EMPLOYMENT

Law guide - Employment contracts

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Employment contracts

Employment statement

You are obliged to provide each of your employees with a written statement or an employment contract setting out certain terms and conditions that govern your employment relationship, so that they are aware of the main terms of their employment. Such a written statement is commonly called an 'employment statement'. You are not required to provide such details to employees whose employment does not last for at least one month.

All of your employees must receive an employment statement within two months of their employment commencing.

Required contents of an employment statement

An employment statement must contain all of the essential elements of a contract including the following information:

- the names of the employer and employee
- the date on which the employment began including any period of continuous employment with a previous employer
- details of the scale/rate of remuneration and intervals of pay
- terms and conditions relating to hours of work including normal hours of work and contractual overtime
- details of Annual Leave, including public holidays and holiday pay (and sufficient information to allow precise calculation of entitlement)
- terms and conditions relating to incapacity for work due to sickness or injury, including provisions relating to sick pay
- rules relating to pension schemes
- the employee's job title and/or a brief description of the work that he or she will be doing
- place of work or an indication that the employee may work at various places and if that is the case provide a list of those places (where known) including the employer's address
- the length of notice required by each party
- where the employment is not intended to be permanent, the period for which it is expected to continue, or if a fixed-term contract, its expiry date
- any collective agreements which directly affect the terms and conditions of employment, including, where the employee is not a party, the persons by whom they were made

- certain details where the employee is required to work outside of Ireland for more than one month
- disciplinary rules
- dismissal, disciplinary and grievance procedures
- the name of the person to whom the employee can apply if he or she is dissatisfied with any disciplinary decision or wishes to raise any grievance relating to his or her employment
- any other term which in view of its importance is an essential part of the contract

The first nine items must be placed within a single statement, but the others may be contained in separate documents such as an employment handbook.

If there are any changes to the employment statement that you give to any one or more of your employees then you must give them a written statement setting out the details of the change within one month of the change taking effect.

If you fail to provide an employee with a written statement, provide an incomplete statement or fail to inform an employee of a change, and the employment appeals tribunal finds that you have unfairly dismissed or discriminated against that employee then they may award of compensation to that employee in addition to any other sum to which that employee is entitled to receive in compensation.

Important clauses

Employment contract

An employment contract may be oral written, or partly oral and partly written. However, it is in your best interests as well as your employee's for the agreed terms and conditions that govern your employment relationship to be confirmed in writing. A contract should expressly set out all of the essential terms and conditions so as to avoid unnecessary disputes arising at a later point in time, which in some circumstances may result in legal action.

Essential clauses

As a bare minimum, a contract should include all the matters that are required to be referred to in an employment statement (see employment statement), and will therefore avoid the need to give a separate written statement. Otherwise, however, there is no prescribed form for a written contract.

Some of the most important clauses that should be included in your contract of employment are the following:

Duties and mobility

This type of clause will provide a job description and the place or places where the employee will be required to perform his or her duties. You should ensure that your employee's duties are widely defined so as to cover all duties that you may envisage that your employees will be required to do, and any possible future changes in duties.

Hours of work

Under the provisions of the working time legislation you cannot force your employees to work certain hours of work a week on average. The average weekly working time is usually calculated over 4 months but is longer for certain employees (6 months) and it can be extended by agreement. Working time includes travelling where it is part of the job, working lunches and job-related training but does not include travelling to work or lunch breaks.

The Organisation of Working Time Act states that the maximum average working week for many employees cannot exceed 48 hours. This does not mean that a working week can never exceed 48 hours, it is the average that is important.

Notice periods

Where you have employed an employee for an indefinite period of time (i.e. where employment is intended to be permanent), the contract should specify the notice period to be given by the employer or employee to terminate the contract. However, in the absence of such notice statute implies a minimum notice period into every contract that can be

terminated by notice. Where contractual notice does apply it must be at least equal in length to statutory notice. A summary of the statutory notice periods is as follows:

Length of continuous employment	*Employee's notice entitlement*
13 weeks up to two years	1 week
2-5 years	2 weeks' notice
5-10 years	4 weeks' notice
10-15 years	6 weeks' notice
15 years +	8 weeks' notice

An employee who has been continuously employed for 13 weeks or more is legally bound to give you at least one week's notice. You are entitled to impose a longer notice period on your employees by mutual consent. In the case of a managerial, professional or other senior employee, it may be advisable and appropriate to make the notice period fairly long, for example six months to be given by either party.

The benefit to you is that you will not be deprived of a key employee on short notice. It may of course be suitable to reduce the notice period in the early stages of employment. This will allow earlier termination if either you or your employee has reason to believe that it is not suitable or convenient to continue with the existing contract.

Garden leave

Once you have decided to dismiss an employee, you may place him or her on garden leave. The aim of garden leave is to get the employee out of the office so that you can either investigate alleged misconduct or so as to protect your business interests.

If an employee is placed on garden leave then he or she will receive full pay but will be asked not to perform any services or special duties for a specified period of time (usually the duration of his or her notice period). Employers commonly put an employee on garden leave so as to protect the business interests of the company as it ensures that the employee refrains from continuing with his or her employment duties and keeps them away from the premises.

Pay, benefits and commission

The National Minimum Wage Act 2000 sets out the framework for the National Minimum Wage (NMW) that you must consider when deciding how much to pay your employees.

If your employee is to be remunerated partly by commission, the contract should deal with this. The clause should not only deal with the rate of commission but also when it becomes payable.

Sick pay

An employee has no right to be paid while on sick leave. It will be for the employer to decide what their policy will be on sick pay and sick leave. An employee may apply for illness benefit if they have enough social insurance contributions.

Often your contract of employment will place a maximum period of sick pay entitlement in a stated period. An employee must put clear rules in place where an employee is sick and unavailable for work.

You are entitled to include a clause specifying that you require your employee to provide a medical certificate if absent for more than a certain number of days.

Holidays and holiday pay

All employees have had a statutory right to paid annual leave of 4 working weeks.

Most employees have a statutory right to paid leave on bank and public holidays. There is one exception however, and that is part-time employees who have not worked for their employer at least 40 hours in total in the 5 weeks before the public holiday.

If an employee works on a bank or public holiday, there is no automatic right to an enhanced pay rate. What you get paid depends on your contract of employment. It is important that you address such matters in an employee's contract of employment so as to avoid any disputes arising at a later point in time.

Pensions

Information regarding pensions must be correct at the date that this document is provided to the employee.

Records

The employer must ensure that it keeps a record of the direct payment payroll arrangements showing the rate and dates of contributions. Separate records should be kept for contributions made by the employer and employee. The records must be kept for a minimum period of six tax years.

Occupational pensions schemes

Occupational pension schemes are either:

- contributory, where both the employer and the employee contribute to the pension; or
- non-contributory, where the employer makes all the payments

In either case, the employer has to pay for a substantial part of the administration costs of the pension scheme, by law.

This is a complicated area and tax relief may be available to employers who contribute to an occupational pension scheme.

Since 1st January 2011 you pay PRSI and universal social charge on your pension contributions.

Retirement

There is no general compulsory retirement age in the Republic of Ireland. Some contracts of employment have a mandatory retirement age (that is, the age at which you must retire), but if it is not set out in your contract of employment or accepted by custom and practice then you cannot be forced to retire.

There are certain circumstances which permit an employer to set a retirement age in the workplace-which will not be viewed as being discriminatory. Where the employer can show that there is a proportionate means of achieving a legitimate aim then it may be justified.

In some cases, there is a statutory retirement age. These retirement ages arise in jobs that are established by law and the law sets out the maximum age of staff.

If you are self-employed, there is no set retirement age. There is no overall retirement age for company directors, but the company's articles of association may set a maximum age.

Implied terms

Implied terms

Even where a particular point is made in a contract or a written statement of the terms of the contract prepared by an employer, there are certain duties and obligations that are read into the contract and apply to you and your employee.

Employer's duties

Duty to pay wages

This is perhaps the most important of an employer's implied duties. As an employer, you have an implied duty to pay all your employees for the work they have completed.

If an employment contract provides sick pay, but does not specify the length of time that it will be paid for, then a court or tribunal may decide for how long it shall be payable. The general presumption is that an employer will only pay sick pay for a reasonable amount of time. What is a reasonable amount of time is determined by the industry that the employee works in and any other circumstance that a court or tribunal finds to be relevant.

Duty to provide work

The question of whether there is a right for an employee to be provided with work depends of the terms of the contract of employment and the particular facts and circumstances. The duty to provide work can exist where:

- An employee has skills which require work to be provided to maintain those skills.
- The employee holds a senior position.
- An employee's bonus or other benefit are determined by appraising how well they have performed their duties, which requires them to be provided with work.

Equally, if your employee is paid by commission, or is a piece worker, there is an implied duty to provide them with work. In these circumstances an employer should not withhold work, if it is available. This duty also applies to skilled workers, who may need work to maintain their level of skill through work.

Duty to indemnify employee

You are under a duty to indemnify your employee for expenses and liabilities incurred by him or her in the course of his or her employment.

Duty to take care of employee's health and safety

Employers must take reasonable care of their employees' health and safety. There are many specific acts and regulations which cover working conditions and safety at work. Failure of

an employer to act in accordance with the relevant legislation may in certain circumstances lead to criminal proceedings and fines.

Mutual trust and confidence

Employers must not, without reasonable and proper cause conduct themselves in a way that is likely to destroy or damage the relationship of mutual trust and confidence that exists between an employer and an employee. Examples of such behaviour are:

- physical and verbal abuse
- sexual harassment and the failure to support someone who is the victim of sexual harassment at work
- moving a senior employee into an inadequate office or location
- imposing an unwarranted disciplinary sanction or failing to follow a disciplinary procedure

An employer's behaviour must be very serious in order to breach the implied term of mutual trust and confidence. If an employer is found to have done so and the employee suffers financial loss then they will be responsible for compensation.

Duty to take reasonable care in giving references

There is usually no obligation on an employer to provide an employee with a reference. If an employer does provide a reference to a third party, that employer owes a duty to the employee who is the subject of the reference (and to the recipient of the reference).

When giving a reference an employee must ensure that it is true, accurate and fair. The reference must not give a misleading or unfair impression overall. In addition, there is an implied term that the information on which it is based shall be verified and that it will be compiled with reasonable care.

If a reference is not compiled reasonably and carefully an employer may be liable for any economic loss suffered as a result of a negligent misstatement. An employer can be sued by an employee for an inaccurate reference either for breach of an implied term or in negligence.

Provision of a grievance procedure

There is an implied term in all contracts of employment that employees' grievances will be dealt with promptly and properly.

Notice

Where an employee's contract specifies a period of notice that must be given in order to terminate the contract of employment this must be given or an employer will have acted in breach of contract. Where a contract is silent as to the amount of notice required to

terminate the employment agreement there is an implied term that reasonable notice will be given. This may be greater than the statutory minimum in some cases.

