

Homework for the New School Year – Updating Your Employment Documentation

As the new school year gets under way, one task which UK human resources professionals may wish to set themselves by way of homework is to update their employment contracts and policies. This is a process which it is advisable to conduct on a reasonably regular basis to ensure that an employer's documentation is up to date and reflects not only the employer's current business but also legislative and case law developments which may prompt the updating of contracts or the introduction or amendment of employment policies.

There are various areas where specific consideration may need to be given to the updating of employment contracts and other documentation, particularly in relation to key executives in order to maximise business protection. Whether they are appropriate will of course depend on a variety of factors including the nature of the employer's business and the level of seniority of the employee. A selection of possible areas in relation to which employment documentation could need to be updated is as follows.

Retirement

Many contracts will still refer to an automatic retirement age. Given the abolition earlier this year of the default retirement age of 65, employers will wish to consider removing all references to a retirement age from their employment contracts (unless in its particular circumstances the employer considers that it can maintain a specific retirement age as an "Employer Justified Retirement Age").

Garden Leave

Garden leave clauses are of potentially considerable benefit to employers in terms of

business protection. This is because they enable the employer to exclude from work an employee who has resigned or been served with notice whilst maintaining the employee's employment and so preventing him or her, even while not at work, from being able to commence work for a competitor. Whilst these provisions are already widely used, it may be worthwhile for employers to review their existing garden leave wording, which may need to be updated to increase the employer's flexibility and protection, for example to include provisions:

- requiring the employee to remain contactable during working hours and provide appropriate contact details
- entitling the employer to require the employee to perform specific special projects or duties outside the scope of his or her normal role
- explicitly confirming the employee's continued duties of loyalty, fidelity and not working for third parties during the remainder of the applicable notice period
- identifying specifically the category of person with whom the employee should not be in contact during garden leave, especially if this needs to extend beyond

colleagues to individuals such as agents, investors, clients, counter-parties, analysts, brokers, professional advisers, suppliers to or other business contacts of the employer

- requiring the employee immediately to return all property relating to the employer and its business and (since otherwise the employee would still be entitled to attend board meetings) to resign any directorships held in the employer's group

- not to take any steps to enable the employee to compete with the employer's business whilst still employed by the employer
- to disclose to the employer any misconduct or breach of duty by the employee or any colleague
- to disclose to the employer the employee's own plans, and the plans of any colleagues, to leave, join a competitor or compete with the employer's business

Bonus Provisions

Whilst the litigation over discretionary and other bonus arrangements over recent years has prompted many employers to develop detailed provisions to protect themselves against unintended and unwanted liabilities, it is nonetheless worth reviewing bonus provisions to ensure that they achieve the employer's objectives. It may be appropriate to provide that:

- the fact that a discretionary bonus is paid in one year or in relation to a particular period is no guarantee of any subsequent bonus
- the employer may decide to defer payment of all or part of any discretionary bonus award
- employees will not be eligible for nor entitled to receive any discretionary bonus if they cease employment, resign or are served with notice by the time of payment
- a bonus is not payable if the employee is subject to an extant disciplinary sanction and that if the employee is suspended as a result of an investigation into misconduct the employee will not be considered for a bonus until the suspension ends and the issue in question is resolved

Explicit Good Faith Duties

For more senior executives, it is becoming more common for contracts to include a variety of specific obligations which seek to replicate and make explicitly contractual those duties which the law applies to those who are deemed sufficiently senior to be fiduciaries and which operate to protect the employer's business. To include these sorts of provisions in a key executive's contract avoids any debate about whether the individual is actually a fiduciary and whether such duties apply in a given situation. Examples include duties on the employee:

Confidential Information

An employer's ability to protect its confidential information will be enhanced by appropriate contractual provisions and employers should consider whether their contractual definition of confidential information is sufficiently in scope to protect its current business. Material which employers may wish specifically to identify as confidential will include financial information (such as business plans, business models, and pricing information, information about investment strategy and specific investments, intellectual property and details concerning any clients, investors, etc.).

