Employment*Brief*

April 2014

Garden Leave not just a bed of roses

Employers have long since recognised the problematic nature of post-termination restrictive covenants in their contracts. Nevertheless they still need to protect confidential information and/or prevent competition. This has lead to an increased use over the years of Garden Leave provisions particularly for senior employees.

Garden Leave provisions arise most commonly where the employee gives notice but the employer does not require them to attend work for the notice period. The employee continues to be paid their full wages under the contract but is removed from the workplace environment so that they are unable to continue relationships with key clients or set up a competitive business during that time. During this period the employee remains bound by his or her contractual obligations including the full scope of the implied duty of fidelity.

Employers should however be aware that abuse of Garden Leave provisions can make the courts use the principals that they are currently using in relation to restrictive covenants. Any restrictive covenants that the contract contains must be discounted by the period of time that an employee is left on Garden Leave and there is a growing emphasis on an employee's right to work and exercise his or her skills. An employee who works in a constantly changing environment where skills and contacts quickly become stale may choose to challenge an overlong Garden Leave provision as a restraint of trade. Employers should as with restrictive covenants consider exactly what they need to protect and tailor any provisions exactly to that need. Trying to do something which does more will often result in nothing being enforceable and therefore afford no protection at all. The advantage of Garden Leave over a post-termination restrictive covenant is that an employer can look at exactly what it needs at the time of enforcement.

Employees facing the prospect of a long period of Garden Leave which they are anxious to get out of will look at engineering a claim for constructive dismissal. They will say that the employer has breached the employment contract and therefore can no longer have the benefit of the rest of the terms namely the Garden Leave term.

The key piece of advice in dealing with Garden Leave or indeed post-termination restrictive covenants is that less is more. Employers very often simply cut and paste a template restrictive covenant without any thought as to how it meets their particular business needs. Contracts that are renewed annually may be able to justify a year's post-termination restriction or indeed a year's Garden Leave but the longer the period the greater the risk. Courts are anxious not to keep people out of earning a living for any longer than is absolutely necessary.

GOVERNMENT CRACKDOWN ON NATIONAL MINIMUM WAGE DEFAULTERS

Until recently employers that broke the National Minimum Wage law had to pay the unpaid wages plus a financial penalty calculated at 50% of the total underpayment for all workers found to be underpaid. The maximum penalty an employer could face was £5,000.

Following an announcement by the Prime Minister before Christmas the Government is to increase the financial penalty percentage from 50% to 100% of the unpaid wages owed to workers. The maximum penalty will increase from £5,000 to £20,000.

The Government wants to go further and is considering bringing in legislation at the earliest opportunity so that this maximum penalty of £20,000 could apply to each underpaid worker.

As well as higher penalties they propose to make it easier to name and shame employers who fail to pay their workers what they are due. The Government's intention is to penalise those with the highest level of arrears. For the current rates of National Minimum Wage please see our Quick Reference Section.

How long should we be keeping employee records?

The Data Protection Act (DPA) provides that personal data should not be kept for longer than is necessary for the purpose for which it is processed. Further detail and the recommended periods for the holding of records are set out in the Employment Practices Code, a guide issued by the Information Commissioner under the DPA.

The Code makes a number of recommendations that an employer should consider when looking at retaining employee records in order to balance the business need to keep records and a worker's right to respect for their private life.

Generally, employers should establish standard retention times for categories of information held about workers and former workers. These should be based on business need taking into account relevant professional guidelines and risk. Documents should not be kept for longer than the usual retention time unless there is a sound business reason for this and there should be a nominated person within the organisation charged with retention of employment records.

The Code says that no recruitment records should be held beyond the statutory period in which a claim arising from the recruitment process may be brought, unless there is a clear business reason for exceeding this. Employers that keep names on file for future vacancies should advise applicants of this and give them the opportunity to have their details removed. Information about criminal convictions collected in the course of the recruitment process should be deleted after verification through a Disclosure and Barring Service check, unless the information is relevant to the ongoing employment.

