



GUIDE TO CONTRACTS

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GUIDE TO CONTRACTS

The importance of a contract

It's the law! You have to have one from day 1 of employment for any new starters after 6th April 2020.

Aside from that, if you are going to enter into a relationship with people to do some work for you, you should have a contract in place from the outset to make sure that the terms of that relationship are clear and to protect the parties in the event that it goes wrong. Let's face it; most people don't review their contracts once they have been signed unless things are going off track! Make sure your contracts says what you need it to say when you need it most.

Don't just make do with a contract "that'll just do for now" or start the relationship without any contract at all, please have a think about what terms you want to put in place with the person you are contracting with.

Here are 6 key things that you should consider:

1. Nature of the relationship;
2. Type of contract needed;
3. What terms does a contract of employment have to contain;
4. What else do you want them to agree to;
5. What else are you prepared to agree to; and
6. Any other supporting documents required.

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If you would like us to review, update or draft a contract for you, contact: support@guardianlaw.c.uk

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1. Nature of the relationship

The status of a contractual relationship can have a significant effect on how you work together and so you need to decide whether the person you are offering work to is going to be:

- A director
- An employee
- A worker
- An agent
- An apprentice
- An intern
- A volunteer
- A board member
- A non-executive director
- A consultant/contractor

There are sub-sets of some of those categories too so your contract of employment may not be suitable for all employees including zero hours employees, part-time employees and the different workplaces you operate from – remote, office, factory and on customer sites.

Each relationship requires different, slightly varied or additional contractual terms. Clauses meant to cover overtime, travel, subsistence and company credit cards may be relevant to construction workers out in the field but not to the office workers who work for the same company.

Action: define the relationship that you intend to have with each member of staff.

2. Type of contract needed

The specific relationship that you have decided upon will govern the specific type of contract you need.

Generally, an employee needs a contract of employment and a self-employed person or company needs a contract for services. The confusing thing is that both of these documents can be called different things!



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The contract of employment may be called the statement of main terms and conditions of employment, and the contract for services may be called a consultancy agreement.

To add further confusion, sometimes the contractual relationship is spelled out in a letter, email or other document. Best practice is that all terms should be contained in one document. Worst practice is to have no written agreement. A verbal contract is not worth the paper it's written on!

For example, if your business is subject to an investigation by HMRC as to whether you are paying enough tax in relation to your workforce, the investigators will want to see evidence of the relationships that you have with staff. Even if you are working under the misapprehension that someone is self-employed and you are not responsible for paying tax and NI for that person, if there is no contract in place governing the relationship and the person is working regularly only for you under your direction and control, they may be deemed an employee and you could both be subjected to pay additional tax and penalties

If you're thinking of using an existing contract, read through it and see if the majority of terms apply to your new prospective relationship. If the terms of the contract don't apply; don't use it and get another one that does!

ACTION: review whether you are using the right contracts

3. What terms does a contract of employment have to Contain?

In this guide, we are going to focus on a contract of employment; the contract that should be issued to your employees on or before day one of their employment.

Your contract of employment does not have to be difficult to read and full of legal jargon. As a minimum, you should provide your employees with a statement of main terms (also known as a Section 1 Statement as it derives from Section 1 of the Employment Rights Act 1996),

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The following information must be included in a Section 1 Statement:

- *Employer's name;*
- *Worker's name;*
- *Job title or description of the role;*
- *Start date and date of continuous period of employment (they can be different in some cases);*
- *Details of how long a temporary role is expected to last or the end date of a fixed-term contract;*
- *Whether there's any probationary period and its duration;*
- *Rate of pay, and details about when/how the employee will be paid;*
- *Hours of work and whether these are variable;*
- *Details of rest breaks and whether these are paid or unpaid;*
- *Holiday entitlement;*
- *Entitlement to sick pay and other paid leave;*
- *Details of where the employee will be based;*
- *If the employee is likely to work in more than one location, where these other places may be;*
- *Notice periods required to end the contract for either party;*
- *Details about pension arrangements;*
- *Details about whether any collective agreements are in place;*
- *Whether the employee is required to work abroad.*

ACTION; Check that your master contract of employment contains all compulsory terms

These terms are compulsory and if they don't apply to your business, don't just delete reference to them, you need to state that they don't apply.

For example, if you don't have any collective agreements in place with trade unions, your contract could state:

Collective Agreements: N/A

Or

There are no collective agreements in place that affect your employment with us.

Most template contracts will contain the Section 1 terms but consider whether that contract provides enough protection to your business (it probably won't!).



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4. What else do you want the employee to agree to?

This is where you need to think about what could potentially go wrong in the relationship and what provisions you are going to wish you had put in the contract of employment before it Did!

