Engagement of Staff

This is a preliminary advice note and is not a substitute for taking detailed legal advice in relation to your businesses situation, which may be legally complicated.

This article pre-supposes that the staff to be engaged are employees and not self-employed. The engagement of self-employed staff will be the subject of a separate article.

Firstly, the law does require a certain amount of minimum written information to be provided to employees at the commencement of their employment, and an employee is entitled to written information in respect of specified employment terms within two months of their employment commencing.

This is provided for by Section1 of the Employment Rights Act 1996 ("the Section 1 Statement").

Failure to provide such minimum information may result in the employer being subject to a penalty payment by an Employment Tribunal of the equivalent of 2 to 4 weeks' pay (capped at the statutory amount of a week's pay for redundancy purposes, currently £430 per week).

However, no employer would be wise just to rely upon only providing the statutory minimum information. It is quite normal for a lawyer to include further and additional provisions to protect the interests of the employers business.

It is quite easy to acquire from the internet standard terms of employment. These are precedents and may be very useful for checking to see what type of additional clauses may be required. However it is not good practice to slavishly follow and copy such precedents without any thought of tailoring such provisions to the nature and requirements of the business concerned.

Set out below are one or two areas where special thought will need to be given.

Sales Staff and Non Competition Covenants
These are staff who deal directly with customers/clients and may in their personal capacity possess a large amount of goodwill of the business. It is quite usual to prepare non competition covenants within the employment contract for such staff to sign. These covenants are regarded unfavourably by the law and indeed are presumed to be unenforceable.

They are only enforced by the Courts if considered to be no wider than reasonably necessary to protect the legitimate business interests of the employer and also where enforcement of the covenants are considered not to be against the public interest.

A lawyer should certainly be instructed to prepare/fine tune any non-competition covenants.
Such clauses can fairly easily become unenforceable if drafted too widely.

For instance, a clause preventing the employee from joining a competing business after their employment has ended may only be enforceable within very limited parameters including time periods and geographical areas.

A general non-competition clause to prevent an employee from dealing with customers/clients with whom the employee has dealt with within a certain period prior to the termination of the employment relationship is also fairly common-, however, such covenants will need to have a specified and reasonable duration: normally 6 months.

The third type of non-competition covenant is a clause preventing former members of staff from soliciting/enticing away other members of staff to leave the business, and these clauses are again subject to similar rules.

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Such clauses will need to carefully drafted so as far as possible to prevent them from being unenforceable. No lawyer can in fact ever guarantee that non-competition clauses will be enforced by a court. They can only do their best based upon their knowledge and experience and their clients instructions.

Confidentiality Obligations
It is quite normal for lawyers to insert into employment contracts confidentiality covenants on the part of the employee. These are contractual and are quite useful to have, and supplement the obligations of the employee under the general law.

Holidays and Sickness
Standard precedent clauses in relation to holidays and sickness absence may be fairly brief and go into only limited detail. Depending upon the needs of your business it may require detailed and sophisticated provisions concerning employees being away sick or taking holiday leave.

Grievance/Disciplinary Procedures
It is mandatory for employers to notify the employees in the Section 1 Statement of any disciplinary or grievance procedures relating to the employee. Such procedures may be very basic or indeed very sophisticated, depending upon the needs of the business. I have in fact drafted very basic (and easy to use) procedures for use by small businesses. It is normally quite useful to expressly state that these procedures are non-contractual to avoid an employee taking legal action for breach of contract if the specified procedures are for whatever reason not complied with by the business.

Other Policies and Procedures
There are potentially very many of these and lawyers always indicate that these are quite useful to have. However in real life it is just not practicable to adopt every possible procedure for your business. A commercial decision will need to be made balancing the length of the employment contract/any employment handbook against the other needs and requirements of the business. It is common to run through the more common procedures and take instructions as to which (if any) the business wishes to adopt to include (usually as part of an Employment Hand Book).

Part-time Staff
Special drafting may be needed for part-time staff, particularly in relation to the taking of holidays and in relation to the special treatment of any part-time staff who habitually do not work on public/ bank holidays.

Termination clauses
It is quite normal for employment contracts to try to specify particular circumstances where the employment can be terminated by the employer without notice or making payment in lieu of notice . Such a list would not be exhaustive but can nonetheless be quite useful. However, it is not possible to contract out of statutory protection under unfair dismissal legislation and accordingly after the statutory protection period has expired for unfair dismissal, it is important not to rely wholly upon such clauses but to consider unfair dismissal legislation as well.

Notice periods and PILON Clause
These can be both a blessing and an expensive burden. The blessing is that the employee must give notice, meaning that they cannot leave the business without giving adequate notice. However, if you wish to terminate employment then this can be quite expensive as you will have to pay the employee for their notice period even though you may ask them to stay at home on garden leave or you terminate their employment immediately and pay them money in lieu of notice.

A Pilon (pay in lieu of notice) clause is a contractual entitlement granted to the Employer to terminate the employment immediately and to pay money to an employee in lieu of notice. This is a very useful contractual provision to have. It may also preserve the enforceability of noncompetition covenants- there is a line of legal authority to the effect that the employee will no longer be bound by such covenants if the employer terminates the employment in breach of contract without providing to the employee their contractual notice.

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A Pilon clause is however a tax disaster, and will usually result in the equivalent of the notice remuneration being fully taxable, whereas it could possibly be paid tax free if there is no Pilon clause in the employment contract.

A commercial decision will need to be made whether or not to include a Pilon Clause within the employment agreement.

Restrictive covenants
Such covenants have already been discussed and prevent former employees from competing with the business.

Such clauses if used, will need to be very carefully drafted to endeavour to ensure that the covenants are as far as possible legally enforceable

Vetting of the right to work
This is mentioned extremely briefly. All employers must set up processes in order to document check new and existing staff to ensure that they have and continue to have the right to work in the United Kingdom. Generally a number of original documents will need to be produced at periodic intervals and copied to comply with the relevant legislation – failure to comply with the statutory provisions can result in heavy fines.

Generally British Nationals or EEA nationals have a right to work in the UK and other nationals require special permission to work from the UK Border Agency. Further, not all EEA nationals have a right to work, but most do. For instance Romanian and Bulgarian nationals are subject to special provisions which have been extended. Nevertheless, it is therefore important to see the passport of all new employees first, to ensure their identity but also to see whether they are a British or EEA national.

The law on this area is fairly complicated and detailed advice will need to be obtained from a lawyer or other professional. Heavy fines can be imposed on businesses who employ staff who are not entitled to work in the UK, and indeed we have acted for clients who have been subject to such fines.

The Employment Contract should also contain a right for the employer to immediately terminate the contract if the employee has no right to work or to continue to work in the United Kingdom
This note focuses on a variety of issues, however there are many more and each business will have its own specific needs and requirements.

It is also potentially dangerous to make use of the standard employment terms of another company or which is downloaded as a precedent from the internet without fine tuning the same to meet the requirements of your own business.

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