PILON Clauses

It may be appropriate to consider whether to retain or include a "PILON" (Pay In Lieu of Notice) clause in employment contracts. A PILON clause entitles the employer to terminate employment immediately by making a payment calculated by reference to the pay otherwise due during the notice period. Unless the employer can utilise a contractual PILON (or there are circumstances justifying the employee's dismissal summarily without notice), dismissing an employee immediately without serving proper notice would be a breach of contract and would constitute wrongful dismissal (even if full compensation were paid for the remainder of the notice period). This breach would leave the employer unable to rely on any post-termination restrictive covenants or express confidentiality provisions that the employee's contract might contain.

The advantage of the inclusion and use of a PILON clause is that it enables immediate termination while retaining the benefit of any contractual post termination restrictive covenants. Depending on how the PILON and any relevant bonus provisions are drafted, the use of a PILON clause may also avoid the employee having a damages claim for loss of

bonus otherwise payable in what would have been the contractual notice period.

PILON clauses should be drafted carefully to identify precisely what the employer has to pay—which may be limited to the salary due during the notice period but may extend to other contractual benefits (although this should be carefully defined). In respect of longer notice periods, it may be appropriate to provide for the PILON payment to be paid in stages and to cease when the employee starts new employment or to be reduced by any earnings the employee receives from new employment during what would have been the notice period.

One specific disadvantage of inclusion of a PILON clause is the fact that any payment made under or referable to the clause will be considered by HM Revenue & Customs as taxable remuneration in the hands of the employee and therefore not capable of being paid tax free by the employer under the exemption from income tax which can apply to certain termination payments up to £30,000.

Policies

Quite apart from ensuring that their disciplinary and grievance policies comply with the provisions of the ACAS Code on Disciplinary and Grievance Procedures and that their equal opportunities and related policies are updated where necessary to reflect the fact that discrimination legislation is now contained in the Equality Act 2010, employers may wish to consider introducing or updating policies on all manner of issues topical examples of which include:

- bullying and harassment, especially in view of the ACAS recommendation that employers should have a separate and specific policy in that regard. This needs to make clear to staff the meaning of bullying and harassment, that it is unacceptable, the consequences of breach of the policy and how complaints should be made and will be handled
- the use of social media such as Facebook, LinkedIn, etc. Given the prevalence of social media and its uses and abuses, employers need to consider the guidance they need to give to staff about the extent to which and purposes for which social media may be used in order to reduce the risks which may arise in respect of issues such as confidential information and harassment.

The Bribery Act 2010

The Bribery Act outlaws commercial bribery as well as bribery of government officials and imposes strict criminal liability upon employers for the corrupt actions of employees and agents. The potential consequences for breach of the legislation are severe including unlimited fines, imprisonment for directors/other individuals involved and confiscation of revenues. The new corporate offence of failing to prevent bribery means that, if someone pays or offers a bribe anywhere in the world (whether to a government official or a business partner), then the company on whose behalf that person is providing services will automatically have criminal liability. There is only one possible defence: that the company had in place “adequate procedures” to prevent bribery.

Having “adequate procedures” does not just mean having a policy and procedures manual. There is no one size fits all solution. Each company should carry out its own risk assessment to understand the country and which business lines generate the greatest risk, and then draw up its policy accordingly. In addition to written procedures and a policy, “adequate procedures” entail regular training, testing and evaluation of staff and business partners, proper vetting and due diligence and a regular monitoring and review of the overall procedures.

If they have not done so already, in addition to any risk assessments and training they may have put in place, employers therefore need to consider adopting appropriate anti-bribery policies and procedures and including appropriate provisions in employment contracts requiring compliance with those policies and entitling the employer to dismiss the employee summarily for breach of the Act or the employer’s anti-bribery policies.

Summary

Whilst reviewing terms and conditions can present challenges—not least in terms of how new terms are introduced for existing staff—the rapid rate of change in employment law and legislation means that regular reviews can save headaches and costs in the long run. If you would like to discuss reviewing your employment documentation, please contact Charles Wynn-Evans, Georgina Rowley or your usual Dechert contact.

Practice group contacts

For more information, please contact one of the attorneys listed, or the Dechert lawyer with whom you regularly work. Visit us at www.dechert.com/employment.

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