The definitive employer's guide to

Contracts of Employment

worknest

Enquiries about employee contracts come in thick and fast to our HR Advisers.

The contract of employment will often be the starting point in determining the arrangements between employer and employee, including pay, termination rights and benefits.

There are also minimum legal particulars that must be provided in writing to workers by day one of employment which can be included in the contract.

This is why you should always seek legal advice when drafting and issuing contracts to your staff, making changes to terms and conditions, or terminating contracts. In this definitive guide, we will answer all your questions, provide expert tips and alert you to potential pitfalls.

Contents

In this definitive guide, you will learn:

1.

Do I need to provide my employees with a written Contract of Employment?

A Contract of Employment sets out the rights and obligations of both the employer and the employee.

Contrary to popular belief, a Contract of Employment does not have to be in written form to be legally valid. It may be a written and signed document, but equally it may be a verbal agreement.

However, if you entered into a Contract of Employment verbally, you are still required to provide each worker with a 'statement of written particulars of employment'.

This must be provided by day one of the employee's start of employment.

The statement must include the following information (although some of it can be provided after day one and in a different document):

- The employer's name and address
- The employee's details – name, job title, job description, start date, salary (including payment intervals, e.g. weekly, monthly), continuous service details, length of term if not permanent, probationary period
- Notice periods
- Hours of work
- Holiday entitlements
- Details of any applicable collective agreements
- Terms and conditions relating to incapacity for work due to sickness or injury, including any provision for sick pay
- Terms and conditions relating to any other paid leave
- Terms and conditions relating to pensions and pension schemes
- Terms regarding any other benefit
- Details of training entitlement
- A note specifying any disciplinary rules or grievance procedures applicable to the worker.

While there is now a requirement for the written statement to include information about **sickness absence and sick pay, disciplinary and dismissal procedures and grievances procedures**, it is possible for the statement to refer to a separate reasonably accessible document for detailed information regarding these, which ideally would be the Employee Handbook.

Important

Employers who do not provide a written statement or don't specify everything required can face claims in an Employment Tribunal.

Important

The rules in respect of the statement of particulars changed in April 2020, requiring slightly more information to be provided from day one of employment, rather than within two months, with this right being extended to workers as well as employees.

Employees abroad

If an employee will work abroad for more than one month, employers are obliged to provide the employee with the written statement of particulars before they leave the country. You also need to provide them with the following information:

- How long the employee will be out of the UK
- What currency the employee will be paid in
- If they will receive any extra remuneration or benefits
- Terms and conditions in relation to their return to the UK.

You need to ensure that their terms of employment comply with the minimum legal requirement in that country, including:

- Working hours
- Breaks
- Holiday entitlement
- Minimum pay (including overtime).

