

Employment status

It is well known that there are three types of employment status, 'employee', 'worker' and 'self employed contractor' and that different rights and obligations arise depending on the status, but it can be difficult to categorise and this question troubles Tribunals and employers alike. However it is essential to be clear about this from the outset of employment and to ensure that both documentation and facts are aligned because the pitfalls of getting it wrong can be costly.

Employee status

An employee is an individual who has entered into or works under the terms of a contract of employment. The contract can be expressly agreed or implied by the nature of the relationship. All of the facts will be taken into account, but the three main features of employment are:

- An obligation to do the work personally, rather than being able to send a substitute.
- Employer is obliged to provide the work and the employee is obliged to accept the work.
- Employer has some control over the way the employee carries out the work.

Self-employed status

The self-employed enjoy no statutory employment rights, although they may be protected by discrimination law.

Worker status

Worker status falls somewhere between employee and self-employed contractor.

Workers are entitled to fewer statutory rights than employees, but do have some key legal rights, including protection from discrimination, protection against unlawful deductions from wages and entitlement to the National Minimum Wage. The Working Time Regulations (WTR) also apply to workers, which means that they are entitled to the rights that flow from this legislation, including paid holiday and rest breaks.

What is the significance of the distinction?

Legal protections: Some core legal protections only apply to employees, for example the right not to be unfairly dismissed and to receive a statutory redundancy payment.



Health and safety: Employers owe employees statutory health and safety protection. Self-employed contractors may not be covered under these duties, although they will be covered under an employer's occupier's liability.

TUPE transfers: Only employees will be automatically transferred to any purchaser of the employer's business under a TUPE transfer.

Tax: An employer is responsible for deducting tax and national insurance at source from the salary paid to employees. Self-employed individuals are responsible for paying their own tax and national insurance under self-assessment.

Insurance: An employer must take out employer's liability insurance to cover the risk of employees injuring themselves at work. Self-employed contractors are unlikely to be covered by this type of insurance.

Liability: An employer is liable for acts done by an employee in the course of their employment. This type of liability is unlikely to extend to self-employed contractors.

LEGAL STATUS OF VOLUNTEERS

The legal status of volunteers is not clear-cut, there is a range of options, from the purely voluntary to contractual arrangements. This uncertainty can make it difficult for organisations taking on volunteers to ascertain whether and to what extent they owe their volunteers legal obligations.

Practical tips for reducing the risk of creating a legally binding contract:

- Avoid making payments to volunteers that could be construed as wages. Payments to cover actual expenses should be clearly identified as such and ideally be reimbursed against receipts.
- Remove or at least minimise any perks that could be regarded as remuneration.
- Reduce obligations on the part of the volunteer by for example, giving the volunteer the ability to refuse tasks and choose when to work.
- Avoid using language that makes the arrangement sound contractual and adopt flexible language, such as "usual" and "suggested".
- Treat volunteers fairly and have in place clear procedures for dealing with problems and grievances to reduce the risk of disputes with volunteers.

Those engaging volunteers would be well advised to seek advice at the outset so that properly drafted agreements can be put into place to minimise the risk of a situation being misconstrued.



Hiring an employee: Part one

This two-part business briefing will highlight the key legal issues a business needs to consider when recruiting a new employee.

Before advertising

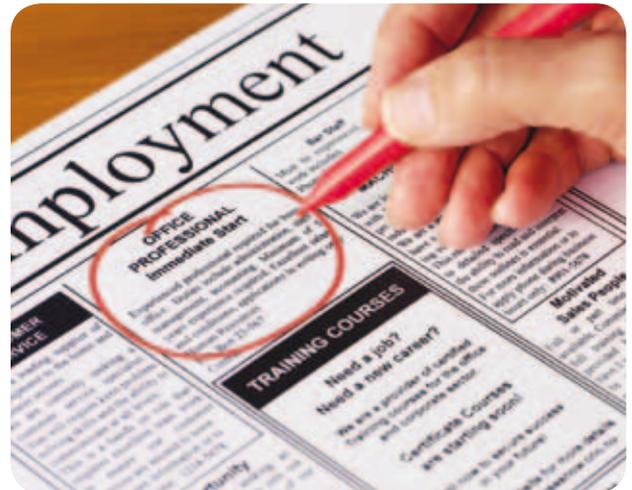
- Make sure all staff involved in the recruitment process have had equal opportunities training (and they continue to receive it while working for the business).
- Draw-up the following documents:
 - a **job description** which sets out the title and main purpose of the job, the place of the job holder within the business and the main tasks or responsibilities of the post.
 - a **person specification** which details the experience, know-how and qualifications, skills and abilities necessary for the job in question. The requirements can be split between those that are “essential” for the job and those that are merely “desirable”.
- Ensure that none of the requirements in either document discriminates against any groups of employees. In particular, consider whether any requirements for specific qualifications, working hours or times, travel, age ranges or dress are necessary for the job in question.
- Consider whether the job needs to be full-time or whether it is open to part-time, home working, flexible working or job sharing. If a business specifies that the job is full-time, it may need to be able to justify its decision.