Employee's duties

Personal service

An employee must be ready and willing to work and cannot delegate or assign his or her duties. Sickness will not breach this duty.

Obedience

Employees must carry out reasonable and lawful orders given by or on behalf of his or her employer.

Whether an order is reasonable depends on the circumstances and whether the employee is obliged under the terms of his or her contract to comply with it.

An employee will not be obliged to comply with unreasonable or illegal orders.

Competence

There is an implied term that an employee will be reasonably competent to do his or her job. Incompetence will be a breach of contract and depending on the seriousness of the breach may result in an employer dismissing an employee.

Due diligence and care

Employees must exercise reasonable care and skill in the performance of their duties and must take care of the employer's property. An employee will be in breach of this duty if he or she performs the duties negligently. Employers are vicariously liable for the actions of their employees. This means that legal responsibility is imposed on the employer even though the act or omission was that of the employee. In such circumstances the employee's negligent act or omission must have occurred during the course of his or her employment.

Fidelity/good faith

This implied term applies during employment but not once it has terminated. Any action by an employee which seriously damages an employer's business will be in breach of this term. Common examples are:

- carrying on a business that is in competition with the employer
- misuse of business client lists

Competition

Unless your employees are expressly prohibited from doing so, taking a job outside working hours is not necessarily a breach of the duty of fidelity, even where that job involves working for a competitor. It will depend on how damaging that other employment is to your business.

For there to be a breach of the duty of fidelity, your employees must normally occupy a position where they have access to confidential information or trade secrets, such that you are at risk of such information being passed to a competitor.

After completion of employment, an employee may of course compete with you without restriction. Any restrictive covenant, which attempts to restrict such competition, is subject to the doctrines of restraint of trade.

Honesty

Employees must behave honestly. To determine the extent of this duty and the seriousness of any alleged breach the nature of the employer, role of the employee and degree of trust required will be relevant.

Secret profits

An employee must not make a secret profit or take a bribe. This would constitute a breach of trust. You would be entitled in such circumstances to compel your employee to account to you for the secret profit or bribe.

Trade secrets and confidential information

Employees will also breach their duty of fidelity if they use or reveal trade secrets or other information, which by its nature is confidential or which has been impressed upon them as being confidential. However, information of a trivial or mundane character, or information that is available from public sources, cannot be turned into confidential information, even by an express term of the contract.

After employment has ceased, an employee is only prohibited from revealing or using your trade secrets or highly confidential information equivalent to a trade secret. If for example the employee has compiled a list of your customers after leaving your employ, the list will not be treated as a trade secret and the employee will not be in breach of the duty of fidelity.

Restrictive covenants

Restrictive covenants

After an employee leaves his or her employment you may like to prevent him or her from competing with you. In order to achieve this you may ask an employee to agree to restrictions upon the type of work that he or she may undertake after his or her employment has ceased. Such restrictions will prevent him or her from competing with you, soliciting customers and poaching your staff. These restrictions are known as restrictive covenants.

Validity of restrictive covenants

Restrictive covenants are only enforceable if they go no wider than necessary to protect legitimate business interests of the employer. Restrictive covenants must therefore be drafted carefully and form part of the employee's contract. Once drafted they must be reviewed on a regular basis to see if they need to be updated.

Surprisingly, a restrictive covenant restraining your employee from working in a competing business or soliciting ex-customers, may not be enforceable and may be deemed to be in restraint of trade. The prevention of competition itself is not a legitimate interest. However, protection of trade secrets and trade connections are legitimate business interests.

Types of restrictive covenant

There are three main types of restrictive covenants that are generally incorporated into one set of restrictive covenant provisions:

1. Non-compete covenants

These covenants aim to prevent an employee from competing with an employer but courts are reluctant to uphold them and they will not be upheld if their effect is to restrict competition. The employer must show that the former employee had acquired influence over his customers and will generally only be upheld if there is no other way to protect confidential information.

The area within which your employee is barred from competing must be reasonable. It must not be wider than the area within which you do business. Usually the employee will be prevented from competing in a specified geographical area, which cannot be unreasonable such as a county, a town or a radius from the employer's place of business. In exceptional cases national or worldwide covenants may be justified.

2. Non-solicitation and non-dealing of customers' covenants

You may be concerned that the employee may wish to take or try to take your clients and customers once he or she has left his or her position. An employer must show who is to be classed as a client or customer and will usually have to restrict the covenant to those with

whom the employee dealt directly. The covenant should only be enforced for a reasonable period of time.

3. Non-solicitation of employees' covenants

You may be concerned that your employee will try to poach members of your staff once he or she has left his or her position. The covenant must specify which category of employee the employee must not poach otherwise the covenant is likely to be unreasonable and therefore unenforceable.

Time

Restrictive covenants should only restrict employees for a reasonable length of time. A time restraint in excess of 12 months can only be justified in exceptional circumstances. Most restrictive covenants are imposed for between 3 and six months depending on the nature of the business.

Breach of a restrictive covenant

If your employee has a restrictive covenant in his or her contract and he or she has acted in breach of it then you are entitled to make an application to court for an injunction. An injunction will prevent your former employee from carrying on a competing business or soliciting customers, whichever is appropriate. You may also claim damages if you have suffered financial loss.

Disciplinary procedure

Disciplinary procedure

It is important for every business to have a disciplinary procedure in place which is fair and accessible to all employees. The procedure should be referred to in the contract of employment (although not necessarily form part of it). All employees should be aware of its existence and what it is about.

Your rules and procedures must:

- be set out in writing
- be fair and reasonable, which means that they should take into account the principles set out in the Labour Relations Commission Code of Practice on Grievance and Disciplinary Procedures

Failure to meet either of these requirements may result in extra compensation for the employee if they succeed in a tribunal claim.

Setting out disciplinary rules

Draw up rules to set the standards of conduct and performance required. Make sure your rules are fair, clearly written and reflect the needs of your business.

Rules can help:

- your workforce to understand what you expect of them
- you act fairly and consistently
- contain and resolve issues
- avoid potential tribunal complaints

A disciplinary procedure is the means by which rules are observed and standards are maintained. The procedure should be fair, effective, and consistently applied.

The rules should not discriminate on the grounds of sex, race, gender reassignment status, marital or civil partnership status, sexual orientation, religion or belief or political opinion, disability, pregnancy and maternity, age, civil or family status and/or membership of the traveller community.

You cannot expect to list everything that might lead to disciplinary action, but you should cover:

- absence without leave
- discrimination, bullying and harassment
- health and safety

- personal appearance
- prohibited activities
- smoking, alcohol and drugs
- work standards
- timekeeping
- use of company facilities and equipment

The procedure should specify a suitable warning process, such as:

- informal discussions
- oral warning
- written warning that further misconduct will lead to dismissal

Gross misconduct

The policy should also set out behaviour which will be treated as being so serious that it is likely to lead to dismissal without notice – gross misconduct. Examples of conduct that will be regarded as gross misconduct should be provided, such as:

- harassment/bullying
- drunkenness/drug abuse
- fighting at work
- fraud
- gross negligence/insubordination
- serious breaches of health and safety
- theft
- use of foul language to clients/customers

It should be made clear that the list is not meant to be exhaustive.

What counts as gross misconduct varies depending on the type of business, the role of the employee and the circumstances of the incident(s).

Informal and formal disciplinary action

Informal action

If an employee's performance or conduct does not meet your standards, you should try to help that employee to improve. Have an informal discussion with the employee as soon as problems arise, explain the problem and agree actions with them. This kind of informal chat is not part of any formal disciplinary procedure.

If the employee's poor conduct or performance persists, you may have to take formal disciplinary action.

Formal disciplinary action

When applying formal procedures, employers should always ensure that they treat the employee fairly and comply with the formal procedures. A full and proper investigation should be conducted before deciding whether or not to take disciplinary action. The graver the ramifications of dismissal to an employee, the more meticulous the investigation should be into the alleged misconduct.

Employees should be:

- informed in writing of the allegations made against them
- provided with any supporting evidence in advance of a disciplinary meeting
- informed of their right to be accompanied to a disciplinary hearing
- given the opportunity to challenge the allegations before decisions are reached
- informed in writing of the decision
- given and informed of a right to appeal

Protection of wages

Deduction from wages

The time, form and method (e.g. cash, cheque or credit transfer) by which you pay an employee's wages will be determined by the terms and conditions of his or her employment agreement. If you depart from the payment arrangements that you have agreed to in an employee's contract of employment then he or she may be entitled to make a breach of contract claim if he or she suffers a financial loss as a result.

In addition, employees are protected by legislation from unauthorised (unlawful) deductions from their wages (including complete non-payment of wages).

Meaning of 'wages'

Wages are sums payable to an employee by his or her employer in connection with his or her job. They include:

- fees, bonuses, commission, holiday pay or other payments in connection with the employee's job
- statutory payments such as Statutory Illness Benefit and Statutory Maternity Pay
- luncheon vouchers, gift tokens and other vouchers of a fixed monetary value that can be exchanged for money, goods or services

Certain other types of payment do not count as wages such as:

- loans or advances of wages
- payments of expenses incurred in employment
- pension and redundancy payments
- lump sums on retirement or in compensation for loss of office
- payments in kind, other than vouchers or tokens that can be exchanged and are of fixed monetary value
- tips and other gratuities paid directly to the worker by a third party

Meaning of 'deductions'

Where an employer makes a deliberate decision not to pay part or all of an employee's wages in accordance with his or her contract, then this counts as a deduction.

Disputes as to whether or not the employer has correctly calculated the gross amount of wages due is a matter to be settled under the law of contract in the civil courts or alternatively, if the employment has ended, in the employment tribunals.

When is a deduction lawful?

You may make a deduction from an employee's wages if the payment is:

- required or authorised by legislation (such as income tax or insurance contributions)
- authorised by the employee's contract
- agreed to in writing by the employee before it is made

Exceptions

The conditions set out above do not have to be met where a deduction is made or a payment received:

- To recover an earlier overpayment of wages or expenses by the employer to the employee.
- As a result of disciplinary proceedings provided for in legislation (for example, police disciplinary proceedings).
- A consequence of the employee taking part in a strike or other industrial action.
- To satisfy a court order or a tribunal decision - provided in the case of a deduction that the employee has given his or her prior written agreement to it.

In addition, where a deduction is made under an arrangement agreed to by the employee in writing for the employer to pay to a third party amounts notified by that third party, the deduction is always lawful under the legislation on unlawful deductions if the employer deducts the amount that has been notified.

Where a deduction is made because of a statutory requirement on the employer to deduct and pay over specified amounts to a statutory authority (for example, PAYE income tax payments to Revenue), the deduction is lawful under the legislation on unlawful deductions - provided that the employer deducts the amount specified by the authority. Any questions as to whether or not the authority has correctly calculated the amount due should be followed up with the authority itself.

