deductions
- Data protection obligations
- Company car/car allowance
- Intellectual property

Some organisations (including owner/manager businesses) issue directors with Director Service Agreements. These agreements generally include many/all of the optional terms plus detailed provisions regarding the ability to summarily dismiss, Board reporting/related obligations and resignation from office obligations.

It is therefore usual for organisations to have more than one type of contract template which they issue when a new staff member joins – that contract template is dependent on that staff member's role in the business.

Contracts for shareholders who are also employees

Shareholders can also be employees. In such cases, the business might be legally required to issue contracts to those shareholders.

Advice should therefore be taken if this is a requirement for your business.



Policies and Procedures

Whilst contracts will contain the contractual terms of the business relationship, it's usual for other information to be included in policies and procedures. These policies and procedures should be housed in either collectively (typically within a staff handbook or within a staff information section on the intranet).



There are a number of benefits of having a dedicated policies and procedures including:

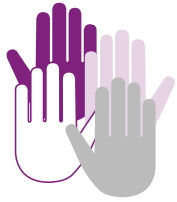
1. **Legal compliance:** every business employing more than 5 employees will need a Health and Safety Policy – failing which the business could face criminal penalties. All businesses with one or more staff members should have disciplinary and grievance procedures if requisite elements of these procedures are not dealt with in the contract. In any event, policies and procedures can be useful tools for employers to ensure compliance with relevant laws and regulations, including those relating to equal opportunities, paid leave (e.g. family friendly leave), data protection and more.

2. **Consistency:** policies and procedures provide consistent reference for both employers and employees, ensuring that there is equal application to all.
3. **Communication:** policies and procedures can help communicate the employer's expectations and obligations to employees, reducing the risk of misunderstandings or disputes.
4. **Employee relations:** policies and procedures can help foster positive employee relations by providing clear guidance on the rights and responsibilities of both employers and employees.
5. **Evidence:** In the event of a dispute or legal claim, policies and procedures can provide evidence of the employer's handling of issues generally.
6. **Framework:** Policies and procedures can provide guidance on handling disciplinary and grievance issues as well as sick leave and other absences.

There are a wide range of policies that employers should have in either its handbook or on the intranet. Some key policies are shown in the graphic below, but this is a non-exhaustive list and employers should consider which workplace policies will be appropriate in relation to the industry in which they operate.

Statutory Rights

There are certain terms of employment which will be implied in all contracts of employment. These will override any contractual terms which are less generous. These rights are not dependant on length of service. We have detailed some of the key statutory rights on the following pages.



Anti-discrimination laws

Organisations must ensure that they provide equal opportunities and prevent discrimination in the workplace. Discrimination law is designed to ensure equality of opportunity at work. It can also protect employees' dignity and ensure that complaints can be raised without fear of reprisal.

Discrimination law covers the entire employment life-cycle, including job adverts and the recruitment process, conduct during employment (both during and outside of working hours), termination of employment and job references.

Given the breadth of discrimination law, and the compensation that can be awarded

for failing to comply, it is important for organisations to understand its/their obligations in this area of the law. This may necessitate taking specialist legal advice in respect of:

- **Providing training to managers and employees on equal opportunities and harassment;**
- **The obligation to make reasonable adjustments;**
- **Responding to requests for flexible working, shared parental leave and/or time off for dependants etc.**
- **Dealing with allegations of discrimination and/or harassment**

Organisations must not discriminate against employees on the basis of the following characteristics:

Sex	Race
Age	Sexual orientation
Disability	Religion or belief
Being pregnant or on maternity leave	Being married or in a civil partnership
Gender reassignment	



Holiday

Workers and employees are entitled to 5.6 weeks' holiday each year. This equates to 28 days paid holiday for full-time workers. This can include the usual eight public holidays.

This entitlement is pro-rated for part-time workers. However, when pro-rating,

organisations must be careful to avoid breaching anti-discrimination laws.

Calculating holiday for a typical worker (such as zero hours workers) can be difficult. We have produced a comprehensive guide

on how to calculate a typical worker's annual leave entitlement which is available at: <https://www.wilsonbrowne.co.uk/guides/guide-to-calculating-annual-leave-entitlement-for-casual-including-zero-hour-and-other-atypical-workers/>

Statutory Rights continued



National Minimum Wage

- A national living wage applies in England and Wales for workers aged 23 and over.
- There are separate National Minimum Wage rates for those under 23.

