

Contracts of Employment

All employer/employee relationships involve a contract of employment. Such a contract is essential to the relationship between the employer and the employee. The contract which an employer offers and an employee accepts will govern many aspects of their future relationship. Normally, the agreed terms of a contract - be they explicit or implicit - are of paramount importance in determining the rights and duties of both parties, and will prove essential in the event of a disagreement between the parties.

A contract of employment means a 'contract of service' and should be distinguished from a 'contract for service'. A person working under 'a contract for service' is not an employee of the company and is better described as an independent contractor.

Specimen contracts are available on www.sfa.ie for permanent or fixed term/ specified purpose roles. These can be adapted to suit the requirements of the business. Specimen agreements are also available for independent contractors.

FORMATION OF CONTRACT

There are three methods by which a contract may be formed:

- express written agreement;
- express oral agreement;
- conduct of the parties - terms of the contract though not expressed can be held to exist because of the conduct of the parties and custom and practice.

PRINCIPLES GOVERNING THE EMPLOYMENT CONTRACT

Two principles govern the formation of a contract:

1. Offer

There must be a clear and specific offer of employment by the employer to the prospective employee. It is advisable from the employer's point of view that all conditions attached to a job offer are clarified with and understood by the prospective employee before a firm offer is made, ideally in writing.

2. Acceptance

A contract of employment comes into existence once acceptance is formally indicated. It is important to note the time of acceptance as the offer may be withdrawn at any time before it is accepted, but not after that time except where both parties agree.

The benefit of requiring a clear acceptance by the employee is that this establishes a firm and documented basis for the contractual relationship.

LEGAL REQUIREMENTS

There are a number of statutory requirements which employers should incorporate into a written contract of employment.

Employment (Miscellaneous Provisions) Act 2018

This Act came into force on 4 March 2019. It amends the Terms of Employment (Information) Act 1994, the Organisation of Working Time Act 1997, the Unfair Dismissals Act, 1977, the National Minimum Wage Act 2000 and the Workplace Relations Act 2015.

TERMS AND EMPLOYMENT (INFORMATION) ACTS, 1994 AND 2012

The Act applies to any person:

- working under a contract of employment or apprenticeship;
- employed through an employment agency. In the case of agency workers, the party who pays the wages is the employer for the purposes of the Act. It is essential, therefore, that users of agency temporary workers ensure that it is the agency who pays the worker;
- in the service of the state.

Terms of Employment (Information) Act 1994 as amended

As of March 2019, the above amendment to the Act means that employers must provide employees with a written statement of the 5 core terms of employment. This must be given within 5 days of the employee commencing their employment. It must include the following:

- Full name of the employer and employee
- Address of principal place of business of the employer in the State
- The expected duration or expiry date for fixed term or specified purpose contracts
- Rate or method of calculation of the employee's remuneration and pay reference period for the purpose of the National Minimum Wage Act 2000
- Number of hours which the employer reasonably expects the employee to work (a) per normal working day (b) per normal working week

The 5 day statement must be given to each employee within the 5 days irrespective if the employment ceases before the end of the five day period. This information is an additional obligation whereby all new employees must receive a written statement of terms and conditions governing their employment within 2 months after they have commenced their employment. Many employers will find that it reduces time and the administrative burden to issue a full statement of terms within 5 days of the employee commencing their employment.

The obligation to provide an employee with a written statement of terms does not apply to employees who have been in continuous service of employment with the employer for less than 1 month.

This statement should include:

- (a) the place of work or, where there is no fixed or main place of work, a statement that the employee is required or permitted to work at various places;
- (b) job title or the nature of the work;
- (c) the date of commencement of the contract;
- (d) a reference to any registered employment agreement or employment regulation order that applies to the employee as well as confirmation of where the employee can obtain a copy of the agreement or order;
- (e) that the employee can under section 23 of the National Minimum Wage Act 2000, request from their employer a written statement of their average hourly rate of pay for any pay reference period provide in that section;
- (f) the payment interval, ie weekly, monthly, etc;
- (g) any terms or conditions relating to hours of work (including overtime);
- (h) any terms or conditions relating to paid leave (other than paid sick leave);

- (i) any terms or conditions relating to incapacity for work due to sickness or injury and paid sick leave and pension schemes;
- (j) the notice period to be given and received by the employer, whether statutory or contractual, or where this cannot be indicated when the information is given, the method used to calculate notice periods, eg contractual notice based on length of service;
- (k) a reference to any collective agreements which directly affect the terms and conditions of the employee's employment including, where the employer is not a party to such agreements, (eg a registered agreement having general force within an industry) and particulars of the bodies or institutions who made the agreements.