The rules governing payments by an employee to his or her employer do not apply where the employer is receiving the money in a different capacity (for example, on a social occasion).

Complaints about unlawful deductions

Any worker who considers that he or she has suffered an unlawful deduction from wages may present a complaint to Workplace Relations Customer Services. This applies regardless of the worker's length of service.

Such complaints must normally be made within six months of the date on which the wages were due to be paid (or, if that is not reasonably practicable, within such further period as the tribunal considers reasonably practicable).

Pay and the National Minimum Wage

Pay statements

An employer must ensure that all employees are provided with written pay statements showing:

- their gross pay
- all deductions made
- their net pay and, if paid in more than one way, the amounts and method of each part payment

The National Minimum Wage

The minimum wage is a legal right which covers almost all workers above compulsory school leaving age. There are different minimum wage rates for different ages of workers and these rates can be reviewed periodically based on the recommendations of the independent Low Pay Commission.

Most workers in the Republic Ireland, including homeworkers, agency workers, commission workers, part-time workers and piece workers are entitled to the minimum wage and refusing to pay it is a criminal offence. Dismissing a worker because he or she becomes eligible or complains about not being paid the National Minimum Wage will constitute unfair dismissal.

You may be required to prove that you are paying the National Minimum Wage and this means that you must keep sufficient records and allow access to them if required.

What payments do not count towards the National Minimum Wage?

- if you pay for or subsidise meals, uniforms, private health care, motoring costs or other 'benefits in kind' for your employees, these don't count towards the calculation of the National Minimum Wage, even if they are taxed as income
- tips, gratuities or service charges paid (even if paid through the payroll)
- expenses paid to your employee for travelling to a temporary workplace, which is treated by you as deductions from earnings
- loans to your employees
- pension payments
- payment for working overtime
- retirement lump sums
- redundancy payments

Guaranteed pay

In some cases employees who are laid off may be entitled to payment. A lay off is not the same as a redundancy and the regulations covering each situation are very different.

Pensions

Overview

Pension schemes in the Republic of Ireland are generally regulated by the Pensions Authority. It is common for large employers to have occupational pension schemes (discussed below), but there is no legal obligation for employers to provide them.

Members of schemes have certain rights in relation to such matters as information. Contributions to approved occupational pension schemes may attract tax relief. Regulation for tax purposes is supervised by the Retirements Benefits District of the Revenue Commissioners.

Occupational pensions schemes

Also known as works pension, company pension, or superannuation, occupational pension schemes are set up by employers for their employees on retirement or to surviving dependents on the death of an employee.

There are two types of occupational pension schemes:

- contributory, where both the employer and the employee contribute to the pension
- non-contributory, where the employer makes all the payments

Funded Schemes

Virtually all occupational schemes are funded - the contributions are put into a designated fund and the benefits are paid from that fund. The most notable exception is the public service pension arrangement where there is no fund and benefits are paid out of current government funds.

A National Pensions Reserve Fund (NPRF) has been established to provide a fund that can be drawn upon for future payments of public service and social welfare pensions. This is different from funded pension schemes. In a funded scheme, you are a member of the scheme and you have a direct interest in the fund. You have no direct claim on the NPRF.

Defined benefit schemes

A defined benefit scheme is one where the benefit entitlement is defined in some way by reference to your earnings, your length of service, an index or a fixed amount. In defined benefit schemes, the contributions may have to be varied from time to time in order to make sure that the fund can meet the level of benefits. Some schemes have provisions for the employer to top up the fund if necessary.

Personal Pensions

Personal pensions in the Republic of Ireland mean pensions that are organised individually by self-employed people or employed people who do not have an occupational pension scheme

The rules governing personal pensions have changed very considerably in recent years. Personal pensions are not subject to the regulation of the Pensions Authority. Instead, personal pensions are subject to tax law and financial services legislation (including the general law on insurance).

Personal Retirement Savings Account

These schemes are designed to be used instead of occupational pension schemes by employers who do not wish to sponsor such schemes. They may also be used to supplement occupational scheme benefits, as Additional Voluntary Contributions (AVCs) and as a substitute for personal pension schemes.

Employers must offer access to at least one standard PRSA to any employee who is not eligible to join an occupational pension scheme within 6 months of joining employment and must offer a PRSA for AVC purposes if there is no facility for AVCs within the scheme.

What is 'working time'?

Working time

The Organisation of Working Time Act 1997 (the 1997 Act) implement the European Working Time Directive and parts of the Young Workers' Directive which relate to the working time of adolescent workers (workers aged 16 or 17).

The meaning of working time

In terms of the 1997 Act, 'working time' means:

- any period during which your worker works at your disposal and carries out their activities or duties
- any period during which your worker is receiving 'relevant training'
- any additional period which is to be treated as working time under a relevant agreement

In broad terms, working time includes travelling if part of the job, working lunches and job-related training. It does not include travelling between home and work, lunch breaks, evening classes or day-release courses.

On-call time will probably be working time when a worker is required to be at or remain close to their place of work. Workers who are on-call at a place where they are required to remain by their employer are likely to be regarded as 'working', even though they may be sleeping or resting, or pursuing other activities during that period. The extent to which they are actually called out will not determine the issue of whether or not they are 'working' for the purposes of the protections afforded under the 1997 Act.

Application of the 1997 Act

All workers are covered by the 1997 Act, including part-time, casual, freelance and agency staff. Exceptions include:

- sectors that are subject to different rules – see section on special cases below
- certain circumstances in which agreements to vary or opt out of working-time limits and other requirements are permitted by law

Workers who can generally decide how long they work because of the nature of their job are also exempt. The 1997 Act states that a worker falls into this category if 'on account of the specific characteristics of the activity in which he is engaged, the duration of his working time is not measured or predetermined, or can be determined by the worker himself'.

Employers need to consider whether a worker falls into this category. Those who can decide when to do their work and how long they work, such as senior managers, are likely to be in this category. Those without this freedom to choose are not.

Workers in this category may have an element of their working time measured or pre-determined, but otherwise decide how long they actually work.

This exception would not apply to workers:

- paid hourly and those claiming paid overtime
- working under close supervision
- who are implicitly required to work – e.g. because of output requirements to be achieved in a specified period

Special cases

Special rules apply to Sunday and night workers. For further information, see Sunday and Sunday night working.

There are exceptions to the Organisation of Working Time Act 1997 if your workers:

- work a long way from where they live
- have to travel to different places for work

There are also exceptions to cover:

- security or surveillance work
- jobs that require round-the-clock staffing
- some employees working in rail transport
- exceptionally busy periods
- emergencies

In all these cases you should average workers' hours over 26 weeks, rather than 17 weeks, to find their average working week. They are entitled to accumulate their rest periods and take them at a later date. This is called compensatory rest.

In addition, your workers may be covered by other working time legislation if your business is in one of the following sectors:

- air, road, or sea transport
- inland waterways and lakes
- sea fishing

Maximum working hours

Limits on working hours

The Organisation of Working Time Act 1997 sets a maximum limit on weekly working hours. The general rule is that working time, including overtime, in any reference period, shall not exceed an average of 48 hours for each seven days.

You are under a positive duty to take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that this limit is not exceeded.

The reference period

The reference period is any period of four months in the course of employment.

In the case of a temporary employee, the reference period may be equivalent to the length of time for which that employee is employed. Where the employee has worked for less than four months, the 48-hour limit applies to the average weekly working time, for whatever period has lapsed since the employee started work.

Measuring of working hours

Where the employee has complete control over the hours they work, time is not monitored or determined by the employer. The limit on weekly working time does not apply. The duration of working time is not measured or predetermined, but is determined by the employee, for example where the person operates as a family worker.

Sanctions for breach of the 1997 Act

Should you fail to observe the weekly working time limit, you will be liable to the sanctions and penalties presently available to the Health and Safety Executive and local authorities, under health and safety legislation.

The Health and Safety Executive or local authority can issue improvement and prohibition notices. In extreme cases, the employers can be prosecuted and this can lead to unlimited fines.

You have a general duty to protect your employee's health and safety at work. If the weekly working time limit is exceeded, you risk being in breach of a duty of care. The 1997 Act provides additional protection as they contain duties on you to observe the limits on weekly working time. If you fail to observe those duties, your employee can enforce such duty as a civil claim in the courts.

The 1997 Act also provides your employees with two further rights if they refuse to work in excess of the maximum weekly working time limit:

- Firstly, they have the right not to be subjected to any detriment by any act, or any deliberate failure to act, by you, for refusing to work in excess of an average 48 hours per week.
- Secondly, your employees shall be regarded as unfairly dismissed (irrespective of the length of service,) if the principal reason for the dismissal is that they have refused to exceed the weekly limit on their working hours.

In addition to these rights your employee may present a complaint to a rights commissioner that the employee's employer has breached a fundamental term of the contract.

Night shifts

Night shift regulations

The Organisation of Working Time Act 1997 provides that if your employee is a night worker, your normal hours of work shall not exceed an average of eight hours for each 24 hours. You shall take all reasonable steps, in keeping with the need to protect your employee's health and safety, to ensure compliance with this limit.

If the work involves 'special hazards' or heavy physical or mental strain, your employee is subject to an eight-hour limit on actual working time in any 24-hour period working. Night work will fall into this category if:

- it is identified as such in a collective agreement or a workforce agreement (which takes account of the specific effects and hazards of night work)
- it is recognised as involving a significant risk to health and safety

If there is no agreement in place your employee will be defined as a 'night worker' should they work at least three hours of their daily working time during night time as a normal course.

Night time is defined as a period of at least three hours which includes the period between midnight and 7.00 a.m. A person will be taken to work hours 'as a normal course' if they work such hours on the majority of working days.

A person works at night 'as a normal course' if they do so on a regular basis, for example on a rotating shift pattern that results in that person working regularly as opposed to an infrequent basis during night time.

The reference period that applies in the case of a night worker is any period of four months in the course of their employment, unless a relevant agreement stipulates which successive periods of four months amount to such reference period. This period may be modified by a collective or workforce agreement.

The reference period may vary in the case of a temporary employee. Where a night worker has worked for you for less than four months, the reference period is the period that has lapsed since the worker started work with you.

Exceptions

There are special cases where the limits on the length of night time work do not apply. These include, among others, the following:

- where the activities are such that the place of work and place of residence are distant from one another or different places of work are distant from one another
- where your employee is engaged in security and surveillance activities requiring permanent presence in order to protect property and persons

- where the activities involve the need for continuity of service or production, for example press, radio, television, gas, water and electricity production, research and development activities, agriculture
- where there is a foreseeable surge of activity as occurs in agriculture, tourism and the postal services
- other activities where the employee is affected by an occurrence due to unusual and unforeseeable circumstances beyond your control

If a situation arises where a special case applies, you must allow your employee to take an equivalent period of compensatory rest wherever possible. In exceptional cases where it is not possible to grant such a period of rest, you have a duty to safeguard your employee's health and safety.