While records should only be retained for a particular purpose and should not be kept for longer than is necessary, this does not rule out keeping information to protect against legal risk. As there is the possibility that any documents relating to a worker could be relevant to a tribunal or court claim for up to six years, employers may retain them for up to six years after termination of employment.

The retention rules about specific types of information are not all set out in one place. Some are covered by the Information Commissioner's Code, others in other statutes and for others there are no rules. Here are some examples of different retention times:

Data retention times - take note

- Job applications and interview records of unsuccessful candidates: a short period, perhaps 6 months after notifying the candidate. If longer, there needs to be a clearly communicated policy to keep candidates CVs for future reference. Application forms should give applicants the opportunity to object to their details being retained;
- Written particulars of employment, contracts of employment, changes to terms and conditions, training and annual leave records: while employment continues and up to six years after employment ceases;
- Working Time Opt out forms: two years from the date on which they were entered into;
- Payroll and Wage records: It depends: for companies: six years from the financial year-end in which payments were made. For all other employers: five years after 31 January following the year of assessment;
- PAYE records: not less than three years after the end of the tax year to which they relate, but sensible to keep them for six years as they may fall within the definition of payroll and wage records, as to which see above;
- Maternity records: three years after the end of the tax year in which the maternity pay period ends;
- Sickness records: three years after the end of the tax year in which payments are made; and
- Immigration checks: two years after the termination of employment.

Auto enrolment will present a big challenge for small to medium sized companies!

One of the biggest changes to our pension system started over 2 years ago when employees of larger companies started being auto enrolled into pension schemes.

Now is the biggest challenge yet to auto enrolment, as small and medium sized employers reach their staging dates. For many of these companies, it may be the first time that they have put a pension scheme in place for their employees.

The implications are daunting for any business, so understanding the costs involved and planning ahead is essential. The employer will need to navigate a number of tasks that are both complex and time consuming and there are also very real dangers if things go wrong.

All employers will receive a letter from The Pensions Regulator (TPR) a year in advance of their staging date. This outlines the employer's statutory responsibilities and duties of which there are approximately 238 and also the penalties that apply should the employer not comply with the rules. No employer wants the worry of sorting things out at the last minute, so here are some key check points to help you prepare ahead:

Nest or private pension? Make a decision on what scheme is right for the company.

Prepare early if you have decided to get support: There are very few pension providers in this market and some already have capacity issues. You must have applied within 6 months of your staging date so seek advice early!

Scheme design: Part of the auto-enrolment analysis is to check whether there is an existing qualifying scheme which can be extended to all employees or is a new scheme required?

Project plan: Create a plan to outline the workload and the timescales for delivery.

Worker assessment: Fully understand what your legal duties are for the different types of worker you employ.

Communicate changes to your workforce: You have legal responsibilities to tell your workers what's happening and why and what it means for them.

Administration: The work doesn't stop once you've started enrolling workers. Find out what's involved to fulfil your ongoing obligations.

To find out more about auto enrolment and what the changes mean for your business, we recommend you speak to a professional adviser. For further information contact Invicta IFA on 01622 662636 for a no obligation discussion.

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 2 years.
- One week's notice for each complete year of service for those employed for more than 2 years.
- Once an employee has more than 12 years service the notice period does not extend beyond 12 weeks.

National Minimum Wage
From October 2013

16 – 17	£3.72
18 – 20	£5.03
21+	£6.31
Apprentices	£2.68

Statutory Sick Pay
from April 2014
£87.55 per week

Statutory Maternity/Paternity/ Adoption Pay
Basic rate from April 2014
£138.18

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.

Calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme at £450.00. For dismissals on or after 6 April 2014 this increases to £464.00.

What can employees do outside of work?

The lines between work-life and home-life are becoming increasingly blurred and there are more and more examples of the two worlds colliding with damaging repercussions for both employers and employees.

This is partly due to the usual suspects like Facebook, Twitter and so on but also the fact that employers can be held responsible for employees' actions outside of work, for example incidents of harassment taking place at an office party.