Putting additional protection in at the outset (the honeymoon period) is the best chance you are going to get to sign the employee up to those terms. Employees rarely agree to detrimental terms during their employment without a fight or sense of resentment for their employer.

Here are a few key provisions to consider adding to your master contract:

- The right to make deductions from the employee's pay if they owe you money; for example, due to an overpayment of wages or holidays, or because they have lost or damaged an item of company property. If you don't have such a right in your contract, you cannot make deductions from their pay without their express written consent. Imagine paying an employee's monthly pay twice in error, having to ask them for it back and the employee refusing or saying that their bank has used it to clear their overdraft and they can only afford to pay you back at £20 per month for the next 100 months and you have no choice but to agree to that!;
- A reimbursement of training fees clause if the employee leaves within a specified period of time after you have paid for some training that they have undertaken;
- How the employee should request holidays and the right for you to refuse any requests due to business needs. This can be helpful during peak trading periods and to ensure you have adequate cover in place;
- How the employee should inform you of any absence from work, self-certification and the provision of fit notes. You can also add a provision to cover compulsory return to work interviews;

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- The requirement of the employee to inform you of any other work and to work in the best interests of the company. This can be important to ensure compliance with the Working Time Regulations if you are the primary employer. You could also potentially refuse an employee's request to work for someone else if you think that the other role will have a detrimental impact on your Business;
- Details of any restrictions on their conduct which apply during and following termination of employment, such as poaching your clients and staff, or setting up in competition with you. This is particularly important for senior or specialist employees. Restrictions should be no more onerous than necessary in order to protect your legitimate business interests; you have to be reasonable! For example, restricting a junior employee from working for a competitor for 12 months anywhere in the UK is unlikely to be enforceable, whereas restricting a senior employee from working for specified competitors for a period of 6 months is more likely to be enforceable;
- Your expectations in relation to confidentiality and data privacy. It is advisable to define what you consider to be confidential information, what happens on termination of employment and that there is an ongoing obligation to maintain confidentiality after employment;
- The conditions, terms and arrangements for remote working, including health and safety requirements; · Your rules surrounding the use of your IT equipment and telephones. Perhaps consider whether you want to include a right to monitor communications and specify how employees use your communication systems. For example, specifying that they must not visit porn sites;
- The right to carry out searches in certain circumstances, such as a reasonable suspicion of theft or drug/alcohol abuse;
- The right to suspend and demote an employee. Technically, if you don't have contractual rights to suspend or demote employees, doing so could be considered a breach of contract so best to include those rights in the contract from the outset;
- The right to place the employee on garden leave or pay in lieu of notice on the termination of their employment. If you want an employee to say away from the workplace during their notice period, you will need to have a right to do that.

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- Similarly, if you want to end their employment with immediate effect, you will need to have a right to pay in lieu of notice, rather than let them work it. This can be a helpful provision for employers who want to prevent an employee from accruing additional service that may give them rights to additional notice and redundancy pay. It can also prevent a breach of contract claim. Employees may escape their restrictive covenants if you breach the contract. There is a principle in law that a party who breaches a contract (by paying in lieu of notice without a right to do so) cannot rely on the remainder of the contract (restrictions);
- Other key terms relating to notice periods, such as an employee's entitlement to bonuses, a pay rise and commission. If you don't want to pay those things if an employee is leaving, you need to tell them in your contract;
- The right to temporarily lay the employee off or reduce their working hours if there's a decline in work or an unavoidable situation arises which means that employees cannot do their job, such as a flood on your premises or broken machinery;
- Your expectations relating to the care of company property and the employee's responsibilities – it's yours, not theirs, they have to look after it and it needs to be returned at the end of their employment;
- The right to make changes to the contract following consultation with an employee and reasonable notice;
- An opt-out of the maximum 48 hour working week under the Working Time Regulations; and
- A consent to process their personal data under the data privacy legislation.

This isn't a finite list and there may be other provisions to include which are industry/company/role specific and can be tailored specifically to your requirements. Hopefully, this will give you food for thought as a starting point.

ACTION: Consider whether your contract contains all of the provisions that you want it to



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5. What else are you prepared to agree to?

