

Ilana Swimer provides advice on what areas employers should consider updating in staff handbooks



Are you up to date for 2013? Businesses should check and amend contracts of employment and staff handbooks to reflect employment law developments from 2012.

Holiday and sickness

Employees who do not take all their annual leave because of long-term sickness are entitled to carry forward their unused holiday into the following year and receive payment in lieu of this when their employment terminates – *NHS Leeds v Larner*. To manage the impact of this decision, an employer can amend contracts to:

- specify that carry-over of holiday is limited only to the statutory entitlement (28 days), where this is less than the contractual entitlement
- make it clear that an employee on long-term sick leave must take all holiday within a specified time, although each case will need to be considered on its own merits.

There is still uncertainty in this area and further case law and legislative changes are expected.

Termination restrictions

Employers that have, or plan to, promote an employee should review any restrictive covenants in their contract if they want them to be enforceable. Consider whether the restrictions are reasonable and amend them to ensure they are appropriate for the employee's new role. It is not enough simply to state that an employee's terms remain unchanged – *Patsystems Holdings Ltd v Neilly*.

Compulsory retirement

The default retirement age of 65 has been abolished. If an employer wants to retain a compulsory retirement age, this should be stated in the contract of employment. To avoid allegations of age discrimination, the aim of any policy on compulsory retirement must be in the public interest, consistent with social policy aims of the state, and be appropriate and reasonably necessary – *Seldon v Clarkson Wright*.

Social media policies

Employees are now using LinkedIn and other social media sites to store client or customer details. Employers should have a clear policy on social media use and review confidentiality obligations in the contract to ensure that it protects information or intellectual property contained on these sites.

Employers are also exposed where staff use personal devices to send work-related emails which are not protected by the duty of confidentiality. To combat this, businesses can add a term into the contract requiring employees to delete work-related emails from personal devices at the end of employment – *Fairstar Heavy Transport NV v Adkins*.

Payment in lieu of notice

When an employer discovers after the termination of employment – but prior to making a payment in lieu of notice (PILON) – that an employee was guilty of gross misconduct, it will be able to avoid making a PILON only if there is an express contractual right to do so – *Cavenagh v William Evans Ltd*.

To avoid confusion about the termination date, an employer should write to the worker stating that it is making a PILON in accordance with the contract, terminating employment with immediate effect – *Geys v Société Générale*.

Duty of fidelity

Review contracts of employment to ensure that they contain provisions requiring an employee to act in the best interests of the company and to report their own wrongdoing. In most cases, this will not be implied – *Ranson v Customer Systems plc*.

Signed contracts

Ensure that employees sign and return their contract to confirm compliance with any terms contained in it as this will not always be implied by the courts – *FW Farnsworth Ltd v Lacy*.

Making sure there is a clear, up to date contract in place incorporating all these recent changes is in the interests of the employer and employee.

Key points

- Contracts can be used to manage the impact of some cases.
- Restrictive covenants should be reviewed after promotions.
- Employers could be at risk where employees use personal devices for work purposes.
- Ensure contracts contain provisions for workers to act in the best interests of the company.
- Employees should sign and return contracts to confirm compliance.

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