Subject to a few exceptions, an employee is generally free to do as they like in their own time. Exceptions include cases where:

- The activities would bring the employer into disrepute, for example an employee insulting their employer's customers on social media.
- The activities being linked to the job in question, for example a bank employee caught shoplifting or a delivery driver in a motoring offence.
- An employee working for a competitor. All employment contracts include a duty of fidelity preventing this but there needs to be a clear conflict. An accountant working for a rival firm is likely to be a problem, whereas as a cleaner working for the same two firms is likely to be acceptable.

Aside from the point above about working for competitors, it may come as a surprise that once an employee has clocked-off there is no general prohibition on them working elsewhere. Employers would be well advised to prevent this in the employment contract or to at least include a clause requiring employees to seek written consent to work elsewhere to ensure that employees' efforts are devoted to the business.

There is a grey area when an employee intends to leave employment and go it alone. The court's stance in these cases generally, is that it is acceptable for an employee to begin to take preparatory steps with a view to setting up a business, but that taking steps in relation to the employer's territory such as approaching its clients would not be acceptable. The problem is that the line between preparatory steps and active steps is often not clear. Employers should seek advice as to the terms that can be included to try and minimise this risk with their key or senior employees.

A question that we are often asked is whether it is acceptable to carry out surveillance activities in cases of suspected wrongdoing. There are cases where employers have used surveillance, for example to record an employee who was filmed on five separate occasions leaving work early to go to the gym. However employers would be well-advised to seek advice before taking action in specific circumstances.

Action points:

- Ask all pertinent questions at the interview stage to make sure that you have all the information you need. It is fine to ask whether a potential employee has criminal convictions.
- Consider including contractual terms allowing for example monitoring of emails or to submit for drug testing.
- Have in place a clear policy on social media so that employees know what is and is not acceptable.

NEWS IN BRIEF

With Christmas well behind us we now take a look at what is coming up in the year ahead. Employment law is never one to stand still and there are a number of key issues that are due to be decided both in case law and in legislation during the months ahead.

Holiday Pay

It has long been the established practice that holiday pay is paid at whatever is the worker's basic rate. Recent cases such as Lock v. British Gas and Neal v. Freightliner Limited have cast doubt on that assertion. The ECJ's judgment is expected on the issue as to whether the amount of commission, overtime and shift premiums can be taken into account when calculating holiday pay.

Redundancy

Two important decisions are expected this year on the issue of collective redundancies and whether British legislation complies with the EU Directive in this area. These are when the employer's duty to carry out collective redundancies consultation is triggered and the meaning of the term "establishment" where the business is conducted over several locations. The key issue for employers is whether the obligation to consult arises where the overall total of proposed redundancies of at least 20 occurs across all of the establishments or whether the total must be at least 20 at each establishment.

Zero Hours Contracts

The debate of Zero Hours Contracts continues. Use of such Contracts increased by 174% between 2005 and 2012 and concerns are now being raised about the effects such arrangements have on workers. The Government published its consultation on the Zero Hours Contract just before the Christmas break. They do not propose an outright ban but look at whether employers should not be allowed to have exclusivity clauses in Contracts that offer no guarantee of work. Consultation on those proposals has now closed and their findings and proposals for the future are eagerly awaited by employers and employees alike.

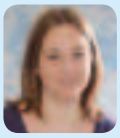
Statutory Discrimination Questionnaire

As from 6th April the Statutory Discrimination Questionnaire procedure will be abolished. To coincide with this change ACAS is publishing good practice guidance on how employers should deal with questions about discrimination in the work place. The guidance suggests that although employers are under no legal obligation to respond they should identify which aspects of the employee's statement or questions they agree or disagree with and put forward any justification in the hope that narrowing the issues at an early state will resolve matters without additional costs.

CONTACT

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

Amanda Finn
Tel: 01622 678341
Email: a.finn@gullands.com



Laura Claridge
Tel: 01622 678341
Email: l.claridge@gullands.com