The contract isn't all about what you want from the employee but should also set out any benefits or arrangements that you're willing to provide to them in return. Again, you can tailor these to your organisation and what you're prepared to offer, but terms may cover:

- Company benefits, such as subsidised gym membership, employee reward or discount scheme, private medical insurance, life assurance, employee assistance programme and social events;
- Bonus or commission schemes, including how these are calculated and any associated conditions;
- Additional holidays which may be accrued in line with length of service or the ability for employees to buy extra holidays;
- Overtime payments which may be applicable to the role or the ability to take time off in lieu;
- Enhanced company payments such as sick pay, maternity/paternity/adoption/shared parental leave;
- Enhanced employer pension contributions;
- Flexible working, such as being able to work from home or on a flexi-hours basis;
- Company property provided for carrying out the role, which may include laptop, tablet, mobile, car or car allowance, personal protective equipment, tools etc. It's important to be clear which of these terms are absolute contractual rights and which are discretionary or non-contractual.

Action: check that the terms relating to enhanced benefits are covered

6. Any other supporting documents required?

The Section 1 Statement is the most important document to give to your new recruit to meet basic legal requirements, but there are often other documents that may contain contractual and non-contractual terms.

Offer letter

It's common practice to issue an offer letter with the S1 Statement/contract to formally confirm the offer of employment and welcome the employee to the company. The offer letter should also set out any conditions upon which the offer is made, which may include:

- *Proof of eligibility to work in the UK;*
- *Receipt of satisfactory references;*
- *Satisfactory completion of a medical form or assessment;*
- *Proof of qualifications;*
- *Receipt of satisfactory DBS check;*
- *Satisfactory drug/alcohol screening results.*

Which conditions you choose to include will depend on your business and the industry it belongs to. Whether or not you request a DBS check will depend on the role an employee is being appointed to do and if it's appropriate to check their criminal history. For example, if they will be working with children or vulnerable adults during the course of their duties, it may be compulsory for you to obtain a satisfactory DBS report before commencement of employment.

You may attach additional forms for the candidate to complete in order to provide the information that you need. For example a referee contacts form or medical screening questionnaire with a consent to contact the candidate's GP.

You can also use the offer letter to confirm arrangements for the employee's first day, details of their induction programme and their line manager's contact details if they wish to ask any questions before they start (remembering that they might be working a lengthy notice period with their current employer).

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New employee details form

The point of this is the collection of the individual's information which we need to set them up as a member of staff. As a minimum, you should be asking for:

- *Full name and address (if you don't already have it);*
- *Personal contact details, including phone number (home and mobile) and email address;*
- *Date of birth;*
- *Contact details for next of kin (we would recommend asking for two);*
- *Bank details (so you can pay them!).*

It goes without saying that care needs to be taken in the collection, storage and use of this information in line with the good old GDPR!

Information about company benefits

If you have any company benefits, it's good to provide details of these with the offer letter, including any required forms and information about how the employee should apply for membership if required.

Company communications

If you produce an employee newsletter or regular business updates, you might want to share the latest edition with your newbie to give them an insight as to how the business communicates with their team and what's been going on recently.

Induction Checklist

You could introduce a checklist to ensure that each new employee goes through a proper induction at the beginning of their working relationship with you. This can be useful to show that you have given them key information from the outset.

Training agreement

In addition to a training fees clause in your contract of employment, you should consider issuing a training agreement if you are paying for training as part of the appointment. The agreement should set out your expectations during the training period and what happens at the end of their training and/or their employment.

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ACTION: Check your ancillary documents to make sure they are fit for purpose.

Employee Handbook

Some employers issue a copy of their employee handbook, containing their HR policies and procedures, at the same time as the contract; others wait until the induction to issue it.

Whilst some employers may issue a Section 1 statement and a contractual employee handbook, we recommend that your employee handbook is non-contractual. The primary reason for this is to enable you to make changes to the way that you operate without having to formally consult with staff every time you do.

If you fail to follow a contractual policy, you are giving an employee a breach of contract claim that they would not otherwise have had. For example, if your contractual disciplinary procedure specifies that you will hold a disciplinary hearing within 5 days of a suspension and your investigation takes longer so you don't get around to hearing the disciplinary until 15 days later, the employee could claim breach of contract and be released from any restrictions. A tribunal may also question why you breached your own contract if the matter proceeded to a claim against you.

The COVID-19 lockdown may have highlighted some gaps in your policies in relation to:

H&S
Home working
Use of company property
Time recording
Data Privacy
Absence reporting
Keeping in touch

ACTION: Review your HR policies and procedures and identify if they are still relevant, fit for your purpose and what's missing

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TO DO LIST:

- ❑ Define the relationship that you intend to have with each member of staff;
- ❑ Review whether you are using the right contracts;
- ❑ Check that your master contract of employment contains all compulsory terms;
- ❑ Consider whether your contract contains all of the provisions that you want it to;
- ❑ Check that the terms relating to enhanced benefits are covered;
- ❑ Check your ancillary documents to make sure they are fit for purpose;
- ❑ Review your HR policies and procedures and identify if they are still relevant, fit for your purpose and what's missing