You must afford your employee the appropriate protection should they be required to carry out work that exceeds the limits on the length of night time work.

If you fail to comply with the limits on night time work, the sanctions are similar to those applicable to limits on maximum weekly working time.

Rest

Adult workers

An adult worker is entitled to a daily rest period of at least eleven consecutive hours in each 24-hour period during which he or she works for their employer, unless working time is unmeasured or your employee is engaged in one of the special case activities, or your employee is a shift worker who changes shift and cannot take the daily rest period between the end of one shift and the start of another, or your employee's rights are modified or excluded by a collective or workforce agreement.

In the above cases (other than unmeasured, working time), you must allow your employee to take an equivalent period of compensatory rest. In exceptional cases where it is not possible, you must safeguard your employee's health and safety by providing appropriate protection.

Weekly rest periods

In addition to the daily rest period, your employee is entitled, as an adult worker, to an uninterrupted rest period of not less than 24 hours in each seven-day period.

An adult worker's weekly rest entitlement will be subject to the same exceptions as are outlined in relation to the daily rest.

The rest period can be reduced where this is justified by technical or organisation reasons, but to not less than 36 consecutive hours. The general exceptions do not apply to young workers.

Daily rest break

In addition to daily and weekly rest periods, an adult worker is entitled to a daily rest break where the daily working time is more than six hours. These rest breaks may be included in a collective or workforce agreement.

Should there be no agreement, the break must be an uninterrupted period of not less than 30 minutes. Your employee shall be entitled to spend this break away from his or her workstation, if he or she has one.

Special cases

Where work time is unmeasured or where your employee is engaged in one of the special case activities or where the rights are modified or excluded by a collective or workforce agreement, general rules applicable to rest breaks do not apply.

However, should your employee have been engaged in one of these special case activities, or where the rights are modified or excluded by a collective or workforce agreement, you must allow your employee to take an equivalent period of compensatory rest. In exceptional

cases where it is not possible, you must safeguard your employee's health and safety by applying appropriate protection.

Where there are unusual and unforeseeable circumstances, it may constitute an exception to your employee having the usual rest break.

Failure to comply

If you do not allow your employee to exercise his or her rights to a daily/weekly rest period or rest break, or fail to provide them with an equivalent of compensatory rest, the employee may present a complaint to the rights commissioner.

The complaint must be brought within six months of the act or omission complained of, unless the rights commissioner is of the view that it was not reasonably possible in the circumstances, to bring the complaint within the period. If the rights commission finds against you, it must make a declaration to that effect and may also award compensation.

The rights commissioner will decide what is fair and reasonable in all the circumstances taking into account your default in failing to provide your employee with the relevant rest period. It will also take into account any loss that the employee may have suffered because of your failure.

If your employee refuses to forego a rest entitlement, or has brought proceedings against you to enforce such an entitlement, or your employee has alleged that you have infringed their right, and this is the principal reason for the dismissal, the dismissal will be treated as unfair irrespective of the employee's length of service.

To recover an earlier overpayment of wages or expenses by the employer to the employee

- as a result of disciplinary proceedings provided for in legislation (for example, police disciplinary proceedings)
- a consequence of the employee taking part in a strike or other industrial action
- to satisfy a court order or a tribunal decision - provided in the case of a deduction that the employee has given his or her prior written agreement to it

In addition, where a deduction is made under an arrangement agreed to by the employee in writing for the employer to pay to a third party amounts notified by that third party, the deduction is always lawful under the legislation on unlawful deductions if the employer deducts the amount that has been notified.

Where a deduction is made because of a statutory requirement on the employer to deduct and pay over specified amounts to a statutory authority (for example, PAYE income tax payments to Revenue), the deduction is lawful under the legislation on unlawful deductions - provided that the employer deducts the amount specified by the authority. Any questions as to whether or not the authority has correctly calculated the amount due should be followed up with the authority itself.

The rules governing payments by an employee to his or her employer do not apply where the employer is receiving the money in a different capacity (for example, on a social occasion).

Complaints about unlawful deductions

Any worker who considers that he or she has suffered an unlawful deduction from wages may present a complaint to the employment appeals tribunal. This applies regardless of the worker's length of service.

Such complaints must normally be made within three months of the date on which the wages were due to be paid (or, if that is not reasonably practicable, within such further period as the tribunal considers reasonably practicable).

Summary of working time regulations

Summary of rights

The basic rights and protections that the regulations provide are:

1. a limit of an average of 48 hours a week which a worker can be required to work

2. a limit of an average of eight hours work in 24 which 'night workers' (as defined) can be required to work. More stringent rules apply to night workers who undertake work which involves special hazards or heavy physical or mental strain.

3. a right for night workers to receive free health assessments

4. a right to 11 hours rest a day

5. a right to a day off each week

6. a right to an in-work rest break of at least 30 minutes if the working day is longer than six hours

7. an obligation on employers to keep records showing that the limits on working hours are being complied with, and to ensure that such records are retained from the date on which they are made.

8. a right to four working weeks' paid annual leave a year

As mentioned above, the 1997 Act does allow a degree of flexibility, and certain rights may be modified or excluded by written agreement. This facility is particularly useful in the context of the 48 hour week, where both you and the worker are willing to increase or exclude the limit on working hours.

Please note however, that strict procedures govern the right to modify or exclude the 1997 Act, and you are therefore strongly advised to seek legal advice in relation to this topic.

Flexible working

Introduction

Where an employer receives a request for flexible working they should have a procedure for dealing with such applications. Employers should take into consideration personal family needs, the number of part-time employees and staffing needs of the organisation.

However, regardless of the legal obligations, businesses are appreciating more and more how flexible working can benefit their performance, e.g. through improved staff motivation and productivity.

Many employers believe that promoting flexible working makes good business sense and brings the following improvements:

- greater cost-effectiveness and efficiency, such as savings on overheads when employees work from home or less downtime for machinery when 24-hour shifts are worked
- the chance to have extended operating hours, e.g. later closing times for retailers
- ability to attract a higher level of skills because the business is able to attract and retain a skilled and more diverse workforce. Also, recruitment costs are reduced
- more job satisfaction and better staff morale
- reduced levels of sickness absence
- greater continuity as staff, who might otherwise have left, are offered hours they can manage. Many employers find that a better work-life balance has a positive impact on staff retention, and on employee relations, motivation and commitment. High rates of retention means that you keep experienced staff who can often offer a better overall service.
- increased customer satisfaction and loyalty as a result of the above
- improved competitiveness, such as being able to react to changing market conditions more effectively

Introducing a flexible working policy does not have to be difficult. However, you need to plan, implement and monitor its introduction across the business.

You should inform and consult employees before you introduce it. This may help them understand how flexible working arrangements may impact on your business.

When planning to implement a policy, you will need to consider the following:

- What flexible working arrangements will suit the business?
- How will you deal with applications, e.g. who will attend the meetings and how will the administration work?

- Are there jobs that might be difficult to do under a flexible working arrangement, e.g. jobs that don't suit homeworking?
- If there are, what is the nature of the obstacle and can you perhaps overcome it?
- How flexible are your IT arrangements, e.g. can employees access their email away from the workplace?

Who can ask for it?

Anyone can ask their employer for flexible work arrangement. Where your employee makes a request, you are obliged to consider it seriously. It also means that your employee has a right of appeal against a refusal of the request by you.

In relation to children, your employee can request flexible working if they are either:

- the mother, father, adopter, guardian, special guardian, foster parent or private foster carer of the child or a person who has been granted a residence order in respect of a child
- married to or the partner or civil partner of the child's mother, father, adopter, guardian, special guardian, foster parent or private foster carer or of a person who has been granted a residence order in respect of a child

In relation to adults, your employee can request flexible working if they care, or expect to be caring, for either:

- a spouse, partner, civil partner or relative
- someone who lives at their address

A relative is a mother, father, adopter, adoptee, guardian, special guardian, parent-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister, sister-in-law, uncle, aunt or grandparent. Step-relatives, adoptive relationships and half-blood relatives are also included.

You must seriously consider any application your employees make, but you do not have to agree to it if there is a good business reason not to. Your employees have the right to ask for flexible working - not the right to have it.

How must an application be made?

In order for a flexible working application to be valid, it must contain certain information. It must:

- be dated and in writing
- confirm that your employee has, or expects to have, responsibility to care for a child or adult
- confirm your employee's relationship with the child or adult in question

- specify the flexible working arrangement applied for
- explain what effect, if any, your employee thinks the proposed change may have on your business and how they believe you can deal with any such effect
- state the date when they want the change to start
- state whether they have made any flexible working applications to you before and, if so, when

What you must do

You should acknowledge receipt of your employee's flexible working request.

If you find that the application is incomplete, you should:

- ask your employee to resubmit it
- tell them you do not have to consider it until it is resubmitted

If your employee unreasonably refuses to provide you with the information needed, you can treat the application as withdrawn. The employee will not be able to make another application for another 12 months.

Your employee does not have to give proof of the caring relationship. You should make the decision on whether or not to grant a request solely on business grounds.

In addition, your employee does not have to show:

- that the child or adult in question requires any particular level of care
- why they, rather than anyone else, must provide that care

However, if you think that your employee is abusing the right to request, e.g. that they do not have a qualifying relationship with the child or adult in question, you can ask for evidence. If your employee refuses to co-operate, you may consider invoking your disciplinary procedure in order to investigate your concerns.

In response to a statutory request for flexible working, except where you are able and willing to agree to a request based just on the application itself, you should arrange a meeting with your employee within 28 days of you receiving their application. If it is difficult to arrange a meeting within this period, seek the employee's agreement to extend it. Failure to hold a meeting within the 28 day period or any extension, without the employee's agreement, will be a breach of the procedure.

You should arrange the meeting at an appropriate time and place that is convenient for all.

The meeting

Your employee has the right to be accompanied by a work colleague or certified trade union representative working in your business.

The companion can address the meeting and confer with your employee during it, but may not answer questions on their behalf.

You must pay both your employee and their companion for the time off from their normal working duties to attend the meeting.

If your employee fails to attend the meeting more than once without a reasonable explanation, you can treat their application as withdrawn, which will mean that they will not be able to make a further application for 12 months.

Extending time limits

There may be occasions where you need more time than the formal procedure allows in order to reach your decision.

There are two circumstances where the time limits for giving decisions and raising appeals can be extended.

Through agreement

You might need to extend time limits where, for example, you need more time to consult with other staff or you agree to a trial period to check the suitability of the proposed working arrangement. Any such extensions need to be agreed in writing.

