

Managing the legal status of volunteers

Since the announcement of David Cameron's "Big Society" it is anticipated that there will be a significant rise in the numbers of people volunteering to undertake what might otherwise be paid work. With this in mind, organisations that engage volunteers need to be aware of their obligations towards them.

The legal status of volunteers has never been clear cut as there are a range of different types of relationships. It is this legal status that determines the extent of any statutory employment rights that these people might have against organisations. Any organisation considering using volunteer workers should have in place clear documentary evidence of their status and bear in mind the following key points:

- Any payments made for expenses should clearly relate to expenses and not be paid in the round or when the volunteer is not actually doing the work. Be careful about creating contractual obligations between yourself and the volunteers. Documents should make it clear that there is no intention to create legal relations and should use clear language to define the relationship.
- The requirement of an organisation that the people working there meet required standards or guidelines is not in itself enough to provide mutuality of obligation, a necessary ingredient of an employed relationship.
- The law is currently unclear as to whether volunteers are protected against discrimination. The Court of Appeal has recently rejected an argument that they are but leave to appeal to the Supreme Court is being sought.
- Be careful of any perks that could be seen as consideration and thereby pointing towards a contractual relationship between yourself and the volunteer.
- Voluntary workers are specifically excluded from the National Minimum Wage Regulations. It may be wise if your organisation relies upon a great deal of volunteer work to have defined policies and documentation that relate solely to those volunteers.



News in brief

Do you tweet?

The employment department have been tweeting now for about three months, covering a range of topical legal and local business issues. Follow us at @Gullands_HR_Law

All change for our Online Policies

We are about to review what policies are most useful to employers as part of our online service. If you have any suggestions please contact Amanda Finn at a.finn@gullands.com

Family Friendly policies

The Government has just finished consulting on a four stage plan to promote a culture of flexible, family friendly employment practices in Great Britain. Amongst a number of matters the consultation makes proposals to share flexible parental leave, provide unpaid leave for fathers to attend ante natal appointments and revisions to the way that annual leave is dealt with under the Working Time Regulations. Workers prevented by illness from taking any of their statutory leave will be able to carry unused leave over to the next holiday year. Watch this space!

USEFUL WEB ADDRESSES

Regular readers will know that we have a precedent bank of useful employment policies freely available to download on our website to be found at gullands.com. They have proved very popular as employers are becoming aware of the importance of having such policies in place.

There are hundreds of employment blogs and websites which provide a wealth of information for employers and employees alike. This means that employees are well informed as to what employers can and cannot do making it ever more important for employers to be up to date with developments. In addition to this of course there is a wealth of misinformation on employment, employee clients are often for example surprised at the level of award that they can expect in the employment tribunal. The median award for unfair dismissal claims in the years 2009/2010 for example was £4,903, and the highest award for religious discrimination was £9,500. This is misperception is largely due to the way that employment cases are reported in the press with the focus on the exceptional and high value discrimination claims.

So where else can employers find reliable information?

The ACAS website has got a handy A-Z advice list covering everything from appraisals to whistleblowing via holidays and notice. The site also has detailed guidance on grievance and disciplinary procedures and various guidance leaflets and is a useful starting point for employers dealing with specific situations.

For more general employment information refer to the Businesslink website. This website contains practical advice aimed at businesses dealing with different issues including employment and other issues such as payroll and tax.

Finally the direct.gov website, although aimed at employees includes a handy redundancy calculator where you can enter length of service, age and weekly pay to calculate the statutory redundancy payment.

Of course these websites are not a substitute for good legal advice, but simply knowing where to find the key bits of information puts you in a strong position to deal with any issues which may come up.

Checklist:

Data protection obligations and your business

This checklist highlights the key legal obligations your business should consider when dealing with personal data about:

- Customers.
- Suppliers.
- Employees.
- Any other individual who you may encounter in the course of business.

Penalties for failing to deal with personal data appropriately

There could be serious financial, commercial and reputational implications for your business (including possible criminal penalties and fines) if personal data is not handled properly.

Protecting and securing personal data

- Personal data is any information about an individual held on computer or in organised filing systems that could identify the individual, either on its own or together with other information your business or a third party holds. It needs to be protected and kept secure. This information includes:
 - name;
 - e-mail address;
 - telephone numbers;
 - date of birth; and
 - notes written about someone (such as an annual performance review).
- You must take particular care with sensitive personal data (for example, medical records) as more restrictive requirements apply to this type of data.
- The individual could be a potential or actual employee, customer or supplier, or possibly someone captured on your business' CCTV footage.

Collecting personal data

- Your business can only collect personal data if it has a legitimate reason for doing so (for example, because a new employee is coming to work for you).
- When your business collects data about an individual, you will need to tell that individual what your business intends to do with their data (for example, if you are collecting a customer's e-mail address to confirm an order). If the purposes for which you want to use someone's data change later, you must approach them again.
- Your business should only collect information it requires at the particular time (for example, a job applicant should not be asked for their bank details). This type of data should only be collected once the applicant has started to work for your business.
- If your business wants to use someone's data for marketing purposes the individual must be informed. It is good practice to do this at the time the data is collected. In some cases (such as text or e-mail marketing) your business generally needs the individual's explicit consent.