The National Minimum Wage will be calculated based on someone's working time.

Organisations therefore need to know what counts as working time; otherwise they can inadvertently fall foul of National Minimum Wage legislation.

Current Rates

These rates are for the National Living Wage (for those aged 23 and over) and the National Minimum Wage (for those of at least school leaving age). The rates change on 1 April every year.

	23 and over	21 to 22	18 to 20	Under 18	Apprentice
April 2022 (current rate)	£9.50	£9.18	£6.83	£4.81	£4.81
April 2023	£10.42	£10.18	£7.49	£5.28	£5.28

There are a number of deductibles which must be taken into account when calculating National Minimum Wage compliance.

These include:

- **Uniform**
- **Equipment**
- **Meals from a staff canteen**



Equal pay

Workers and employees have the right to receive pay which is equal to that received by members of the opposite sex who are doing equivalent work or work of equal value.

This not only refers to salary but also covers other contractual benefits.



Statutory Rights continued



Statutory Sick Pay

Workers and employees are entitled to take time off work if they are sick. Employers must provide statutory sick pay (SSP) for eligible workers and employees (this can include casual and zero hours workers).

The right to SSP must be confirmed in writing – either in the contract of employment or a Sickness Absence Policy.

Those who qualify for SSP are entitled to be paid the applicable rate for up to 28 weeks in any three year period.

Evidence of the right to receive SSP is generally by self-certification and thereafter by Fit note.

Self-certification refers to the process by which an employee notifies their employer that they are unable to work due to illness or injury, and provides information about the duration of their absence.

This is typically done by filling out a form or sending an email to their line manager or HR department. In most cases, self-certification is used for absences of up to seven days, and does not require the employee to obtain a doctor's note.

There are circumstances when an organisation can require a Fit note during a self-certification absence.

Fit notes are documents that are issued by doctors to employees who are unable to work due to illness or injury. They are used for absences of more than seven days, and provide information about the employee's condition and their expected return to work date.

Fit notes may also provide recommendations for adjustments to the employee's work duties or environment, in order to support their recovery.



Statutory Rights continued



Maternity Leave

Employees are entitled to 52 weeks' maternity leave plus right to return to their job at the end of the maternity leave.

This right only applies to employees and not workers.

Just because an employee is entitled to maternity leave does not mean they

automatically qualify for statutory maternity pay. Employers may operate more generous rights for maternity leave and pay than the statutory rights.

You can calculate an employee's maternity leave and pay using the maternity and paternity calculator via: <https://www.gov.uk/maternity-paternity-calculator>.

Any maternity pay is subject to tax and National Insurance deductions. These payments should therefore be made via payroll.

Details regarding maternity pay must be given in writing – typically this detail is included within a Maternity Leave Policy.



Paternity

Employees can choose to take either one week or two consecutive weeks' leave. The amount of time is the same even if they have more than one child (for example twins).

Leave cannot start before the birth. The start date must be one of the following:

- the actual date of birth
- an agreed number of days after the birth
- an agreed number of days after the expected week of childbirth

Leave must finish within 56 days of the birth (or due date if the baby is early)

Statutory Paternity Pay for eligible employees is either the applicable weekly rate or 90% of their average weekly earnings (whichever is lower). Although employers can operate more generous rights.

Tax and National Insurance need to be deducted. These payments should therefore be made via payroll.

You can calculate an employee's paternity leave and pay using the maternity and paternity calculator via: <https://www.gov.uk/maternity-paternity-calculator>

Details regarding paternity pay must be given in writing – typically this detail is included within a Paternity Leave Policy.



Unpaid parental leave

An employee is entitled to 18 weeks of unpaid leave for each child and adopted child for the first 18 years of the child's life. An employer can operate a paid parental leave scheme if

it wishes to do so; any terms of the paid leave must be provided in writing. The limit on how much parental leave each parent can take in a year is four weeks for each

child (unless the employer agrees otherwise). The parental leave must be taken as whole weeks, rather than individual days, unless an employer agrees otherwise.

Statutory Rights continued



Adoption

Workers and employees have the right to receive pay which is equal to that received by members of the opposite sex who are doing equivalent work or work of equal value.

This not only refers to salary but also covers other contractual benefits.

Employees can take up to 52 weeks' Statutory Adoption Leave. The first 26 weeks is known as 'Ordinary Adoption Leave', the last 26 weeks as 'Additional Adoption Leave'.

Leave can start on a variety of dates.