The written record of the agreement must:

- be dated
- be sent to the employee
- specify what period the extension relates to
- specify the date on which the extension is to end

Through absence

An automatic extension applies where the individual who normally deals with the request is absent from work due to leave or illness. The extension lasts as long as the period of absence. There are no other circumstances where an automatic extension to any period applies.

Making a decision

You must notify your employee of your decision within 14 days of the meeting to discuss their flexible working request.

If you need more time to consider the request, you must agree this with the employee.

If you accept their flexible working request, you must write to them, dating the document and:

- detailing their new working pattern
- stating the date on which it will start
- stating that the arrangement means a permanent change to your employee's terms and conditions of employment (unless agreed otherwise)

If you decide that you cannot accommodate any kind of flexible working for your employee, you must, in writing, dating your document:

- state which of the listed business grounds apply as to why you cannot accept their request
- provide an explanation of why the business reasons apply in the circumstances
- set out the appeal procedure

In your written refusal of a flexible working request, you must explain why the business ground applies in the circumstances. If an employee understands why a business reason is relevant, they are more likely to accept the outcome and be satisfied that you have considered their application seriously - even if it is not the outcome they wanted.

You do not have to go into a lot of detail, but you should include the key facts about why the business ground applies. These should be accurate and relevant to the business ground.

If you and/or the employee are not sure that the proposed flexible working pattern will work in practice, you could think about trying a different working arrangement or, alternatively, you could consider a trial period.

Trial periods can potentially happen at two stages before a formal agreement is reached:

- Firstly, if you know that your employee will be applying, then you can agree to a trial period before they submit a formal written flexible working request. If you do this, the formal procedure will still be available to the employee in the future.
- Secondly, if the employee makes a formal written application, you could agree to an extension of time for you to make a decision and the trial period could happen before you reach a final agreement. In this case the rest of the formal procedure would still be available to the employee.

If you and the employee think that a flexible working arrangement resulting in a permanent change to their contract of employment may not be the best solution, you could consider an informal temporary arrangement.

This may be appropriate where, for example, the employee suddenly becomes the carer of an adult with a terminal illness or they have to care for someone with a fluctuating condition like Parkinson's Disease.

You should put any such agreement in writing.

Part-time workers

Employing part-time workers can be an efficient way to keep costs down in areas where you do not need full-time cover. It is also a way to build in flexibility so that you can respond to changes in demand and develop your business.

It is recommended that employers should do the following:

- seriously consider requests for job sharing/change to part-time work
- provide individuals with information on availability of part-time work
- those who are large organisations should keep a database of individuals interested in part-time work/job sharing

(Further details are available in the chapter on ‘Flexible working’.)

Part-time employees' rights

Employers of part-time workers must not treat them less favourably than full-time workers. Any treatment that puts part-time workers at a disadvantage could lead to a complaint to the employment appeals tribunal, or to a claim of indirect sex discrimination as the majority of part-time employees are women. A comparable full-time worker is one who works for the same employer and does similar work under the same type of contract.

This means that part-time workers must enjoy pro-rata terms and conditions including equal:

- rates of pay
- rates of overtime pay - once part-time workers have worked more than the normal full-time hours
- entitlement to company pension schemes and benefits
- access to training and career development
- holiday entitlement
- rights to career breaks
- contractual sick pay, contractual maternity and parental leave and pay rights as offered to full-time staff
- treatment when selecting candidates for promotion and for redundancy

Part-time workers have the same rights and benefits - in proportion to the hours they work - as comparable full-time staff, unless you can justify the difference on objective grounds. For example, you may be justified in not allowing a part-time worker to join a health insurance scheme because of the disproportionate cost. Part-time workers who believe they are not treated equally can present a claim to a rights commissioner. Written notice of a complaint must be presented within six months of the alleged contravention.

Part-time workers who still believe they are being treated unfavourably may appeal any decision of the rights commissioner to the labour court. This must be done within six months of the decision being communicated to the parties.

A worker does not have the right to claim unfair dismissal, however, he/she does have the right to claim that he/she has been subjected to a detriment if he/she is subjected to detrimental treatment for any of the above reasons.

Unfair dismissal

Irrespective of length of service, an employee may make a claim for unfair dismissal if he/she is dismissed for:

- bringing proceedings him/herself or giving evidence in proceedings brought by a worker under the part-time rules against his/her employer
- alleging that the employer has infringed the part-time rules
- refusing or proposing to refuse to forgo a right conferred upon him by the part-time rules or
- because the employer believes or suspects that the employee has done or intends to do any of the above

Prevention of less favourable treatment

The Protection of Employees (Part-time Work) Act 2001 ensures that part-timers are not treated less favourably in their contractual terms and conditions than comparable full-timers, unless different treatment is justified on objective grounds. Less favourable treatment of a part-timer will be justified on objective grounds if it can be shown that it is necessary and appropriate to achieve a legitimate business objective.

Reorganising hours

Reorganising the hours of work is a contractual matter between employer and worker. However, in reorganising workloads, employers will need to avoid treating part-time workers less favourably than full-time staff. They should also be aware that in certain situations they may be vulnerable to claims for indirect sex discrimination.

To comply with the law, in reorganising workloads, part-time workers should not be treated less favourably than full-time workers, unless this treatment can be objectively justified.

Promotion for part-time workers

If individual companies and the economy as a whole are to reap the full benefit of the flexibility part-time work can offer, then more types of jobs and levels of management must be opened to part-time workers. Part-time workers should also be given equal opportunity to seek promotion as full-time workers. Not only is this an area where an employer could be open to a claim of less favourable treatment, but applying opportunity fairly will bring benefits to the employer.

It should also be borne in mind that part-time staff may be willing to work full-time on promotion because the extra pay available would allow him/her to afford childcare or buy in the necessary help.

To comply with the law, previous or current part-time status should not of itself constitute a barrier to promotion to a post, whether the post is full-time or part-time.

Rate of pay

Enhanced pay

Examples of enhanced pay include bonus pay, shift allowances and unsocial hours payments.

As a result of the Protection of Employees (Part-Time Work) Act 2001, part-time workers must receive the same basic rate of pay as comparable full-time workers. They must not be given a lower hourly rate, unless justified on objective grounds.

One example where a different hourly rate might be objectively justified would be a performance related pay scheme. If workers are shown to have a different level of

performance measured by a fair and consistent appraisal system, this could justifiably result in different rates of pay.

In general, the same principle applies to enhanced rates of pay. In special circumstances, special rates of pay apply. These may include bonus pay, shift allowances, unsocial hours payments or weekend payments. In these cases, part-time workers are entitled to the same hourly rate as a comparable full-time worker.

To comply with the law, you should pay part-time workers the same hourly rate as comparable full-time workers.

Examples of complying with the law:

- Bonus pay: A firm awards its workers a Christmas bonus. Its part-time workers receive a pro rata amount, depending on the number of hours they work.
- Shift allowances: A store has both full-time and part-time workers, working early, day and late shifts. The early and late shifts attract time-and-a-half pay for both full-time workers and comparable part-time workers.
- Unsocial hours: A part-time care assistant receives the same unsocial hours' payment for working between midnight and 6 am as his comparable full-time colleague.

Overtime

Part-time workers do not have an automatic right to overtime payments once they work beyond their normal hours. Only when part-time workers have worked up to the normal hours of comparable full-time workers do they have a legal right to overtime payments.

This does not affect the right of part-time workers, where they are entitled, to receive unsocial hours' payments, weekend payments or other forms of enhanced pay.

To comply with the law, you should pay part-time workers the same hourly rate of overtime pay as comparable full-time workers, once they have worked more than the normal full-time hours.

Examples of complying with the law: A hotel, in which full-timers work five eight hour days per week, hits a busy period in the run up to Christmas. It asks its entire staff to work extra hours. A part-time worker who normally works 9 am to 12 pm agrees to work 9 am to 2 pm. She receives her normal hourly rate of pay, with no overtime payment, for the additional hours. The same applies to a second part-time worker who normally works two days a week, and agrees to work four. A third part-time worker normally works three days a week, and agrees to work for five days and one evening. She receives her normal pay rate for the extra two days, but receives an overtime payment for the extra evening.

Profit sharing

Participation in profit sharing and share option schemes has sometimes been limited, and those who work part-time excluded. This can undermine one of the key aims of these

benefits - to motivate staff and make sure they have a stake in their company's future success.

The Protection of Employees (Part-Time Work) Act 2001 will make most exclusions of part-time staff from profit sharing or share option schemes unlawful. Part-time workers should receive a pro rata level of benefits in line with the number of hours they work, unless their exclusion can be objectively justified.

In the case of share option schemes, there may be cases where exclusions can be objectively justified, in particular, where the value of the share options is so small that the potential benefit to the part-timer of the options is less than the likely cost of realising them.

To comply with the law:

- Part-time workers should be able to participate in profit sharing or share option schemes available for full-time staff, unless there are objective grounds for excluding them.
- The benefits part-time workers receive under these schemes should be pro rata to those received by comparable full-time workers.

Example of complying with the law: A retailer operates a profit sharing scheme. The benefits received are determined by the sales figures of individual workers. All staff, whether full-time or part-time, participate in the scheme.

Contractual sick and maternity pay

The Regulations apply directly to contractual sick and maternity pay. This means that there is an obligation on employers not to treat a part-time worker less favourably than a comparable full-time worker. The benefits that a full-time worker receives must also apply to part-time workers pro rata. The only exception will be if the different treatment is justified on objective grounds.

To comply with the law part-time workers should not be treated less favourably than full-time workers in terms of:

- calculating the rate of sick pay or maternity pay
- the length of service required to qualify for payment
- the length of time for which the payment is received

Example of complying with the law: A hotel worker who works two days per week has been with the hotel for seven months, when he becomes ill and is absent for two weeks. The hotel's sick pay scheme entitles staff to full pay on certified sick leave after six months' service for up to one month of absence. The worker receives full pay (i.e. two days per week) for the whole of his absence.

Access to occupational pensions

Most part-time workers have had access to their employer's occupational pension scheme. Under this principle, employers must provide equality of access, contributions and benefits to men and women, unless the differences are attributable to a material difference other than sex. As most part-time workers are women, the majority of part-time staff already had access to pension schemes because excluding part-time workers might have represented unlawful sex discrimination against women. However, coverage was not universal. Employers could deny access to part-time workers if the exclusion could be objectively justified on grounds unrelated to sex and there was no disparate impact on women.

Under the Protection of Employees (Part-Time Work) Act 2001, employers cannot deny access to both male and female part-time workers, unless different treatment is justified on objective grounds. Scheme rules may need to be revised, to ensure that they comply with the new legislation.

To comply with the law, employers should not discriminate between full-time and part-time workers over access to pension schemes, unless different treatment is justified on objective grounds.