Using data collected on individuals

- Your business is generally allowed to use someone's personal data if they have given their consent. The data can also be used in other circumstances, for example, if your business:
 - needs to use the data to fulfil a contract with a customer (such as using their address to deliver goods to them); or
 - has a legitimate interest in using it, although this must be balanced with the individual's rights. For example, if a part of your business has been sold to a third party and you need to transfer customer data to it.
- Data should only be used for the reason that it was collected (for example, if calls between staff and customers are recorded for training purposes only, they should not be used to discipline a member of staff).
- If you want a third party to manage data (such as carrying out payroll services) you should take legal advice. Your business will still be responsible for protecting the data and will need to enter into a written contract with the third party.

- Your business should also take legal advice if it is considering transferring any data outside the countries in the European Economic Area. It is very easy to transfer data outside of your own country (for example, by sending an e-mail to an office outside of the UK).
- If the data is being used in marketing material, check that the recipient is aware that their data may be used for this reason and confirm they do not object. You will generally need the individual's explicit consent (opt-in) for e-mail, fax and text marketing. If the individual is an existing customer, you may be able to market similar products to them by these means without prior explicit consent. You should take legal advice if you want to do this.
- If your business is considering using sensitive personal data (for example, information about ethnic origin, trade union membership or criminal records), you should take legal advice.

Storing personal data

- All data must be accurate and up to date. Databases should be regularly cleaned and out-of-date information must be deleted.
- Data should only be held for as long as it is required and for the reason it was collected. For example, if personal data was collected to deliver a product a year ago and not used since, it should not be held on the basis that it may be needed for another reason at some time in the future.

Keeping data secure and confidential

- Personal data must be kept secure at all times. For example:
 - computers and files should be password protected;
 - personal data on laptops and other portable devices should be kept to a minimum;
 - manual filing cabinets containing personal data should be locked and only accessible to authorised personnel;
 - confidential documents should not be left unattended on desks; and
 - personal data should be removed promptly from fax machines, printers and photocopiers.
- When your business sends personal data, it must be done in a secure way (for example, confidential information should not be sent in the internal mail).
- Personal data must be disposed of securely (for example, by shredding, placing in confidential waste bags, destroying or securely deleting electronic files). Confidential papers should not be put in the recycling bin.
- When working away from the office or in public areas:
 - ensure personal data stored on portable devices such as laptops, Blackberries, CD-ROMs or memory sticks is encrypted and kept secure at all times;
 - avoid leaving papers or electronic devices lying around;
 - make sure members of the public cannot see confidential documents or computer screens; and
 - avoid talking about confidential matters when the public can hear.
- Security breaches (such as accidentally losing personal data) should be reported to the appropriate person immediately.
- Electronic documents, including calendar entries and meeting requests, should be password protected or designated private where appropriate.

Enquiries about personal data

- Make sure your business has a system in place to deal with individuals who request details of the personal information your business holds on them. You are permitted to charge an administration fee of up to £10 for responding to this type of request.
- Individual employees should not deal with this type of enquiry, unless they have been given specific authorisation to do so. The request should normally be passed to the person within your business who has responsibility for data protection issues.
- Personal data should not be given out to the friends or relatives of an individual without that individual's specific consent.



Managing sickness absence

Among the queries that we deal with on a daily basis, managing sickness absence is one of the most frequent issues raised. The key to dealing with sickness absence is, first, to have clear policies which are communicated and understood by employees and which ensure a fair and consistent way of dealing with sickness absence.

There are many different sorts of sickness absence which may need different plans of action. The two most common are recurring short term absences and long term absences.

In the case of frequent short term absences, the employer may have to make a decision as to whether they believe the employee has genuinely been unwell and not only planning how to deal with those absences but whether there is anything

that can be done to minimise them. If, however, the employer considers that the employee is not genuinely unwell they will need to consider what investigations need to take place and whether disciplinary action should be commenced.

To establish whether it is fair to dismiss an employee for a long term illness, an employer needs to demonstrate that they have acted reasonably in treating that absence as a sufficient reason for dismissal. This involves considering:

- What illness the employee is suffering from
- The prospect of the employee returning to work
- What arrangements are in place for the employee's work to be covered during their absence
- The employee's length of service.

It is important that the employer follows a fair procedure and that they have made their employee aware throughout any process of what is expected of them. Medical evidence will be key to ascertaining the basis of the employer's decision. It should be up to date and with a clear prognosis about the duration of the employee's illness. The report should be shared with the employee and their view sought also on what has been said.

Employers should always seek specific advice when illnesses relate to a disability or pregnancy or when employees have the benefit of permanent health insurance cover.

