EMPLOYMENT LAW SUPPORT

PROVIDING EMPLOYMENT LAW SOLUTIONS

September 2016 Update

Welcome to this month's update - where we discuss the latest legislation and guidance.

Off the record conversations

When you are having an off the record discussion with an employee you can't be sure that your words will not be used against you later. If someone wants to talk about it, it is likely they will and try and include what you talked about if they make a claim in the Employment Tribunal.

There are rules that prevent these discussions being used openly in evidence, be it using the 'without prejudice' conversation rule or a 'protected conversation'.

'Without prejudice' privilege has been around for years and can apply to lots of different situations. Although it only applies if it is in a genuine attempt to settle a dispute or an actual dispute is contemplated. So the 'without prejudice' rule will not apply where is no dispute to settle.

What happens if you just want to see if an employee who doesn't fit in would be willing to leave on agreed terms? In that situation there may be a risk a constructive dismissal claim or an argument that a subsequent dismissal was pre-planned.

The concept of 'protected conversations' were introduced in 2013. It allows employers and employees to chat in confidence about termination where there is no existing or contemplated dispute. But the biggest limitation is that is only applies to ordinary unfair dismissal cases. It does not apply to discussions where later an employee argues that there may be some form of discrimination for example.

The upshot is that, unless you are able to predict with certainty the claims that the employee will / may bring, you will probably be embarking on settlement negotiations with your fingers crossed. So if you have any uncertainty that the employee may be able to make another claim apart from unfair dismissal then do not have a protected conversation.

The second restriction is that protected conversations do not cover situations where either party may have behaved improperly such as if there has been harassment, victimisations, discrimination, undue pressure etc.

In practice, the best way to keep conversations off the record is to start out with a plan. If there is an existing dispute (and you make sure to be clear on this), then you may be able to rely on 'without prejudice' privilege.

If there is no existing dispute, perhaps you can use the 'protected conversation route' but be clear on its limitations that it only applies to ordinary unfair dismissal.

Once you have decided that a conversation needs to happen, think very carefully about when you will initiate it and how you will conduct it. Managers and others involved know what to say and what not to say.

Employers: Of course this is all entirely academic if you offer a Settlement Agreement then the risk of a claim is removed. That is why it is good to be fair in your discussions and to give serious thought to the deal you are prepared to offer. Pitch it right and you'll probably save yourself the worry of a claim.

Contact us: we can help guide you through the process and draft a Settlement Agreement

Immigration – the new rules

Employers have had obligations for years now to check their employees have the right to work in the UK. Most are used to these checks. However, the new Immigration Act 2016, which is now largely in force, has aimed to build upon the earlier measures.

So what are the new measures?

1. It is crime to employ an illegal worker where the employer knows or has 'reasonable cause to believe' the person is an illegal worker.

This is an extension of the existing law where the employer previously had to knowingly employ the illegal worker. The potential sanctions here are huge - with unlimited fines (previously capped at £5,000).

2. Compliance sanctions and shut down - the Chief Immigration Officer has the power to impose compliance sanctions and even close businesses down for 48 hours if they continue to employ illegal workers.

3. Search and seize powers - immigration offices will now be able to enter premises to search and seize and retain evidence.

4. New offence of illegal working - there is also a new offence of illegal working which carries a prison term of 6 months.

5. Civil penalties - immigration officers may enforce a civil penalty instead

Steps Employers should take:

Step 1: Get the employee's original documentation as listed in the Home Office guidance. The acceptable documents are set out in two lists in the guidance (A and B) and depend on whether the person concerned is subject to immigration control or not.

- If the person is not subject to immigration control and has no restriction on their stay in the UK, then use documents from list A which may include passport, national identity card or permanent residence card, birth or adoption certificate.

- If the person is subject to immigration control and has limited leave to remain in the UK, they have to provide original documentation from List B. These documents include passport, work permits and other immigration documents endorsed to show the holder is allowed to stay in the UK and do the relevant work.

- If the person has got a family permit or residence card they must provide original documents as directed in the guidance.

Step 2: Take all reasonable steps to check that the documents being presented are genuine and the holder is the person named in the document.

Check:

- that any photos match the person's appearance
- the dates of birth correspond across the documents
- the expiry dates of leave to remain have not passed
- the government visas and stamps to make sure the person can do the type of work you are offering. Check if the roles change that the individual still has the relevant permissions
- if the person holds tier 4 immigration permission to study in the UK, there are extra checks required such as getting a copy of their timetable to satisfy yourself that they are undertaking the number of permitted working hours in term time
- the documents have not been tampered with
- check other documents such as marriage certificate to explain any difference in names between documents
- that they have any relevant professional credentials or licences required and that these are current and relevant

Step 3: copy the documents in a format which cannot later be altered and keep securely.

Record the date of the check and date for any follow up checks. You must keep the documents for 2 years after their employment terminates.

Brexit

This may cause significant changes in this area. HR departments are likely to have to dedicate additional resources to these changes. On exit, the current right to free movement of EEA and Swiss nationals will stop and be replaced by an alternative although as yet we do not know what this will be.

After the check - What happens if someone does not have the right to work in the UK?

- If the individual is not permitted to work in the UK, then you can (and must) refuse to employ them.
- You should not stop someone from submitting an application because they do not have the right to work at the date of application as this may be seen as discrimination. However, any offer must be subject to that person having the right to work in the UK.

It is also a good idea to include a warranty in the Employment Contract that an employee should report any changes in immigration status and have an express right to terminate employment if the employee is not or becomes not entitled to work in the UK. However, a fair dismissal process would still need to be followed if they have worked for more than 2 years.

Employers: if you follow the checks above and keep records then you can show that you have taken all reasonable steps.

Contact us: we can assist with advising on this process

Long-term sickness – the right to return to the same role?

Unlike maternity leave, sick leave doesn't have a statutory framework that gives employees the right to return to the same role. The law does not specifically say that an employee must return to exactly the same job on exactly the same terms.

However, this doesn't mean a Company is free to chop and change their role on return from long-term sickness. Still it is never that straightforward, it is really fact specific.

Questions to ask:
- How long is 'long term'?
- What condition is the employee suffering from?
- How big an employer are you?
- Why and how are you looking to change the role?
- How have you dealt with similar situations in the past?

The first thing you should look at is the employment contract. Does it give you a general or specific contractual right to vary the employee's role or duties?

Remember that a significant change may amount to a dismissal. If the employee were to agree, after consultation, to alter their role and duties then you avoid these problems.

The other point is to assess the employee's current state of health.

- Have they been certified fit to return?
- Are they capable of doing the things they used to do?
- What has occupational health said?

You will know if the employee's capabilities have changed as a result of the accident, illness or other condition and they are no longer able to do the job they were employed to do, something needs to give. If the company is willing and able to make some alterations to their duties and they accept this, then you can agree the new job role and hours. You will need to assess if any other reasonable adjustments ned to be made if the employee is disabled

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Contact us: we can assist with long-term health issues at each step voluntary sectors.

For more information or assistance Email: enquiries@employmentlawsupport.co.uk

MEMBER OF
DANIEL BARNETT'S
INNER CIRCLE
WWW.HRINNERCIRCLE.CO.UK

The Law Society
of England and Wales
(Roll No. 41593)

Milton Keynes
& North Bucks
Chamber of Commerce

LinkedIn

Silverstone
Business Forum

Employment Law Support Principal: Caroline Robertson
Solicitor Non-Practising