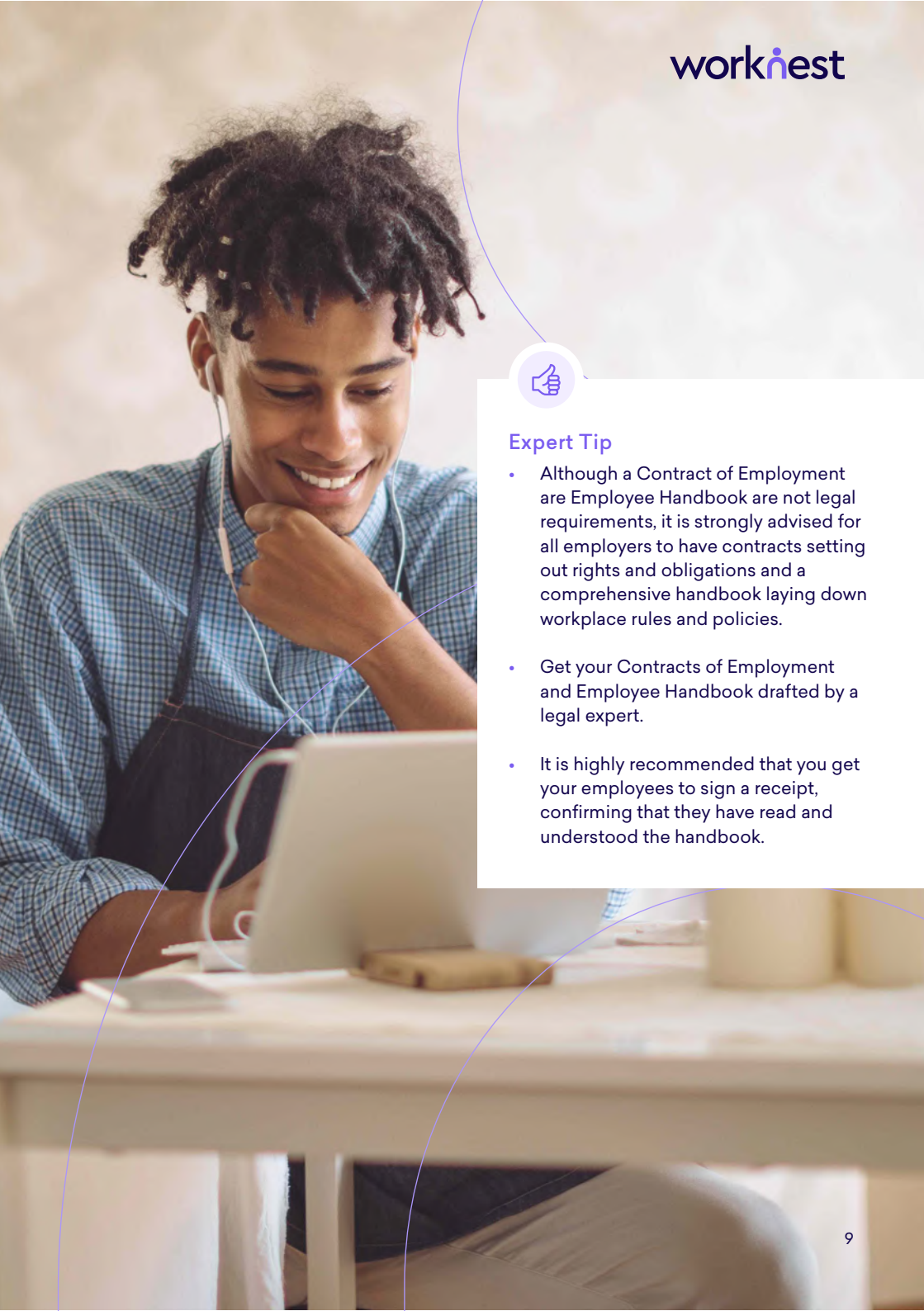
What other things are useful to include in the contract?

In addition to the information needed in the written statement of particulars, you may decide to include information about:

- Garden leave
- Restrictive covenants
- Confidential information
- Data protection.

Important

It is highly advisable to issue a written Contract of Employment to each and every employee. Having a written contract can give you more protection than an unwritten implied contract as it lays down your obligations and their rights, providing clarity to each party.



Expert Tip

- Although a Contract of Employment are Employee Handbook are not legal requirements, it is strongly advised for all employers to have contracts setting out rights and obligations and a comprehensive handbook laying down workplace rules and policies.
- Get your Contracts of Employment and Employee Handbook drafted by a legal expert.
- It is highly recommended that you get your employees to sign a receipt, confirming that they have read and understood the handbook.

2. Does the contract need to be signed?

There is no statutory obligation to have the Contract of Employment or the written statement of particulars signed.

The key ingredients to a contract are that there is an offer, acceptance, consideration and the intention to create legal relations.

Once the applicant has accepted the job, there is a legally binding Contract of Employment between the employer and the applicant. The law does not require witnesses or a signature to make it valid, although this is recommended.

No excuses
An employer cannot use the fact that an employee has not signed the contract as a way to deny employees their statutory rights, for example not allowing them to take their annual leave.

Equally, it does not give you an excuse to make changes to an employee's contract, such as reducing their hours or pay. As we will learn later on in the guide, making changes to an employee's contract will, in most cases, require you to obtain the employee's consent. Failure to do this will normally result in a breach of contract.

Employees abroad
A signature can be handwritten or provided through electronic means.

Expert Tip

It is best practice to have the employee sign and date the contract and return it back to you for three main reasons:

1. It proves you are complying with your legal obligation to provide an employee with a written statement of particulars.
2. It makes it clear what terms and conditions were agreed between the parties in case a dispute arises in the future.
3. It is also important to have a signed contract to rely upon restrictive covenants, rights to deduct from salary, and any 48-hour opt out under the Working Time Regulations.