The particulars specified in paragraphs (g) - (l) may be given in the form of a reference to statutory or administrative provisions or collective agreements governing those particulars. If this course is followed, the employee must have reasonable opportunities to read these other documents during the course of the employment or they must be reasonably accessible to the employee in some other way. The written statement must be signed and dated by or on behalf of the employer.

A copy of the statement must be retained by the employer during the employment and for a period of one year after the ending of the employment. Even if the employee leaves the employment within the two month period for giving a written statement, the statement must still be given to the ex-employee.

With the enactment of the Employment (Miscellaneous Provisions) Act 2018 it is not necessary to re-issue contracts of employment for existing staff, however, it is advised that those contracts for those who do not have written statements of employment which confirm to the Terms of Employment (Information) Act 1994 as amended can request a statement of terms of employment and that statement will need to comply with the provisions in the Employment (Miscellaneous Provisions) Act 2018.

Penalties - Written statement of terms/daily and weekly working hours

Failure to issue a written statement of terms of employment which includes the daily and weekly working hours is a criminal offence which carries a potential fine not exceeding €5000, fixed payment notice and/or custodial sentence of up to 12 months in prison.

Penalisation

The Employment (Miscellaneous Provisions) Act 2018 introduced a new section which protects employees against penalisation for invoking their rights under the new amendment. Penalisation is defined as any detriment to the employee's terms

and conditions of employment such as a transfer of duties, suspension, demotion, lay-off or dismissal. An employee may pursue a claim in the Workplace Relations Commission where the maximum award under this provision is 4 weeks' remuneration.

The Terms of Employment (Additional Information) Order, 1998, SI No. 49

The written contract must also include particulars of the times and duration of rest breaks being allowed to the employee and any other terms and conditions relating to those rest breaks.

Payment of Wages Act, 1991

The Payment of Wages Act, 1991 gives every employee the right to a written statement every pay day of the gross wages or salary payable and the nature and amount of any deductions.

Unfair Dismissals Act, 1977 - 2015

Section 14 of the Unfair Dismissals Act, provides that an employer must give each new employee a written statement of the procedure which the employer will observe if at any time s/he should wish to dismiss that employee. This must be done within 28 days of the date on which the employee commences work. It is advisable therefore, when a written contract is being issued that this procedure is incorporated into it. Any amendment of the dismissal procedure should also be notified within 28 days of its coming into effect. (For further details see Guideline 2: A Disciplinary Procedure.)

ADDITIONAL TERMS OF CONTRACT

The terms which an employer may seek to include in the contract of employment will depend on the type of contract itself, the position being offered, whether it is manual/hourly paid, managerial, etc. They will also depend on the circumstances of the individual firm. As mentioned earlier, under the Terms of Employment (Information) Acts, 1994 - 2012, an employer is obliged to give an employee a written statement of certain conditions of employment. Other terms that could be included in a standard contract of employment are as follows:

- probationary period;
- flexibility/interchangeability;
- requirements regarding shiftwork/overtime;
- lay-off/redundancy/short-time;
- right to search;
- grievance procedure;
- disciplinary procedure;
- company rules;
- deductions from pay;
- retirement age;
- confidentiality/non-compete clause.

WORK OUTSIDE THE STATE

Where the employee is required to work outside the State for a period of at least one month, the employer must have already given him/her prior to departure, a copy of the written statement of terms and conditions that will apply. The statement must also include written particulars on the following:

- the period of employment outside the state;
- the currency in which the employee is to be remunerated in respect of that period;
- any benefits in cash or in kind payable to the employee in respect of the employment outside the state;
- any terms and conditions governing the employee's repatriation.

TERMS OF EMPLOYMENT CONTRACT

Apart from the above legal requirements and recommended additional terms, the terms of a contract may derive from a number of other sources.

Agreed Terms

These may be 'specific', ie where detailed terms are offered, or they may be 'general' referring to a company/union agreement which may contain specific conditions of employment. General terms should be referred to when making the offer of employment to ensure that the prospective employee is aware of their existence.

Implied Terms

Implied terms may be of a general nature, held to exist in the contract by common law, or more particular terms which if not expressed would be held by a third party as implied due to the conduct of the parties, custom or practice, or because without them the contract could not operate.

Examples of such implied terms for employers are the obligation to pay wages when they are due, and the provision of a safe working environment. Similarly, employees have obligations such as to co-operate, to work competently, to exercise care, and to obey the reasonable and lawful instructions of the employer.

Implied Terms by Statute

Such terms are held to exist in every contract of employment by virtue of the enactment of employment legislation. Examples include holidays, payment of redundancy, minimum notice and fair dismissal.

Incorporated Terms

The parties may agree to incorporate into the contract of employment terms which have been determined elsewhere, for example in a collective agreement. If the parties agree that a particular collective agreement will govern one of the terms of the contract, then the incorporation is 'express'. If there is no specific statement by the parties then the incorporation is said to be 'implied'.

