



# Employment Contracts

## Guidance Manual

The contents of this Manual have been approved by Melanie Slocombe, solicitor, under English law and by Neill Clerk & Murray, solicitors, under Scottish law.



This is an excerpt from Lawpack's *Employment Contracts Kit*.

To find out how to prepare employment contracts, without the expense of a solicitor, [click here](#).

## Important Facts about this Lawpack Kit

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This Lawpack Kit contains the information, instruction and documents necessary to draw up employment contracts for employees.

The documents included in this Lawpack Kit cover the most common employment situations, but we cannot cater for all circumstances. This Lawpack Kit is for use by employers in England, Wales and Scotland; it is not suitable for Northern Ireland.

As with any legal matter, common sense should determine whether you need the assistance of a solicitor rather than relying solely on the information and forms in this Lawpack Kit.

We strongly urge you to consult a solicitor if:

- substantial amounts of money are involved;
- you do not understand the instructions or are uncertain how to complete and use a contract correctly; or
- what you want to do is not precisely covered by the documents provided.

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## Included in this Kit

### For England & Wales and for Scotland:

Full-time/part-time employment contract	1 copy
Temporary/fixed-term employment contract	1 copy
Domestic employment contract	1 copy
Staff Handbook	1 copy

## Contractual rights of employees

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As well as being entitled to statutory rights, employees have contractual rights.

### Express and implied terms

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Usually, the parties to the contract will have expressly stated the major terms of the contract. These may be written or oral, but it is obviously preferable to put these terms in writing in order to minimise future disputes. Even though in practice express, oral terms may be just as binding as written ones, they are very much more difficult to prove.

In addition to the express terms of the contract, all contracts of employment have what is known as 'implied terms'. Implied terms are not stated expressly in the contract because:

- they are too obvious to be recorded; or
- they are common practice within the particular business or industry and are precise, reasonable and well known; or
- they are necessary to make the contract work; or
- the parties to the contract have shown by their behaviour their acceptance of such terms.

A term is not implied simply because it would be reasonable to include it. There are terms which are accepted as commonly implied in employment contracts relating to the employer's and the employee's duties, as shown below:

### Common implied terms

#### **Employer's duties:**

- to pay wages;
- to co-operate with the employee and maintain mutual trust and confidence;
- to take reasonable care for the health and safety of the employee;
- to take reasonable steps to bring to the employee's attention any contractual rights which are dependent on them taking action, but which the employee may be reasonably unaware of;
- to exercise pension rights in good faith;
- to deal reasonably and promptly with employees' grievances;
- to give a reasonable period of notice of termination when no specific period of notice has been agreed.

#### **Employee's duties:**

- to work for the employer with due diligence and care;

- to co-operate with the employer, including obeying lawful orders, and maintaining trust and confidence and not impeding the employer's business;
- to follow a duty of fidelity, i.e. not compete with the employer and not disclose confidential information, unless in the public interest;
- to take reasonable care for their own safety and that of fellow employees;
- to give a reasonable period of notice of termination when no specific period of notice has been agreed.

In addition to those above, terms may be implied into a contract of employment by legislation, for example, equality clauses which are implied by the Equal Pay Act 1970; these terms automatically apply to any contract.

Terms may also be incorporated into a contract of employment from other sources. Prime examples are terms which may be implied into an individual contract through collective agreements and work rules or staff handbooks.

### Unenforceable terms

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- Unlawful terms or terms contrary to public policy.* For example, a contract which has the effect of being a fraud on the Inland Revenue or a contract under which a foreign employee works illegally without a work permit.
- Terms purporting to waive employees' statutory rights.*
- Discriminatory terms.* For example, on the grounds of sex, race or disability.
- Terms in restraint of trade if their main purpose is to restrain competition.* Such terms are enforceable, however, if their main purpose is to protect something in which the employer has a legitimate business interest worthy of protection. For any such clause to be enforceable it needs to be carefully drafted, taking into account the nature of the employee's work. If the clause is too wide it will be void. The courts will not rewrite clauses to make them enforceable; an example of a restraint of trade clause is given at clause 10 of the employment contracts in this Kit.
- Terms which purport to exclude or restrict liability for death or personal injury resulting from negligence.* In the case of loss or damage other than death or personal injury, a contract term may only exclude or restrict liability for negligence if it satisfies the requirement of reasonableness (Unfair Contract Terms Act 1977).