You should keep a copy for your records and then provide the employee with a copy for their records.

It can take the form of, for example, typing your name in full, using your finger or pen to sign on a touch screen device, or electronically pasting in your signature.

Expert Tip

If you do use electronic signatures, it is recommended that you give the employee a printed copy or send an electronic version that clearly shows their signature.

3. What are the different types of contracts?

There are numerous types of contracts:

Indefinite contracts
This is the most common form of contract used to run your core business activities.

You may hire someone on a permanent full-time or part-time basis and pay them weekly or monthly.

Fixed-term contracts
This is a contract that ends on a specified date or when a particular event or task is completed.

Fixed-term contracts can be very useful to cover a period of maternity leave or long-term sick leave, to do a job where funding has been provided to undertake a specific task, or to do some seasonal work.

Zero hours contracts
A zero hours contract is a contract between an employer and an individual whereby the worker has no guaranteed hours and is only paid for the work they actually carry out.

This means employers do not need to give them work and the worker does not have to accept any work offered to them.

It allows employers to have a pool of people available. This enables an organisation to respond quickly and effectively to any fluctuation in business demands, e.g. to deal with an unforeseen event, cope with absences or in the build up to a busy period.

Freelancers and consultants
Taking on a freelancer, contractor or consultant can be a good option for an employer who needs someone to work on a specific project. It allows you to get talent in without taking someone on a permanent basis.

For these types of individuals, a contract for services will need to be drafted which clearly establishes the rules between you and the self-employed contractor.

It is essentially a commercial agreement and must accurately reflect the actual working relationship and should cover, amongst other things, how long the agreement will last, how it can be terminated, the rules on shared services, etc.

Expert Tip

When employing apprentices, there are a number of things that need to be included in the Contract of Employment, otherwise the apprentice may end up with enhanced protections. Always seek advice when taking on apprentices to ensure that the contract you are using complies with the relevant law and you do not face nasty surprises if you wish to dismiss them.

Agency workers
Agency workers will have a contract with an agency but they will work on a temporary basis for an employer. This works on the basic premise that the agency has the responsibility to pay the worker and ensure that they receive their rights. Therefore there are fewer obligations than when employing permanent staff.