The advert

- Decide whether the job should be advertised internally, externally or both.
- Consider using specialist publications, websites and agencies to target different communities, ages and sexes.
- Think carefully when writing the advert. Protection from discrimination because of a protected characteristic (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation) covers all areas of employment, including job adverts. For example, avoid using language that might imply only someone of a certain age would be suitable (for example, “mature”, “experienced” or “young”).
- Ensure any employees absent from work (including women on maternity leave or those on long-term sick leave) are informed of the vacancy to enable them to apply. Failure to do so could amount to discrimination.

The application

- Use a standard application form to enable individual applicants’ answers to be directly compared against the selection criteria more easily and help avoid potential unlawful discrimination claims.
- Draw up a shortlist using the same criteria used in the job description and person specification. Every applicant should be marked against the same criteria to help avoid any potential unlawful discrimination claims.



- If a business is making redundancies, it must consider applications for suitable vacancies from employees selected for redundancy ahead of external applicants. Women selected for redundancy while on maternity leave are entitled to be offered a suitable alternative vacancy (where one is available) in priority to other potentially redundant employees.

Pre-employment health questions

- In most cases, a business is prohibited from asking potential recruits questions about their health (for example, businesses should avoid asking questions about an applicant’s sickness absence record).
- However, there are some circumstances where a business is entitled to ask health-related questions. For example, asking an applicant for a job in a warehouse whether they have any health problems that may prevent them from lifting or handling heavy items. Businesses can also check whether an applicant has any special requirements it needs to take into account when making the arrangements for interview, such as wheelchair access.

Part two will feature in the January issue of *Employment Brief* and will cover the interview, the offer, the contract and probationary periods.



GULLANDS PROMOTES NEW PARTNER

Gullands Solicitors has announced the promotion of Amanda Finn, Head of their Employment Department, to Partner, to take effect from 1 October 2014.

Amanda, who joined Gullands in 2004, specialises in all aspects of employment law and acts for local businesses and charities of all sizes on a wide range of matters including provision of contracts and handbooks, advice on termination of contracts and representation in the Employment Tribunals.

Amanda was recommended in the Chambers Guide 2013 as an ‘Associate to Watch’ in the Kent Employment sector.

Commenting on her promotion, Amanda Finn said: “I am delighted and proud to join the partnership at Gullands and I look forward to playing an active role in strengthening and developing both the employment team and the business over the coming years.”

Blair Gulland, Chairman of Gullands, commented: “Amanda has developed a strong and loyal client base during her time with us and has proved herself to be a real asset to the firm. I am very pleased that she has accepted our invitation to become a partner and we all look forward to continuing to work with her in the future.”

Amanda Finn is Head of Employment and can be reached at a.finn@gullands.com

Reference: to give or not to give?

Generally there is no legal obligation for a business to provide a reference for an employee or former employee or for that reference to be comprehensive.

However, an employer's policy on references must be consistent to avoid allegations of discrimination. If refusing to provide a reference, bear in mind that the refusal should not be based on one of the protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. A refusal to provide a reference may also lead to a claim of victimisation if an employee has previously brought a discrimination claim against the employer, given evidence or information in a discrimination claim or made an allegation of discrimination against the employer.

Settlement agreements, where the employee agrees not to issue a claim against the former employer usually for payment of a settlement sum, often include a term stating that a reference will be provided in an agreed form upon request. To avoid claims for breach of contract, make sure that these agreements are honoured and ensure that the agreed wording is used. Any oral reference provided should not deviate from the agreed wording.

Employers should also be aware when providing a reference that they will owe a duty of care to both the former employee and the recipient of the reference. Employers should therefore take care to ensure the information given is true, accurate and fair.

For these reasons employers are increasingly unwilling to provide anything more than a factual reference, that is to say a brief note of the employee's start and finish dates and role. It is best practice to include a statement in this type of reference that it is company policy to provide only factual details, so that it does not reflect badly on the employee.

Employers may decide to provide a fuller reference, covering for example performance, disciplinary record, honesty or timekeeping and in these situations a disclaimer should be included.