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EMPLOYMENT LAW
GUIDELINES

VARIATION OF EMPLOYMENT CONTRACTS

An employer may, after employment has commenced, wish to vary the terms of the contract. If there is an 'express' or 'implied' term in the contract which permits such variation, this will not cause any breach of contract. As a general rule, however, the contract may not be altered unilaterally. A contract may be altered in the following ways:

- by agreement with the parties;
- by conduct or implication; ie where a change is made, and is not opposed, and the contract continues under the new terms for a period of time, the parties will be deemed to have accepted the new terms by acquiescence in accordance with the terms of the contract.

It is important to note that under the Terms of Employment (Information) Acts, 1994 - 2012, an employer is required to notify an employee of any changes to the particulars contained in the written statement not later than one month after the change comes into effect. This requirement does not apply if the change results from a change in administrative provisions or collective agreements. It would, however, be good practice to do so, as an employee's ignorance of change arising from these sources could give rise to unnecessary problems.

APPEALS PROCEDURE

Disputes about failure to provide a full and accurate written statement of the particulars of the terms of employment or failure to notify an employee of any changes to be included in a statement, may be referred under the Terms of Employment (Information) Acts, to an adjudication officer at the Workplace Relations Commission.

TERMINATION OF CONTRACT

Any contract may be terminated by either party giving the required notice or reasonable notice where none is specified, subject to the Minimum Notice and Terms of Employment Acts, 1973-2005.

Termination of employment is a particularly complex issue, fraught with industrial relations and legal complications. The following is a brief outline of the various ways in which a contract of employment may be terminated.

1. By Mutual Agreement

A contract is made by agreement and can be ended by agreement between the parties.

2. By Circumstance

An example of termination by circumstance is where a 'fixed term' contract expires. Another is a 'specified purpose' contract whereby an individual undertakes to perform one, or a number of specific tasks within a company, and on

completion of such task(s), the contract will end automatically.

3. Operation of Law

In some cases, a contract of employment may be ended automatically because of the operation of law. An example of this would be where a contract may end by reason of the legal doctrine of frustration. The doctrine applies where some event has occurred which renders performance of the contract impossible. It is worth noting that in order for the doctrine to apply the contract should have become either:

- impossible to perform; or
- radically different to that which was originally agreed.

It should also be noted that the procedure can only be invoked in the most unusual circumstances, for example in the case of imprisonment.

4. Breach of Contract

A contract of employment may be terminated without notice, by either party, where a serious breach of the contract occurs. Termination by reason of breach of contract can be divided into summary dismissal and constructive dismissal.

(a) Summary Dismissal

An employer is entitled to dismiss an employee without notice for an act of misconduct which involves an unacceptable breach of contract such as dishonesty or assault. However, the employer must apply fair procedures and act reasonably, as failure to do so may result in a successful claim of unfair dismissal by the employee.

(b) Constructive Dismissal

Likewise, an employee may resign if the employer commits a serious breach of contract. For example, the employer fails to pay wages in accordance with the contract, or the employee feels that the actions of the employer towards him/her are so unacceptable that there is no alternative but to leave the employment. Such an employee can seek redress under the Unfair Dismissals Acts, 1977 - 2007.

Damages for breach of contract of employment can be sought by either employee or employer depending on where responsibility for the breach lies. As mentioned above, an employee may seek redress under the Unfair Dismissals Acts, 1977 - 2007. Alternatively, an employee may sue his employer at common law for 'wrongful dismissal' in the civil courts. However, only one of these options may be pursued.

5. Resignation

A contract may be terminated by an employee when he tenders his resignation and the employer accepts it. No action may be taken subsequently on foot of the contract by either

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side except where the resignation is tantamount to constructive dismissal (see above). A resignation by an employee at the instigation of the employer may be held by the Workplace Relations Commission to be a constructive dismissal. Once a resignation has been tendered by an employee to an employer and accepted, it may not be unilaterally withdrawn.

A presumption by an employer that an employee has resigned will not normally be upheld in law. For example, where an employee fails to attend for work, he should not be treated as having resigned. In such a situation the contract of employment only comes to an end when some positive action is taken by either the employer or the employee.

CHECKLIST FOR ACTION

Employers should ensure that:

- employees are given a written statement containing their terms and conditions of employment within 5 days of commencing employment;
- employees receive a written statement outlining the dismissal procedure within one month of commencing employment;
- periodic reviews of the contracts of employment should be undertaken to ensure that they conform to actual conditions in the employment;
- where changes occur in the contract of employment, the written contract itself should be amended accordingly;
- supervisors and line managers are made aware of the terms of the contracts of employees under their supervision;
- where these issues are covered by an agreement between the company and the employee representatives, each employee covered receives a copy.