Example of complying with the law: Before the Protection of Employees (Part-Time Work) Act 2001 came into effect, an employer employing full-time and part-time drivers denied the part-time drivers access to the pension scheme. This was not unlawful as, in this company, men and women worked full-time and part-time in equal proportions, and so indirect sex discrimination could not be proved because there was no disparate impact on women.

Under the Protection of Employees (Part-Time Work) Act 2001, the employer is required to offer the part-timers access to the pension scheme on the same basis as the full-time workers, unless their exclusion can be justified on objective grounds.

Access to training

Access to training is essential if part-time workers are to work effectively, and employers are to make the most of their staff. There is a strong business case for making sure that staff are equipped to do their job well and their skills are up-to-date. Investing in training, when well-targeted, is investing in the future of the enterprise. It also shows a commitment to workers which will pay dividends in increasing the level of staff morale and commitment to the organisation.

Part-time workers often encounter difficulty in obtaining access to training - especially career-orientated development or vocational training. Either they are excluded entirely, or, though they are in theory entitled to attend, their other responsibilities prevent them from participating because of the inconvenient hours. Denying part-time workers access to training will obviously be less favourable treatment.

To comply with the law, employers should not exclude part-time staff from training simply because they work part-time.

Redundancy

In a redundancy situation, it used to be common practice to make part-time workers redundant before full-time workers. However, the automatic redundancy of part-time staff is likely to be unlawful on two counts: it could well infringe the Protection of Employments (Part-Time Work) Act 2001 to treat part-time workers less favourably than their full-time equivalents, and, since many part-time workers are women, it is likely to be a form of unlawful sex discrimination. Different treatment of full-time and part-time workers will only be lawful if it can be justified on objective grounds.

The Redundancy Payments Act 2003 has secured the rights of part-time workers to a statutory redundancy payment through amending insurability requirements for redundancy to bring them into line with the Social Welfare Acts and the Protection of Employees (Part-Time Work) Act 2001.

To comply with the law, the criteria used to select jobs for redundancy should be objectively justified, and part-time workers must not be treated less favourably than comparable full-time workers.

Example of best practice: A library employs an equal number of full-time and part-time staff. A shortage of funding forces the library to reduce the money it spends on staff. The library offers three voluntary schemes - voluntary redundancy, early retirement and a reduction in hours. However, savings still need to be made. The library therefore looks at the level of public interest (measured by borrowings and attendance) compared both to its opening hours and to its different sections. It finds that the library is least used on the middle three days of the week, and that the fiction and reference sections have seen marked drops in their popularity. The library therefore balances demand and staff availability cover by making redundant three full-time posts and one part-time in the fiction and reference sections and two part-time posts covering Tuesday to Thursday.

Other benefits

Where possible, benefits should be provided pro rata. In some cases, this may prove difficult. In the case of a benefit such as health insurance or company car, that cannot easily be divided, employers will have to decide whether to withhold it from part-time workers. Employers may decide that the cost of extending such a benefit to part-time workers would be prohibitive. However, it will not be enough for employers to show that a benefit could not be applied pro rata. They must also show that the decision is justified on objective grounds.

A part-time employee who normally works less than 20 per cent of the normal hours of the comparable full-time employee can be treated in a less favourable manner with regard to a pension scheme or arrangement. However, this provision does not prevent an employer and a part-time employee from entering into an agreement whereby the part-time employee receives the same pension benefits as a comparable full-time employee.

Other benefits such as clothing allowance, travel allowance or staff discounts might also be extended to part-timers in line with the principles set out here.

To comply with the law, benefits such as subsidised mortgages and staff discounts should be applied to part-time workers, unless an exception is justified on objective grounds. These might include the disproportionate cost to the organisation of providing such a benefit, or the imperative to meet a real need of the organisation.

Example of complying with the law: A finance company provides staff mortgages at a reduced rate of interest for all staff, both full-time and part-time. The same preferential rate of interest applies regardless of hours worked and likewise the same multiplier to determine the mortgage advance.

Leave/holidays/breaks

Part-time workers, like their full-time colleagues, are entitled to a minimum of statutory annual leave, maternity leave, and parental leave. Many of these entitlements are extended or enhanced by contractual conditions. Part-time workers should have the same leave entitlements pro rata as their full-time colleagues.

To comply with the law:

- the holiday entitlement of part-time staff should be pro rata to that of full-time workers
- contractual maternity leave and parental leave should be available to part-time workers as well as full-time workers
- career break schemes should be available to part-time workers in the same way as for full-time, unless their exclusion is objectively justified on grounds other than their part-time status

Public holidays and bank holidays

The rights of part-time workers in relation to public holidays and bank holidays may not always be clear.

Under the Protection of Employees (Part-Time Work) Act 2001, part-time workers should not be treated less favourably than comparable full-time workers in their entitlement to public/bank holidays. Allowing full-time workers the day off, but not part-time workers, is clearly less favourable treatment and unlawful under the regulations unless there is objective justification.

If you have worked for your employer at least 40 hours in the five weeks before the public holiday and the public holiday falls on a day you normally work you are entitled to a day's pay for the public holiday. If you are required to work that day you are entitled to an additional day's pay.

If you do not normally work on that particular day you should receive one-fifth of your weekly pay. Even if you may never be rostered to work on a public holiday you are entitled to one-fifth of your weekly pay as compensation for the public holiday.

If you do not have normal daily or weekly working hours, under SI 475/1997, an average of your day's pay or the fifth of your weekly pay is calculated over the 13 weeks you worked before the public holiday.

Company rules

Introduction

The general interest of all employees and the efficient operation of the business requires the observance of certain basic standards of conduct. The rules set out below are binding on all employees. You are asked to read them carefully and to discuss with your supervisor any points you do not fully understand.

Failure to observe the rules will result in disciplinary action taken in accordance with the company's disciplinary procedure.

THE FOLLOWING LIST IS PROVIDED BY WAY OF ILLUSTRATION ONLY AND IS NOT INTENDED TO BE EXHAUSTIVE.

Model company rules

The following is a set of model company rules which can be adapted for use in most businesses.

Attendance and timekeeping

a) All employees are expected to report for work punctually and to observe the normal hours of work laid down in their Statement of Terms and Conditions.

b) If late for work, you are to report to your supervisor and explain the reason for lateness before starting work.

c) If it is necessary to take time off during working hours, you are to report to your supervisor both before leaving and restarting work.

d) If it is necessary to leave work before the normal finishing time, prior authorisation must be obtained from your supervisor.

e) The company reserves the right to make deductions from wages or salaries in respect of lateness or absence *[note: the employee should agree this expressly in writing, e.g. in the employment contract].*

f) Except in the normal course of their duties, employees are not to leave their place of work or to visit other departments without prior authorisation from their supervisor and the supervisors of any departments visited.

Sick leave and time off

a) If for any reason you are unable to report for work, you should telephone or send a message to your employer – as soon as possible on the first day of absence. You should indicate the reason for, and probable duration of, your absence.

b) In cases of sick leave lasting 2 days or more, your employer may require you to provide a medical certificate from your GP or family doctor

c) If time off work is required for domestic or other reasons, prior authorisation is to be obtained from your employer.

Health and safety

a) Employees have a particular duty to safeguard the health and safety of themselves and all others who may be affected by their acts or omissions. Attention is drawn to the company's health and safety policy and employees are required to co-operate in its implementation.

b) All safety notices and instructions are to be strictly observed.

c) Safety guards are not to be adjusted or removed from machinery except by authorised persons.

d) No machinery is to be cleaned or adjusted whilst in motion.

e) All injuries sustained at work must be reported to your employer immediately and entered in the Accident Book.

Company property

a) All company property shall be treated with due care.

b) No company property shall be removed from the company's premises without prior authorisation from a member of management.

c) The company's time, materials and equipment shall not be used for unauthorised work.

d) On termination of employment, all company property, including tools, documents and protective clothing, is to be returned immediately to the company.

Company business

All information about the company's business acquired in the course of employment is to be regarded as strictly confidential and must not be disclosed to another party except as required in the normal course of your work.

Visitors

Visitors are only to be brought onto company premises with the prior consent of management.

Smoking

Smoking is prohibited throughout the entire workplace with no exceptions. This includes company vehicles. This policy applies to all employees, consultants, contractors, customers or members and visitors.

Drinking

Alcoholic beverages are not to be brought onto, or consumed on, company premises.

Gambling

Gambling is forbidden on company premises at all times.

Private telephone calls

Urgent private telephone calls may be received but should be kept as brief as possible. Essential outgoing calls may be made with the prior approval of your employer.

Meetings

Meetings, other than in the normal course of the company's business, shall not be arranged or held during working hours, or on the company's premises, without the prior permission of a senior manager or director.

Other employment

Employees are not to engage in other employment or business activities where there is a potential, or actual, conflict between the interests of the company and those of the other business.

Gross misconduct

The following breaches constitute gross misconduct and may render an employee liable to summary dismissal (i.e. dismissal without notice):

a) refusal or failure to carry out a reasonable instruction

b) a serious breach of the company's safety rules

c) any act at work which seriously endangers the health or safety of any other person, including interference with any equipment provided for the health and safety of employees

d) violence, assault or dangerous horseplay

e) theft or fraud, including 'clocking' for another employee

f) wilful damage to the property of the company or a fellow employee

g) gross immorality within the workplace

h) sleeping during working hours

i) gross insubordination or objectionable and insulting behaviour

j) being under the influence of drink or non-prescribed drugs during working hours

k) conduct which is inconsistent with the continuance of the relationship of fidelity between the company and an employee

l) serious breach of internet and email policy

Internet and email rules

Introduction

It is common for employers to provide internet, fax and email facilities to their employees as they are essential to the daily communication of a business. It is necessary to regulate the way in which your employees use these facilities so as to avoid misuse and illegal activity that you may find yourself liable for as an employer. While most employee handbooks gives the employer the right to monitor email and internet usage and telephone conversations, this right is subject to the Data Protection Acts 1988 to 2018.

The aim is to get guidelines as to what is and what is not acceptable. That way, as an employer, you will aim to achieve a unified approach towards internet use, faxes and emails, which will help to maintain security levels and will assist you in taking effective disciplinary action if necessary.

Therefore it is advisable for all businesses to have a clear electronic communications policy to which all of your staff should adhere. Usually such a policy will be found inside an employee handbook.

Sample policy

The following is a sample of the type of restrictions that may appear in an electronic communications policy:

Confidentiality

- An employee should not transmit anything in an email or fax message that they would not be comfortable writing in a public document.
- Employees should never assume that internal messages are necessarily private and confidential, even if marked as such. In particular, Internet messages should be treated as non-confidential.

Offensive messages

- Employees must not send offensive, demeaning or disruptive messages.
- If an employee receives mail containing material that is offensive or inappropriate to the office environment then they must delete it immediately. Under no circumstances should such mail be forwarded either internally or externally.