Points to consider when giving a reference:

- **Discrimination:** Comments about performance, attendance or sickness absence may run the risk of discrimination on the grounds of disability. Disclosure of this information may also be an issue under the Data Protection Act.
- **Defamation:** The employer must be able to justify and support comments and show that it honestly held the views. It will be a defence to a defamation claim, even if its contents are untrue, if the business believed the information was correct and it was provided without malice.
- **Malicious falsehood:** Where an individual can show that the reference provider knew the words were untrue or did not care whether they were true or not.
- **Negligent misstatement:** An employer could be sued for negligence if it provides an inaccurate reference either by the employee or the recipient if it is relied on and causes loss.
- **Deceit:** If a business knowingly includes false information with the intention that it will be relied upon, the business could be sued by the recipient for deceit.

So in summary, whilst there is no obligation to provide a reference, if you do give a reference proceed with caution. If you decide not to, make sure that the decision was made on solid principles and that you act consistently in all cases.



**Proceed with caution
when giving a reference**

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 2014	
16 – 17	£3.79
18 – 20	£5.13
21+	£6.50
Apprentices	£2.73

Statutory Sick Pay
from April 2014
£87.55 per week

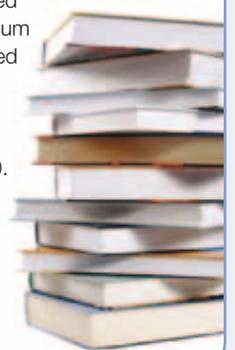
**Statutory Maternity/Paternity/
Adoption Pay**
Basic rate from April 2014
£138.18

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 for dismissals after 6th April 2014 under the Statutory Scheme at £464.00.





A year in business

360 Employment Evolution is able to recruit, train, support and sustain your staff, by getting to know your business, understanding your requirements and supporting your team's balance and harmony. Each step is flexible to a company's needs, used where and when most effective and finally, builds a solid relationship between agency and employer. As a small agency, local and adaptable to flexibility and change, we offer a truly tailored service to our clients' recruitment drives. We invest time, effort and industry knowledge into successful and fruitful relationships. We are contactable throughout working hours that suit our clients' needs, whether they provide a 24/7 care service or a late shift within their customer service and sales team.

We have successfully placed candidates into apprenticeship programmes, junior and trainee positions, management and executive positions, sales, customer service, finance, legal, accounts, publishing and care sector careers at a 98% sustainable success rate.

We have delivered training courses with local employers, training providers and the Job Centre Plus in health & social care, CV advice, interview feedback, business admin and executive job search, enabling people to learn valuable skills to move closer to the job market.

We've also already hosted several successful legal seminars with Gullands Solicitors, to educate and share information with over forty HR professionals within the local area.

360 Employment Evolution is excited to be planning for 2015 and will continue to invest in the local community, hold seminars and charity fundraisers for local businesses to come together. We are involved in tenders for both recruitment and training programmes for the next 12 months and are looking to expand our team year on year. We strive to introduce candidates into employment and support apprentices to gain enough experience and qualifications to eventually become our clients!

The support, motivation and kind words from clients, friends and family have been so valuable to our motivation and success. We are successful at what we do because we care; we are approachable, personable and passionate. We believe in our products and service – a true one-stop-shop for recruitment, staffing, training and advice.

Sarah Wilson, Director.
www.360employment-evolution.com

EMPLOYMENT MYTHS

I don't have an employment contract, therefore my employer can dismiss me and I don't have any employment rights.

This is a myth, if an employee is turning up to work and being paid then there is an employment contract, albeit that the terms of the contract are not recorded in writing. In addition to this, the law implies certain minimum standards into employment situations, for example notice periods and the right not to be unfairly dismissed or discriminated against.

If I am working on a fixed term contract, my employer can dismiss me at the end of the term without following a procedure.

In employment law the end of a fixed term contract will be deemed to be a dismissal. Therefore even when a fixed term contract comes to an end, a fair procedure should be followed to avoid unfair dismissal claims.

My employer can dismiss me without any notice during my probationary period.

All employees are entitled to a minimum of a week's notice after one month's employment. This means that even if an employer exercises the right to dismiss during the notice period, after a month of employment the employee is still entitled to be paid for or work a week's notice.

We are a charity, so employment law does not apply to us.

This is not correct. Whilst a Tribunal will consider the resources and size of an employer when considering the employer's reasonableness in a claim for unfair dismissal, it is not the case that charities will be let off the hook or held to a lower standard. Employment law applies to all employers, regardless of their status.

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

This newsletter is intended to provide a first point of reference for current developments in various aspects of law. It should not be relied on as a substitute for professional advice.