## Types of contract of employment

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This Lawpack Kit provides you with the following choice of employment contracts:

- Full-time/Part-time employment contract
- Fixed-term/temporary assignment contract
- Domestic employment contract

When deciding which is the most appropriate, you should consider the type of work, the duration of the employment and the nature of the employment relationship that is sought by both parties.

### Full-time employment contract for an indefinite period

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The majority of contracts of employment are for an indefinite period. They can be terminated by either party giving notice. The period of notice should be specified in the contract, but if not, there is an implied term (see page 20) that the contract may be terminated upon reasonable notice. In deciding what is reasonable, the following should be taken into account:

- ability of the employee;
- remuneration of the employee;
- what is usual in the trade.

However, it is more advisable to express the notice period. To determine this employers should consider:

- How long is it likely to take to find a replacement for the employee if he resigns?
- Will a replacement need to be trained?
- How much would it cost to make a payment in lieu of notice? Long notice periods can be very costly.
- Is it possible that the employee will work for or become a competitor? In these circumstances, a relatively long notice period is advisable.
- What is reasonable to expect from the employee?
- What is competitive in the market place?

The contractual notice period must not be less than the statutory minimum period of notice referred to on page 13, but if contractual notice is longer then the longer period must be given.

### Part-time contract

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An increasing number of employees are now engaged on a part-time basis. Such employees have the right not to be treated less favourably by their employers than a full-time co-worker with broadly similar qualifications, skills and experience, who is engaged in the same or broadly similar work.

Part-time workers may complain to an employment tribunal about any objectively unjustifiable less favourable treatment accorded to them by their employer and compared to that accorded to a relevant full-time worker on the ground of their part-time status. Note that workers, a broader category than employees, are protected by these rights. Broadly, in order to comply with the obligations towards the part-time worker, unless it has a genuine business need to do otherwise, the employer should ensure the following:

- Part-time workers should receive the same hourly rate as comparable full-time employees.
- Part-time workers should receive hourly rates of overtime comparable with full-time rates, once they have worked more than the normal full-time hours.
- Part-time workers should not be treated less favourably than full-time employees in terms of: the rate of any contractual sick or maternity pay, the length of service required to qualify for payment, and the length of time the payment is received, bonus entitlements or other contractual benefits.
- That it does not discriminate between full-time employees and part-time workers over access to pension schemes; calculation of benefits from the pension scheme for part-time staff should be on a pro rata basis as the calculation for full-time employees.
- That it does not exclude part-time workers from training simply because they work part-time (although there is no legal obligation to plan the training to accommodate their schedules).
- The contractual holiday entitlement of part-time workers should be pro rata that of full-time employees.
- Contractual maternity leave, parental leave, adoption leave and paternity leave should be available to part-time workers as well as to full-time employees.
- Career break schemes should be available to part-time workers and full-time employees in the same way.
- The criteria used to select jobs for redundancy should be objectively justified, and part-time workers must not be less favourably treated than comparable full-time employees.

Part-time workers also have anti-victimisation rights. Any dismissal of a part-time worker because he has exercised any right under the Part-Time Worker (Prevention of Less Favourable Treatment) Regulations 2000 is automatically unfair, regardless of the worker's length of service or whether the employee is above normal retiring age. Such workers also have the right not to suffer any detriment short of dismissal on grounds of that action.

Certain employees (both male and female) have the right to request flexible working for the purpose of caring for a child and employers will have a legal duty to consider such applications. In addition, employers should also bear in mind that inflexible working practices (such as a refusal to allow an employee returning from maternity leave to work part-time) may also be challenged as indirectly sex discriminatory.