Passwords

An employee must not allow other employees to use their password.

Viruses

Any files or software downloaded from the Internet or brought from home must be virus checked before use. Employees should not rely on their own PC to virus check any such programs but should refer direct to [Name of IT employee].

The Internet

Access to the internet during working time should be limited to matters relating to an employee's employment. Any unauthorised use of the Internet is strictly prohibited. Unauthorised use includes connecting, posting or downloading any information unrelated to an employee's employment.

Interception of communications

We reserve the right to intercept any email for monitoring purposes, record keeping purposes, preventing or detecting crime, investigating or detecting the unauthorised use of our telecommunication system or ascertaining compliance with our practices or procedures. *[NB employee should expressly agree this, e.g. in contract of employment.]*

Breach of policy

If an employee is found to be in breach of this policy then he or she will be disciplined in accordance with the employer's disciplinary procedure and may be dismissed. In cases of serious breaches of this policy, amounting to gross misconduct, an employee may be dismissed summarily.

Teleworking

Overview

Teleworking is working at a distance under an employment contract/relationship using information and communications technologies (ICT) to keep in touch with employers, colleagues or customers. A teleworking employee can:

- work from home full or part time
- divide their time between home and the employer's office
- be a mobile worker who uses a variety of locations, including their home, the employer's office and any place where their telecommunications equipment can work

Employer considerations

Most employers know that a blanket refusal to allow a woman to return to work after having children to work part-time is likely to be unlawful. Employment Appeal Tribunals decisions have ruled that a request to work from home was conceptually similar to a request to work part time at the employer's workplace. Consequently, employers need to give careful considerations to any proposals for alternative working arrangements including teleworking.

Similarly 'family friendly' policies and 'flexible working' and the 'work-life balance' frequently require employers to consider the potential for teleworking. It has long been the case that an employer has an obligation to consider temporary teleworking to assist an employee with a physical problem (e.g. the onset of ME (Myalgic Encephalomyelitis) the chronic, disabling illness which can affect both adults and children).

Many employed teleworkers only telework for part of the working week - the average figure is 1.5 days. The majority of teleworkers are not women carrying out clerical tasks and combining work with family responsibilities but middle aged men with high levels of education, usually in managerial or professional provisions.

Contractual issues

If teleworking is not part of the initial job description and the employer makes an offer to telework, then the worker may accept or refuse this offer. As with most initiatives teleworking is best introduced on the basis of consensus.

Employers are required to provide employees with a written statement of particulars of employment within two months of commencement. Teleworkers are entitled to a written statement under the same conditions as office workers. The place of employment must be included in these particulars and details of the teleworking arrangements should thus be incorporated.

Change in working practices

Where teleworking represents a change in working practices the employer give at least one month from the date of change to produce revised particulars. It is thus good practice for the whole scope of contractual amendments to be detailed in the revised written particulars. After discussing the change with your employee, you should confirm the change to his/her contract of employment by using a confirmation of change to terms in a contract of employment document.

As part of its teleworking policy, the employer should make it clear that there is no intention to change the employee's status and the rights they are thus entitled to, unless both the employee and the employer wish to change the nature of the employment relationship in other substantive ways. Teleworking should not be used as a backdoor means of replacement of permanent jobs with freelance or temporary jobs.

Employment conditions

Particular aspects of a teleworker's contract which may need to be amended or specified are:

- place of work
- hours of work - greater flexibility, within the limits of the legislation, may be possible, perhaps with a set 'core' times when remote workers undertake to be working or contactable. There may need to be an agreement on attendance at on-site team meetings. Equally, the employee needs to know on what basis the reporting manager and the other company personnel are contactable.
- extra responsibilities or duties - this may include procedures for reporting to the office
- expenses policies may have to be altered, for example, by allowing claims for expenses to attend team meetings or travel to the office for other reasons
- for home-based workers allowances for business rates, heating, lighting, wear & tear, etc., may be considered
- for home-based workers access arrangements to the working area may need to be clarified. Health & safety requirements mean that an employer has a responsibility to assess the home workplace (e.g. for electrical power supply, safety of equipment, ergonomic use of equipment). This is not just confined to the computer and phone, it will involve considering the desk, chair, lighting, heating and general working conditions.
- provision of equipment by the employer, i.e. computer, smart mobile, provision of telephone line/broadband connection for work purposes. In some cases, the employee can provide equipment and be reimbursed.
- equipment and data security procedures, including back-up
- employer's insurance may need to be extended to cover work equipment not kept in the office, including equipment used on the move. Workers using their own

equipment for work purposes should check whether such use is covered by their home insurance policy.

- procedure if the teleworker wishes to return to working in the office

Reversibility

On the general principle that people should not be compelled to telework, those who do so should be able to change their mind if they find the arrangement to be unsatisfactory. This applies to workers who may dislike the isolation and to employers if productivity is suffering. Both sides should, however, consent to the changes.

Exceptions

In some cases, however, it may not be possible to reverse the decision to telework. For example, accommodation at the employer's premises may have been reduced as a consequence of the fact that employees are now teleworking. Similarly, the costs of reversal (added to the sunk costs of providing equipment for home working) may be too high.

Consequently, the circumstances in which a decision to telework cannot be reversed should be spelled out at the beginning in the individual's agreement (e.g. where the initial job description was for a home worker).

Equipment

It is important that all questions concerning work equipment, liability and costs are clearly defined before starting teleworking. As a general rule, the employer is responsible for providing, installing and maintaining the equipment necessary for regular telework unless the teleworker uses his/her own equipment. In these latter circumstances, however, the employer needs to ensure that the teleworker's equipment does not give rise to additional security vulnerabilities for failing to comply with the same data protection and security standards to be found on standard issue equipment used and maintained by the employer.

Employer responsibilities

Written into the contract of employment should be terms which state that if teleworking is performed on a regular basis, the employer compensates or covers the costs directly caused by the work, in particular those relating to communication.

In all cases, the employer must provide the teleworker with an appropriate technical support facility. The employer has the liability regarding costs for loss and damage to the equipment and data used by the teleworker.

Employee responsibilities

For the employee's part, the teleworker must take good care of the equipment provided to him/her and under the terms of the company's email policy must not collect or distribute illegal material via the Internet.

Data protection

The employer is responsible for taking appropriate measures to ensure the protection of data used and processed by the teleworker. It is important that the employer informs the teleworker of all company rules concerning data protection. It is then the teleworker's responsibility to comply with these rules.

General advice

Employers and teleworkers should be careful to ensure that the other household members should not have access to personal data as defined by the data protection legislation. A lockable cupboard into which all equipment can be stored at the end of the working day is a usual feature of most companies' home teleworking programmes.

Data security

Remote working is likely to raise issues of data security. The most important safeguard for employers is to make teleworkers aware of the risks, supported by simple and explicit policies including regular data backup procedures, automatic downloading and installation of security patches to all teleworker's computers, the use and maintenance of professionally supported anti-virus software (again with automatic downloading and installation of updates) and the use of email communications for and on behalf of the employer by the teleworker.

Privacy

Staff who are using their homes for working have a right of privacy out-of-hours and need to be able to separate their working and home lives. Times when they can or cannot be contacted on work issues should be agreed.

Monitoring systems

If any kind of monitoring system is put in place it needs to be proportionate to the objective and in compliance any code of practice.

Health monitoring

Similarly European Directive 90/270 establishes employer responsibility for health monitoring relating to:

- ocular risks
- musculo-skeletal problems
- work station conditions and environmental problems

Such mechanisms should be strictly proportionate to the objective and do not constitute a right to 'spy' on employees.

Health & safety

The employer is responsible for the protection of the occupational health and safety of the teleworker.

Responsibility for care

Employers are under a general duty to provide a safe working environment as far as reasonably practical. Health and safety at work legislation applies whether employees are working in a conventional office or remotely.

This general duty is qualified by the principle of so far as is reasonably practicable. Employees must also take reasonable care of their own health and safety and that of anyone else who might be affected by what they do.

For home-based workers, this is likely to include other family members, neighbours, visitors and so on. It is the employee's responsibility to report all employment related hazards to their own or others' health.

Employer's responsibilities

Employers are required to undertake a suitable and sufficient risk assessment of all the work activities carried out by their workers. This includes those who work from home or elsewhere. In the case of teleworkers, it is good practice for the teleworkers themselves to carry out a self-assessment of the risks from work activities carried out in the home.

All assessments need to identify the hazards that are present and then to assess the extent of the risks. Hazards can arise from electrical equipment and VDUs or from equipment and fittings in the room where the work activity is taking place. These may include the workstation, seating, lighting, heating and ventilation and so on.

The following should be considered:

- Employers should avoid the need for excessive manual handling by teleworkers. Training should be provided for heavy lifting where necessary.
- Employers should ensure that all equipment provided is appropriate for the job requirements and, where necessary, provide training. The employer is responsible for the safety of the equipment they supply.
- All electrical goods must comply with existing safety regulations. The employer is responsible for checking compliance. In most cases, the teleworkers' domestic electrical system is their own responsibility.
- It is the employee's responsibility to report all faults which may be a hazard to their own or others' health.
- It is the employer's responsibility to provide adequate first-aid provisions for teleworkers. Exact provisions depend on the nature of the telework activities.

The Protection of Employees (Temporary Agency Work) Act 2012

The Protection of Employees (Temporary Agency Work) Act 2012 affects all organisations that supply or hire temporary agency workers (commonly referred to as 'temps'), who are under the 'direction and supervision' of a hirer.

The regulations give new rights to temporary agency workers (TAW), which can be enforced at the employment appeals tribunal against their agency and/or the hirer.

Pre-existing agency worker rights

Before the regulations came into force, agency workers already had the right to:

- receive the national minimum wage
- receive the paid statutory minimum holiday allowance
- statutory work-time breaks
- maximum hours of work a week (unless agreed in writing)
- protection under health and safety legislation
- protection from discrimination

New rights granted by the regulations

Access to facilities and amenities

From the first day of an assignment, a TAW will be entitled to the same rights of access to the hirer's collective facilities or amenities as are enjoyed by a comparable worker working at the same location (or, if there is no such person, at another location used by the hirer). A 'comparable worker' is someone employed directly by the hirer who does broadly the same work or has broadly the same skills and qualifications as the TAW. Collective facilities or amenities include those provided by the hirer to its workforce as a whole or to particular groups. Examples might include staff canteens, common rooms, car parks, toilet/shower facilities, transport services or workplace crèches.

The facilities should be made available even if they are shared with another business and can extend to facilities that are based at another site occupied by the hirer.

This does not mean a TAW will get priority over other staff and does not include off-site facilities provided by a third party, such as subsidised gym membership.

Hirers can refuse access to facilities only if they can 'objectively justify' their decision by establishing it as both reasonable and proportional. Guidelines state that it is unlikely hirers will be able to justify such decisions solely on grounds of cost.

