Employment
Issues for growing businesses
Employment and recruitment – legal issues for employing staff

Employing staff, and especially employing your first member of staff, can be a minefield for growing businesses. What issues should concern employers and how can they be avoided.

How are you going to find someone suitable?

Referral is the safest way of recruiting. When looking to recruit, it is often a good idea to put feelers out with local contacts and others in your industry; social networks are ideal for this. They may know someone who is looking for a move or who is available.

Alternatively you can recruit by advertising or by using an employment agency. An agency will charge you a fee which is normally a percentage of the first year's salary of the person whom you recruit, 25% is relatively common. The advantage of agents is that they sift through the applications and take out the poorest candidates. The disadvantage is that they are expensive and you will not always be very impressed with their short-listed candidates. Finding an agency that actually knows your sector is always a good idea.

Should you take them on as an employee or as a self-employed person?

From your point of view taking on a self-employed person is better than taking on an employee. This is because self-employed people do not enjoy the whole raft of rights that employees have under UK and European law, including:

- the right to paid holiday (a minimum of 5.6 weeks a year for all employees);
- the right to statutory sick pay;
- the right to 52 weeks maternity leave (irrespective of length of service) and other maternity rights;
- paternity and parental rights; and
- after a year's service, the right not to be unfairly dismissed.

You might think that with this in mind you should have no employees at all and that you should only engage self-employed people and that that way you would avoid having staff with expensive employment rights. Unfortunately, the Employment Tribunals and H M Revenue & Customs wised up to that long ago so even if you treat someone as a self-employed person at some point in the future either they themselves or HMRC may establish that in fact they are employees. The issue is most likely to be raised by the individual themselves when you terminate their engagement (i.e. they may then argue that in fact they are an employee and accordingly can sue for unfair dismissal). The issue is most likely to be raised by HMRC during the course of a PAYE audit. You do not want HMRC to conclude that you have staff claiming to be self-employed who should be treated as employees for payroll purposes. The business will end up with a bill for the PAYE deductions that ought to have been made in respect of the relevant individuals (plus interest and penalties) and the business will for years thereafter be under close scrutiny from the Revenue.
So whilst it is better from your point of view to engage staff on a self-employed basis, you should only do this when you are confident that in the circumstances you could (if challenged) persuade both the Revenue and an Employment Tribunal that they are genuinely self-employed.

**How can you tell?**

HMRC publish guidance to help organisations work out whether someone who works for them should be treated as an employee or as a self-employed person.

http://www.hmrc.gov.uk/employment-status/index.htm

As HMRC say in that guidance, if the answer to all of the following questions is “Yes”, then the worker is probably an employee:

- do they have to do the work themselves;
- can someone tell them at any time what to do, where to carry out the work or when and how to do it;
- do they work a set amount of hours;
- can someone move them from task to task;
- are they paid by the hour, week, or month; and
- can they get overtime pay or bonus payment or other benefits normally awarded to employees?

And if the answer to all the following questions is “Yes” then the worker is probably self-employed:

- can they hire someone to do the work or engage helpers at their own expense;
- do they risk their own money;
- do they provide the main items of equipment they need to do their job, not just the small tools that many employees provide for themselves;
- do they agree to do a job for a fixed price regardless of how long the job may take;
- can they decide what work to do, how and when to do the work and where to provide the services;
- do they regularly work for a number of different people; and
- do they have to correct unsatisfactory work in their own time and at their own expense?
- Can a substitute be nominated if they are absent?

Most of your staff are probably going to fall within the employee category because they have to do the work themselves, cannot choose where and when they work, are paid an annual salary, do not provide their own equipment and have no financial risk etc. If there is any doubt employed status is the default option for HMRC.

**Employment and Consultancy Agreements**

Once you find someone suitable you then need to prepare an employment contract or consultancy agreement (where the individual will be self-employed) setting out the terms on which they will work for you. Employment law requires that you give all employees a written statement of their terms of employment within two months after their employment commences.

You can obtain standard employment documents from various sources, including certain websites who (for a fee) will supply you with various standard documents. It is however preferable to ask a
solicitor to draft an employment contract that is tailored to the particular requirements of your business and explicitly spells out all the rights and obligations of the Company and the employee. This is especially true in the case of consultancy agreements because the implied duties owed by an employee to an employer do not apply in the case of consultants. For example, the intellectual property in material created by an employee during the course of his employment belongs by law to his employer (unless otherwise agreed). There is no parallel provision in relation to consultants. Accordingly when engaging consultants you must enter into a proper consultancy agreement with them that specifically states that it is agreed between the parties that intellectual property created by the consultant during the course of his work for you belongs to you.

The following is a list of the key provisions you normally see in each type of contract:

### Employment Contract

<table>
<thead>
<tr>
<th>Provision</th>
<th>Comment</th>
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</thead>
<tbody>
<tr>
<td>Names and addresses of the parties</td>
<td></td>
</tr>
<tr>
<td>Employee’s start date/ continuity of employment</td>
<td>Any previous employment before the contract commenced should be clarified and defined</td>
</tr>
<tr>
<td>Job Title and duties</td>
<td>An employer should reserve as much flexibility as possible so that (within reason) it can move the employee to other suitable roles and ask them to take on additional or different responsibilities.</td>
</tr>
<tr>
<td>Hours of Work</td>
<td>The contract should state that the employee can be required to work extra hours where the business requires it. The contract should state whether overtime is paid or not. Consider if an Opt – Out Agreement is needed where employee may work in excess of 48 hours per week</td>
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<tr>
<td>Place of Work/ mobility clauses</td>
<td>In case the business moves premises, the employer should reserve the right to require the employee to move to another location within a specified area (e.g. Central or Greater London). Care is needed where mobility clauses may require a female employee to relocate due to possible sex discrimination issues</td>
</tr>
<tr>
<td>Salary</td>
<td>State dates of payment, any annual reviews and if employee is entitled to an increase or is it discretionary.</td>
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<tr>
<td>Details of pension arrangements and other fringe benefits (life cover, car, medical insurance etc)</td>
<td>The contract needs to specify the terms and conditions on which fringe benefits are provided and should reserve the employer the right to amend those terms and conditions from time to time. Specify whether of not a contracting out certificate is in force.</td>
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<tr>
<td>Holiday entitlement</td>
<td>The contract should specify how much holiday the employee is entitled to take and whether there are any restrictions on when holiday may be taken. Ensure minimum Working Time Regulations requirements are met.</td>
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<tr>
<td>Sick pay entitlement (i.e. the maximum number of days sickness absence a year for which they will be paid)</td>
<td>We recommend that the employment contract should state quite a low number of days sick pay (e.g. 10 working days per year) and that any sick pay above that limit is discretionary. Entitlement can be graduated for longer service.</td>
</tr>
<tr>
<td>Notice entitlement</td>
<td>The contract should specify how much notice each party has to give the other to terminate the contract. The employee is statutorily entitled to receive not less than one week’s notice per year of service (up to a maximum of 12 weeks), except in the case of gross misconduct. Consider tax issues including a PILON clause – pay in lieu of notice and include garden leave provisions for senior employees.</td>
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<tr>
<td>Details of any post-termination restrictions (e.g. preventing poaching of clients after leaving)</td>
<td>In the case of employees who could poach clients or employees if they leave to join or start-up a competing business, you should consider including post-termination restrictions in their contract. Such restrictions are only enforceable if reasonable so great care needs to be taken in their drafting.</td>
</tr>
<tr>
<td>Details of where the Employee can find copies of the Company’s disciplinary, grievance and other procedures</td>
<td>Staff handbooks become out of date almost as soon as they are printed. For that reason it is better to put employment policies and procedures on an intranet provided all staff have access to it.</td>
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## Consultancy Agreement

<table>
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<tr>
<td>Names and addresses of the parties</td>
<td></td>
</tr>
<tr>
<td>Start Date</td>
<td></td>
</tr>
<tr>
<td>Description of the services to be provided</td>
<td>It is very important that the Consultancy Agreement precisely describes what you are expecting the Consultant to do, including details of any deliverables.</td>
</tr>
<tr>
<td>Time period during which services will be provided</td>
<td>You need to know that the work will be done within a reasonable time period so the timing should be specified in the contract.</td>
</tr>
<tr>
<td>Consultancy fee (amount and timing of payment)</td>
<td>The agreement needs to state precisely what the Consultant will be paid and whether he/she is entitled to charge any additional expenses on top of his/her fee. Invoicing at month end is normal.</td>
</tr>
<tr>
<td>Right for the consultant to appoint a substitute to deliver services on his/her behalf.</td>
<td>For tax reasons, a consultancy agreement needs to specify that the Consultant can appoint someone else to carry out the work for you on their behalf. You should ensure, however, that the agreement states that they can only do this with your prior approval.</td>
</tr>
<tr>
<td>Ownership of IP</td>
<td>The agreement should state that the intellectual property in work done by the Consultant for you belongs to you.</td>
</tr>
<tr>
<td>Statement of self-employed status and indemnity from consultant in respect of his/her tax and NI</td>
<td>The agreement should specifically state that the Consultant is not employed by you and should require the Consultant to indemnify you in respect of his/her own tax or NI since HMRC will look to you for any unpaid tax and National Insurance.</td>
</tr>
<tr>
<td>Liability</td>
<td>The Consultant may wish his/her liability to you for</td>
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defective or negligent work to be subject to an agreed limit. This will require careful negotiation. You may wish to insist that the Consultant maintains a minimum level of insurance against any potential claim you might have against him/her. If you do, this should be stated in the agreement.

Confidentiality

The agreement should impose a duty of confidentiality on the Consultant so that he/she cannot disclose confidential information relating to your business to any third party.

Termination provisions

The contract should identify the circumstances in which either party can terminate the contract (e.g. early termination for breach of contract).

Restrictions post termination

Consider appropriate non-poaching and non-solicitation clauses in respect of clients, contracts and key staff.

Understanding Employment Rights

It is important to comply with employment law and to understand the rights an employee has. There are many websites providing general helpful advice about employment issues including:

http://www.berr.gov.uk/whatwedo/employment/index.html
http://www.businesslink.gov.uk

If general advice is not sufficient then you might consider consulting an employment solicitor or an HR professional. It can be very time consuming dealing with employees and once you employ a significant number of people you might consider taking on an HR manager on a full or a part-time basis. It is better to avoid employment problems than find yourself on the receiving end of an employment tribunal claim.

Likewise, if you find yourself in dispute with a Consultant, take legal advice as soon as possible to avoid the problem escalating.
Andrew Fishleigh is an experienced employment lawyer advising employers and employees in contentious and non-contentious matters. Having initially commenced his legal career with the Treasury Solicitor, Andrew subsequently practiced with DJ Freeman and Garretts in London and Reading.

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Disclaimer

We have written these materials to help you, but no article can address all the issues. The benefit of using an experienced lawyer is that they ask the right questions and build the solution around you. Please therefore note that these materials only provide you with general information and should not be regarded as a substitute for taking legal advice.

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