### **Fixed-term/temporary assignment/specific task contract**

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A fixed-term contract is one that has a termination date. The duration of the fixed-term contract may be for any period. Fixed-term contracts may provide that a notice to terminate the employment earlier than the original termination date can be given; if there is no notice provision, employment is guaranteed for the full period.

A fixed-term contract will automatically expire at the end of its term. Failure to renew a fixed-term contract upon termination may lead to a valid claim for unfair dismissal or redundancy pay.

Fixed-term employees may complain to an employment tribunal about any objectively unjustifiable, less favourable treatment accorded to them by their employer and compared to that accorded to a comparable permanent employee on the ground of their fixed-term status. A comparable permanent employee is one who is engaged in broadly similar work having regard to whether they have similar level of qualification, skill and experience and who is employed by the same employer.

Broadly, in order to comply with the obligations towards fixed-term employees, unless the employer has a genuine business need to do otherwise, it should ensure the following:

- fixed-term employees should receive the same hourly rate and overtime rate as comparable permanent employees;
- fixed-term employees should not be treated less favourably than comparable permanent employees in terms of: the rate of any contractual sick or maternity pay, the length of service required to qualify for payment and the length of time the payment is received, holiday entitlement, bonus entitlement or other contractual benefits;
- that it does not discriminate between fixed-term employees over access to pensions schemes;
- that it does not exclude fixed-term employees from training simply because they are on a fixed-term contract;
- contractual maternity leave, parental leave, adoption leave and paternity leave should be available to fixed-term employees as well as to comparable permanent employees;
- career break schemes should be available to fixed-term employees and comparable permanent employees in the same way;
- the criteria used to select jobs for redundancy should be objectively justified, and fixed-term employees must not be less favourably treated than comparable permanent employees.

The use of successive fixed-term contracts is limited to a maximum of 4 years ), unless their use for a longer period can be justified. Any contracts continuing beyond this 4-year period shall be deemed to be permanent contracts.

Fixed-term employees also have the right to be informed by their employer of all available permanent vacancies in the business. This can be achieved by posting all vacancies on internal notice boards.

Fixed-term employees also have anti-victimisation rights. Any dismissal of a fixed-term employee because he has exercised any right under the Fixed-Term Employee (Prevention of Less Favourable Treatment) Regulations 2002 is automatically unfair, regardless of the employee's length of service or whether the employee is above

normal retiring age. Such employees also have the right to suffer any detriment short of dismissal on grounds of that action.

### Short-term contract

These can be used where the work to be done can be completed within a short period of time. Where the contract is for less than three months the employee is not entitled to statutory sick pay or medical suspension pay. However, if a second such contract is entered into with the same employer and it is continuous with the first, then the employer becomes liable to pay statutory sick pay or medical suspension pay.

### Domestic employment contract

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When a nanny or domestic help is employed directly by a family, the family, as their employer, will have legal obligations to this individual. The domestic employment contract included in this Kit is a full-time contract, adapted for use when appointing a nanny or other domestic help.

Broadly, nannies and other domestic helps have the same statutory rights as all other employees. There are some rights that they do not have, on the basis that their employer is exempt as a small employer; where this is the case, it has been mentioned under the section 'Statutory rights of employees' beginning on page 12; in summary, nannies and other domestic helps will generally have:

- No right to the National Minimum Wage, if they are living with the family.
- No right to access to a Stakeholder Pension.
- No rights against discrimination on the grounds of disability.
- No automatically unfair dismissal rights if dismissal is due to pregnancy or the fact of giving birth. Please remember however that if a nanny is dismissed for these reasons, she would still have the right to claim unfair dismissal; just it will not be automatically unfair. She will also need to have at least one year's service to bring an unfair dismissal claim (whereas there is no minimum service requirement for an automatically unfair dismissal claim).

Please also remember that it should never be assumed that a nanny must be female; refer back to page 5 for details on this.

As employers, families employing nannies are also required by law to:

- Deduct the correct amount of PAYE tax from their employee's pay.
- Work out how much National Insurance contributions both they and their employee have to pay.
- Keep a record of their employee's pay, tax and National Insurance contributions.
- Pay the total tax and National Insurance contributions to the Inland Revenue Accounts Office.