Statutory Adoption Pay for eligible employees is either the applicable weekly rate or 90% of their average weekly earnings (whichever is lower), although employers can operate more generous rights.

You can calculate an employee's adoption leave and pay using the maternity and paternity calculator: <https://www.gov.uk/employers-adoption-pay-leave>

Tax and National Insurance need to be deducted. These payments should therefore be made via payroll.

Details regarding adoption pay must be given in writing – typically this detail is included within a Maternity Leave Policy.

With such a multitude of policies it is easy to see how they can become over complicated and out of date. Find out more here: <https://www.wilsonbrowne.co.uk/business/employment-hr/employment-policies-procedures-and-contracts/>



Pension

Employers are required to provide eligible employees with certain pension rights. This includes:

- Automatic enrolment into a qualifying scheme;
- Employer contributions;
- Notifying the employee of requisite information regarding the scheme as well as the employee's rights in respect of the scheme (including the right to opt-out); and
- Correctly process opt-outs.



Termination: Dismissal and Resignations

The termination of employment is a significant event in the employment relationship. It should be handled in accordance with the terms of the employment contract and relevant laws.



Dismissal

Failure to dismiss an employee for a reason other than one allowed by law and/or without following the correct procedure or giving adequate notice, may lead to a claim for unfair or wrongful dismissal and/or discrimination claims. Quite apart from the management time required to deal with a claim as well as the potential reputational damage it may have, compensation for a successful claim can potentially be substantial.

There are five potentially fair reasons for dismissing an employee which include redundancy, poor performance and misconduct.

Dismissing an employee for any reason other than the five potentially fair reasons will automatically render a dismissal as “unfair”.

Even if an organisation has established a potentially fair reason for dismissing an employee, it must still follow a fair procedure. Failure to do so could lead to a finding of unfair dismissal.

Automatically unfair dismissal claims can be brought from day one (for example, dismissals connected to whistle-blowing), however, in most instances, an employee needs two years’

service before they benefit from ordinary unfair/constructive dismissal protection.

Employees can bring a discrimination related claim (including a claim that they have been dismissed in contravention of anti-discrimination laws) regardless of their length of service.



Breach of contract/wrongful dismissal

It is possible to dismiss an employee fairly/without the risk of an unfair dismissal or discrimination claim but still be in breach of contract. This can happen if the individual has not been given the correct notice/not allowed to work their notice.

In addition to a breach of contract claim, any breach may also result in the organisation losing valuable protections in the contract such as post-employment restrictions (for example, stopping an employee going to work for a competitor).

It is therefore important that not only does the organisation serve the correct notice, it must also serve it in the correct way so it can be sure both that notice has been given and the date on which it takes effect.

Termination: Dismissal and Resignations continued



Resignation

In the event an employee resigns there are a few key matters to be aware of, namely:

1. **Have they resigned in haste/anger?**

If they have, it may be necessary for the organisation to invite them to reconsider their resignation. Failure to do so, in some instances, can count against an organisation in the event of a subsequent constructive dismissal claim.

- ### 2. **Has the resignation been offered verbally or in writing?** If has been offered verbally, it is generally prudent to request it is confirmed in writing. Either way, resignation acceptances should be confirmed in writing. That acceptance should confirm some key matters such as the date on which their employment ends, whether full notice is to be worked, arrangements for the return of Company property and a reminder of any terms that remain in effect after their engagement ends.

3. **Consider the use of an exit interview.**

4. **Correctly calculate final pay and benefits.**

This includes calculating any accrued but untaken holiday and holiday taken in excess of their accrued entitlement.

5. **Treat intended final salary deductions with caution.** These can result in claims irrespective of a catch-all deduction clause in a contract.

6. **Consider the provision of references.**

Increasingly organisations opt for factual only references given the liabilities that can arise if the reference is unlawful.

7. **And finally,** start planning to start the employment life-cycle again. So, back to the beginning with recruitment!



How can the Wilson Browne Employment Team help you?