One key issue that employers often forget is that they should maintain contact with employees on sick leave. It is often the case that employers don't have any contact with the employee until such time as they write instigating some disciplinary process. The amount of contact will very much depend upon the employee's role and indeed, the nature of their illness. There is a fine line between intrusive contact and simply keeping in touch. There is much guidance that can be obtained free of charge on these issues from the ACAS website.

The heart of any effective scheme is a combination of both legal and human resources issues. Employers who do not have a defined sickness policy should consider putting one in place.

QUICK REFERENCE SECTION

Statutory minimum notice periods
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more but less than two years.
- One week's notice for each complete year of service for those employed for more than two years.
- Once an employee has more than 12 years service the notice period does not extend beyond 12 weeks.

National Minimum Wage
(From October 2011)

16 – 17	£3.68
18 – 20	£4.98
21+	£6.08

Statutory Sick Pay
(from April 2011)
£81.60 per week

Statutory Maternity/Paternity/Adoption Pay
(basic rate from April 2011)
£128.73

Statutory Holiday
5.6 weeks for a full time employee.
This can include bank and public holidays.

Redundancy calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

The calculation is capped at 20 years. Maximum weekly pay is capped under the statutory scheme at £400.00 for dismissals post 1st February 2011.



The do's and don'ts of providing a reference

This article sets out the key issues your business should consider before providing a reference for an employee or former employee.

Providing a reference

Generally, there is no legal obligation on your business to provide a reference for an employee or former employee and you are, therefore, generally entitled to refuse to provide one. However, your policy on references must be consistent or it could lead to allegations of discrimination. There are some limited exceptions to this rule as set out below:

Discrimination

You must ensure that a refusal to provide a reference is not discriminatory. Your business is not allowed to discriminate on the basis of any of the nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Having a clear policy in place about the circumstances in which references will be given will help in defending any allegations of discriminatory treatment.

Victimisation

A refusal to provide a reference may lead to a claim of victimisation if an employee or former employee has:

- Previously brought discrimination proceedings against your business.
- Given evidence or information in discrimination proceedings against your business.
- Made an allegation of discrimination against your business (for example, under your grievance procedure).

Compromise agreements

Compromise agreements often include a term stating that, if requested, a reference will be provided in an agreed form, usually annexed to the agreement. Make sure you adhere to the agreed wording in these situations and that any oral reference provided does not go further than or deviate from the agreed wording. To avoid problems, ensure your standard wording in settlement agreements includes the phrase:

"subject to any further information coming to our attention which we consider should be included in the reference, we agree to provide a reference in the following terms".

What information should be included in a reference?

- Your business owes a duty of care to both the subject and the recipient of any reference you provide. You must, therefore, take care to ensure the information it contains is true, accurate and fair. You are not obliged to provide any detail in the reference or for it to be comprehensive.



- A reference could simply provide brief factual details of the start and finish dates of employment and the roles performed and no more. However, you should include a statement in this type of reference that it is your company policy to provide only factual details, so it does not reflect badly on the employee in question.
- If you decide to provide a more comprehensive reference, you should include a disclaimer. Any disclaimer you include must be reasonable. A more detailed reference may include information on:
 - performance in the job;
 - disciplinary record;
 - honesty;
 - time-keeping;
 - absence record;
 - reason for leaving.

Duty owed to the subject of the reference

Discrimination

Your business must not provide a discriminatory reference. You should take particular care when making comments about performance, attendance or sickness absence where there is a risk that these comments may be discriminatory on the grounds of disability. A reference must also avoid victimising the subject (for example, if they have previously complained of discrimination).

Defamation

- You must be able to justify and support any comments made in a reference and show that you honestly hold the views made in the reference to be true.
- Your business cannot be successfully sued for defamation for the contents of a reference (even if its contents are untrue), providing you believed the information in the reference was correct at the time it was provided and the contents were provided without malice.

Malicious falsehood

Your business could be sued for malicious falsehood if an individual can show that a reference you gave contained untrue words that were published maliciously (that is, the person who wrote the reference knew the words were untrue or did not care whether they were true or not).

Negligent misstatement

Your business could be sued for negligence if you provide an inaccurate reference.

Breach of contract

Your business could be sued for breach of contract if you do not give a reference when you have previously agreed to provide one (for example, in a contract of employment).

Duty owed to the recipient of the reference

Negligent misstatement

You will usually be asked by a prospective employer for information about an ex-employee because you have specialist knowledge of that employee. If your business provides an inaccurate reference that the prospective employer relies on, you could be sued for negligence.

Deceit

If your business knowingly includes false information with the intention that the recipient will rely on it, your business could be sued by the recipient for deceit.

Data protection

- Your business must be careful when providing information in a reference about an employee's sick record or reasons for periods of absence, because information about health is regarded as sensitive personal data.
- It should be possible to provide information about how many days absence from work an employee has had during the last year without revealing any sensitive personal data.
- If you are asked to provide information on the reasons for an employee's absence, you should exercise caution and seek consent from the employee. You should show the employee a draft response and seek their approval before disclosing it.

CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.



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