There are a number of organisations that carry out payroll services for a fixed fee for families employing nannies, and this is very often a good way of ensuring that legal obligations are met and that fines and late payment penalties from the Inland Revenue are avoided.

## Variation of contract

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An employer does not have an automatic right to vary an employee's terms of employment. The extent to which employers can unilaterally change an employee's terms or working arrangements will depend entirely on the terms themselves.



### Existing terms

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Flexibility may be expressly built into the contract by, for example, the inclusion of wide terms or narrow, but changeable terms. An example of the former is 'You may be required to work anywhere in the UK' while an example of the latter is 'You will work 8 hours in 24, day, night or shift work'. Another way flexibility may have been built into the contract is by the use of terms which can be altered in content or removed. For example, a bonus may be stated to be payable at the manager's discretion.

The contract may also contain what is known as 'machinery for change'. For example, the staff handbook 'as issued from time to time' may be stated to be incorporated. This would mean that matters dealt with in the handbook could be changed and the change incorporated into the contract, without the need of the employee's express consent.

If the contract contains such flexible clauses or incorporates machinery for change, then the employer will be able to alter the terms in line with these clauses.

If there is no flexibility or machinery for change then employers must follow the correct procedure if they want to alter an employee's terms of employment, in order to minimise the possibility of claims for damages and/or compensation relating to the change.



### Offering new terms to the employee

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The first step for the employer is to offer the new terms to the employee. He can either accept or reject them. Acceptance must be positive, unequivocal and unconditional. There is no particular form of offering or acceptance required, so it can be oral, written or by conduct. However, by doing nothing an employee cannot be said to have accepted the new terms. The only time doing nothing can amount to acceptance is when the contract contains a term making this so. An example of such a term would be, 'If you do not object in writing within 14 days you will be deemed to have accepted the change'. It is possible for an employee to accept the new terms by his conduct: if he changes his behaviour to comply with a term in the offer (for example, he turns up for work at a new time) he will be taken to have accepted the new terms.

## Dismiss and offer employment on new terms

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If the employee does not accept the changes, the only other option for the employer is to dismiss him and offer employment on the new terms. However, by doing this the employer may become liable for claims for breach of contract, unfair dismissal or redundancy if the correct procedures are not followed and the appropriate reasons for dismissal do not exist. Termination of employment and other employment law issues are dealt with in greater detail in Lawpack's *Employment Law* guide book.

## Staff Handbook

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An employer will always have a number of practices and procedures that it will want to apply to its employees. Generally, it is advisable for these to be contained in one document, which should be issued to all employees at the commencement of their employment. Employees should be asked to confirm that they have read and understood the Staff Handbook.

However, it is also important for the employer to retain the ability to amend the practices and procedures in the Staff Handbook, and therefore the statement, 'the Staff Handbook, as amended from time to time, applies to all employees' should be put in the introduction. The Staff Handbook should also be referred to in the contract, as in the contracts in this Kit.

The Staff Handbook may contain a variety of procedures and will vary from employer to employer, but in nearly all cases it should include the following:

- Equal Opportunities Policy
- Disciplinary Rules and Procedures
- Grievance Procedure
- Health and Safety Policy

A template Staff Handbook is included in this Kit, which includes examples of matters that an employer may wish to include in a Staff Handbook. It is beyond the scope of this Kit to cover all administrative issues that may need to be included in a Staff Handbook, so it is important that an employer considers its own needs and requirements when preparing its own. It is quite common for example that a Handbook deals with a number of other matters, such as the logistics of overtime, taking time off for holiday, sickness, public duties, maternity, parental leave and for taking care of dependants. These arrangements will vary according to the employer and its needs, although they will always need to be in line with statutory rules. It is recommended that advice is sought from a solicitor or from other relevant bodies. For example, where employers consider a more detailed policy incorporating a harassment and bullying policy to be more appropriate, they should seek guidance from the Equality and Human Rights Commission or ACAS. And specific rules relating to the health and safety regulations particular to an organisation may need to be added.