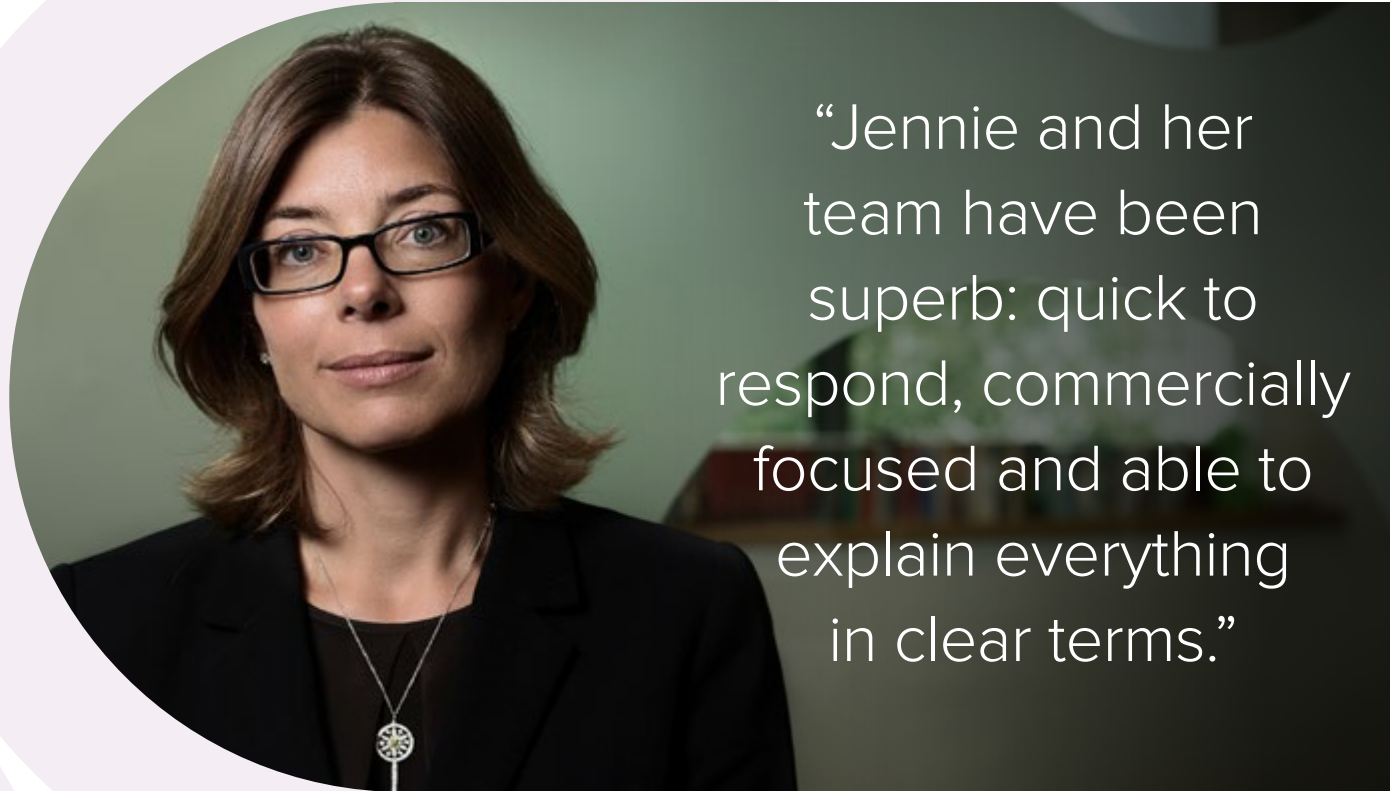
“We advise employers of all sizes on the full range of employment law issues and, as a small, closely knit, team, we are proud of the personal relationships we build with our clients,” says Jennie Jahina, Head of Employment at Wilson Brown Solicitors.

“Our employment team has assisted numerous employers by helping to avoid potential pitfalls by drafting contracts of employment that are tailored to the meet the specific needs of their business. We also have extensive experience on the use and enforceability of restrictive covenants, which are clauses designed to protect the business once the employee’s employment has terminated.

“Our team can review your existing policies to ensure that they are up-to-date and fit for purpose. Alternatively, if you do not have any policies in place or you are simply looking to replace your existing policies, we have a fixed price package for 11 clearly drafted, fully bespoke, up-to-date, core HR policies. The policies cover absence management, disciplinary and capability, redundancy, equal opportunities, whistleblowing, harassment and bullying, grievances, bribery, holiday maternity and paternity, health and safety, IT and social media. All of this is available for a fixed price that we will agree upfront.

“We also have a vast array of guides for employers listed on our website.”

Visit: <https://www.wilsonbrowne.co.uk/business/business-guides/>



“Jennie and her team have been superb: quick to respond, commercially focused and able to explain everything in clear terms.”



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