Information on job vacancies

A TAW will also have a right to access information on job vacancies with the hirer. However, this is limited to those vacancies that would be available to a comparable worker working at the same site as the TAW, so not every vacancy must be communicated. However, such communication should be made simultaneously to the TAW and comparable worker.

This right will not affect a hirer's ability to control:

- the qualifying criteria for the vacancy (such as qualifications or time in service with the business)
- how applications are treated (there is no right for a TAW to have equal or preferential treatment)

This right will not apply if there is a genuine recruitment freeze, such as prior to a restructuring and/or redeployment of staff.

It is recommended that hirers provide details of the available facilities and vacancies to the TAW during their induction.

Alternatively, details of the facilities could be provided to the agency as part of the information regarding the assignment. Information regarding vacancies can be posted where they can be reasonably accessed by a TAW, such as on a notice board or an intranet.

Equal treatment rights

If a TAW works for a hirer in the same job for more than 12 calendar weeks, they will qualify to receive the same 'basic terms and conditions of employment' as a comparable worker.

The regulations state that these are terms relating to pay, duration of working time, night work, rest periods, annual leave and, for pregnant TAWs, paid time off for antenatal appointments.

A hirer should undertake a risk assessment in relation to a pregnant TAW just as it should do for its pregnant employees.

Pay includes:

- basic pay
- overtime pay
- bonuses and commission payments directly related to the amount or quality of work
- additional pay for working unsocial hours or for undertaking hazardous duties
- holiday pay
- vouchers or stamps that have a monetary value (e.g. luncheon vouchers)

For example, if a TAW is paid less than a comparable permanent worker, then after they have worked for 12 weeks they will be entitled to the same rate of pay.

Before the TAW qualifies for these rights, the hirer should provide the agency with details of the basic terms and conditions of employment of either a comparable permanent worker (if there is one), or (if there isn't) that the TAW could have expected to receive if employed directly by the hirer.

This should include information on:

- the pay they can expect to receive
- any entitlement to additional pay for overtime, working unsocial hours or for undertaking hazardous duties and when or how they will qualify for it
- bonus schemes and how performance is appraised
- annual pay increases (e.g. when they take effect)
- offered vouchers or stamps
- the annual leave allowance

Note that the regulations exclude entitlement to certain terms and conditions, such as:

- enhanced sickness, redundancy, maternity, paternity and adoption leave payments, i.e. more than the statutory minimum
- occupational pension payments
- benefits in kind
- payments which require staff to have worked for a minimum period (over 12 weeks) before qualifying
- bonuses which are not directly linked to performance, i.e. bonuses linked to loyalty or long service such as flat-rate bonuses paid to encourage loyalty

If a TAW believes that they are not receiving their equal treatment rights, they should write to the agency requesting details of the basic terms and conditions of employment that they can expect to receive.

The request cannot be made before they become entitled to the equal treatment rights and must be made before starting a claim at the employment appeals tribunal.

The agency has 28 days from receipt of the request to respond in writing with relevant information regarding the hirer's basic terms and conditions of employment (based on the rights of any comparable employee); any relevant information or factors taken into account when determining them (such as pay scales); and the reasons for any difference in the treatment of the TAW.

If the TAW has not received this within 30 days of their request, they can request the same information from the hirer who will also then have 28 days from receipt to provide a written response.

Calculating the 12-week qualifying period

A calendar week means 7 days, starting with the first day of an assignment. It does not matter how many hours the TAW works during a calendar week. Therefore, a TAW who starts on a Wednesday and works for 2 hours that day and no more up to and including the following Tuesday will have accrued one calendar week.

The regulations provide for situations when the number of calendar weeks will pause, continue to accrue or restart, whilst a TAW is accruing their 12-week qualifying period.

The number of calendar weeks will pause if there is a break in the assignment or between assignments:

- due to any reason and for no more than 6 calendar weeks, after which the TAW returns to the same job with the same hirer
- for up to a maximum of 28 weeks due to the TAW suffering sickness or injury (unless related to their pregnancy, maternity or childbirth)
- for up to a maximum of 28 weeks due to the TAW performing jury service
- due to the TAW taking any entitled leave, such as holiday
- caused by a regular and planned shutdown by the hirer of their workplace - such as over Christmas and New Year
- caused by strike action, lockout or other industrial action at the hirer's workplace

The number of calendar weeks will continue to run if there is a break in the assignment:

- due to pregnancy, childbirth or maternity-related absence, whilst the TAW is pregnant and for up to 26 weeks after childbirth or the date the TAW returns to work if earlier. This will include time taken off work for antenatal appointments or absence due to a pregnancy related sickness.
- due to the TAW being on maternity, adoption or paternity leave

The number of calendar weeks will restart if the TAW:

- begins a new assignment with a new hirer
- begins a new job with the same hirer that is 'substantially different' from the previous one *and* the hirer has given written notice to the agency of the new role and the job requirements *and* the agency has informed the TAW of this and that their qualifying period will restart
- has a break in the assignment or between assignments of more than 6 calendar weeks

- is performing jury service or is absent due to sickness or injury (other than due to their pregnancy, maternity or childbirth) for a period of more than 28 weeks

What 'substantially different' means will depend on the circumstances, but it may include, though is not limited to, differences in:

- the required skills
- pay
- workplace location
- working hours
- use of equipment

Who is excluded from the regulations?

Generally, workers who are not under the direction and supervision of a hirer are excluded from the regulations. This may include:

- workers who are introduced through an employment agency but are subsequently employed directly (whether permanently or for a fixed period) or who are genuinely self-employed, have a business relationship with the hirer (the hirer is their client or customer) and are not under the hirer's direction and supervision - such as contractors or consultants including those that trade through an umbrella company
- workers who work temporarily but are recruited directly by (and work solely for) the hirer
- workers on secondment
- circumstances where a hirer has contracted out services performed on its premises to another business (such as catering) and that other business manages its staff

In the event of a dispute regarding whether a worker is excluded from the rights granted by the regulations, the employment appeals tribunal will look at the reality of the working relationship and the true intentions of the parties and will not solely rely on the terms of any agreements made between them.

Contracting out or avoiding the regulations

Hirers and agencies cannot require TAWs to sign agreements which exclude their rights under the regulations.

Furthermore, the regulations contain anti-avoidance provisions which prevent a hirer or agency from implementing structures or practices which are intentionally created to deprive a TAW from qualifying for the new rights.

Types of claims

There are a number of potential employment appeals tribunal claims that can be made against a hirer and/or an agency, which must be brought by a TAW within 3 months of an alleged breach of the regulations.

A hirer will be held liable for failing to provide for the 'day one rights' and, depending on the circumstances, may be jointly liable with the agency if a TAW's equal treatment rights have been breached.

TAWs are also able to make a claim if they have been subjected to a detriment (such as early termination of an assignment) by the hirer or agency because they have (or are believed or suspected to have):

- brought proceedings under the regulations
- given evidence or information in connection with another TAW's claim under the regulations
- made allegations of a breach of the regulations
- asserted or refused to forego their rights under the regulations

A hirer or agency will also be liable if the TAW has suffered a detriment because they believed or suspected that the TAW intended to do any of the above.

Liability

The employment appeals tribunal can order the hirer and/or the agency to pay compensation to a TAW if their rights under the regulations have been breached.

There is no limit to the amount that can be awarded, although generally it will be limited to actual financial loss or a reasonable amount if the loss cannot be quantified (such as if access to facilities are refused).

Action points

The following actions are recommended if you are currently using TAWs or intend to do so:

- Identify which facilities TAWs can use and the vacancies that they should be made aware of.
- Identify which TAWs are likely to work more than 12 weeks and calculate the additional costs that may be incurred (by comparing their basic terms and conditions with those of a comparable permanent employee). You should also consider whether there is any reasonable basis for not giving the TAW the same basic terms and conditions of employment as the comparable employee.
- Put processes or systems in place that:

    - inform TAWs of relevant or (if easier to implement), all job vacancies (e.g. through (limited) access to an intranet or access to a common notice board)
    - inform TAWs of the facilities that they can access or use (e.g. by providing a list of facilities to the agency or as part of an induction)
    - monitor and diarise key information or dates (e.g. how many qualifying weeks a TAW has worked; the date that they will qualify for the equal treatment rights; when information regarding basic terms and conditions, or amendments to them, should be sent to an agency; the time by which a TAW's request for information should be responded to)
    - monitor the performance of TAWs and include them in appraisals (if necessary).
- Provide training to managers and HR personnel.
- Review contractual terms with the agencies and in particular ensure that there are terms dealing with how any joint awards made by an employment tribunal will be apportioned between you (to avoid potential further litigation) and how and when information required by the regulations should be exchanged
- Consider using just one agency (where possible), in order to reduce the administrative burden

Reducing the effect of the regulations

Hirer's should also consider:

- ensuring that TAWs are only used for tasks/assignments that will genuinely not last more than 12 weeks
- increasing the use of overtime for existing staff
- increasing the use of self-employed contractors or consultants who fall beyond the scope of the regulations
- setting up a panel or register of individuals who can be recruited directly for temporary work
- outsourcing certain services to another business whilst ensuring that they do not get involved in supervising or directing their staff
- restructuring pay grades and entitlement to benefits so that they are based on achieving a certain amount of qualifying service
- restructuring bonus schemes which are based on performance or quantity of work done
- using staff discounts instead of monetary vouchers

Termination of the contract

The end of a contract of employment

In general there are three main ways that an employment relationship can come to an end:

- termination by the employer (a dismissal)
- termination by the employee (a resignation)
- termination by mutual agreement

Expiry of a fixed-term contract

When a fixed-term contract is not renewed or a contract is entered into for a specific purpose and that purpose ceases then the employee will be dismissed. In the case of expiration of a fixed term contract, if the contract is not renewed the dismissal may be unfair, and the employee entitled to apply for re-engagement or compensation.

Notice

Either an employer may terminate a contract or an employee may resign from his or her position giving the required period of notice. Where an employee resigns, it is advisable to interview that employee and ascertain the reasons for the resignation. The employee should be asked for a letter confirming the resignation and the reasons for it. Place the interview notes and the employee's letter on the employee's personnel file.

Wrongful dismissal

A wrongful dismissal occurs where an employee has been dismissed by an employer in breach of a term of his or her contract such as:

- failing to give contractual notice
- failing to follow a contractual disciplinary procedure

An employee who has been wrongfully dismissed can bring a case to the Employment Appeals Tribunal. Where a claim or appeal is heard by the Employment Appeals Tribunal, the tribunal will issue a determination. Any decision made can be appealed to the Circuit Court.

Constructive dismissal

Constructive dismissal occurs where the employee resigns in because of the employer's behaviour towards him. In this scenario an employee may also qualify for claims of wrongful dismissal and unfair dismissal.