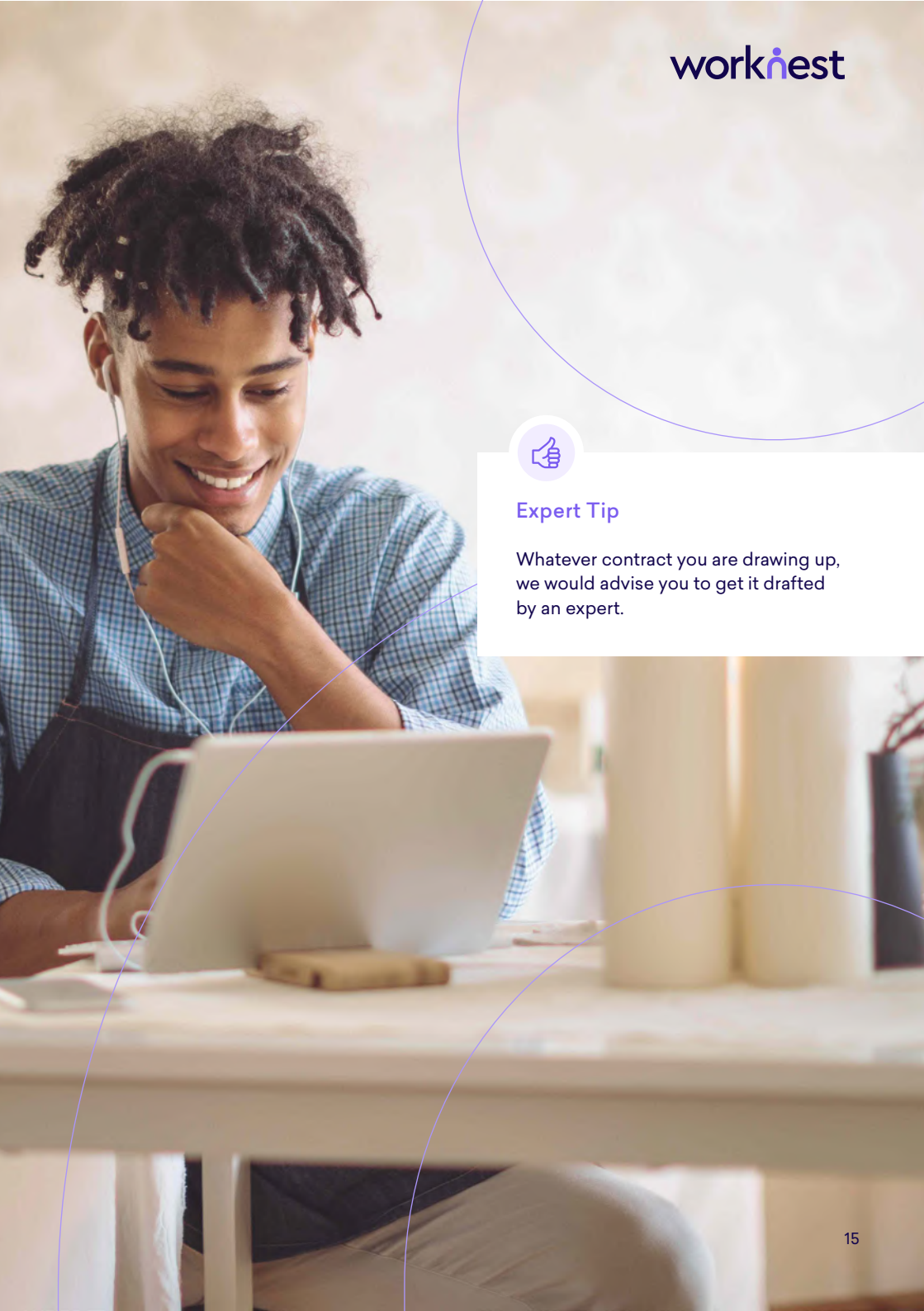
Agency workers are useful as they can step in at the last minute and provide cover for sickness, family-related leave or absences for unforeseen or emergency matters. Alternatively, they can help a business respond to a seasonal rush or a sudden increase in demand. They can also cover a position while you find a suitable permanent option or provide a niche skill within your business that your other employees simply do not have.

Director's Service Agreement
When employing directors, you should draw up a Director's Service Agreement which covers duties, restrictions during employment, remuneration, etc. Note that there may be additional issues to cover off in the agreement if you are a PLC or working within a regulated sector like financial services.

Apprenticeship agreements
There are different types of apprenticeship agreements. There are apprentices on a Framework Apprenticeship and those on the new Approved English Apprenticeship. In addition, there are Modern Apprenticeships, which carry with them full, enhanced protection. Depending on the type of agreement, different provisions need to be included.

Volunteer agreements
Often, organisations will draw up an agreement with the volunteer which usually covers their role, training, supervision, expenses, health and safety and insurance.

Secondment agreements
If you are temporarily assigning an employee to another organisation, you will need to enter into a secondment agreement which sets out the rights of the secondee and the obligations of the employer and the host business.



Expert Tip

Whatever contract you are drawing up, we would advise you to get it drafted by an expert.

4.
Can I agree whatever I want with the employee?

The simple answer is no.

Statutory terms
The law establishes certain minimum duties and obligations that all employers must abide by. For instance, you cannot agree with an employee that you will pay them below the applicable National Minimum Wage / National Living Wage.

Implied terms
Every Contract of Employment contains certain terms that are 'implied'. This means that, even though they are not written down, they still need to be followed.

Therefore, even if it's not mentioned in the contract, implied terms will include the following:

- Employers must provide a safe working environment for all their employees.
- Employers and employees have an implied duty to maintain a relationship of mutual trust and confidence.
- Employees have a duty to not breach their duty of fidelity.
- Employees must follow reasonable and lawful orders.

The reason they may not be explicitly included is that they may be very obvious, but all the duties explained above are necessary to make the contract work.

Custom and practice
Some terms may be implied if there is a long-standing or established practice in place. Examples are that employees will be paid overtime for any additional hours or they will receive a bonus at Christmas. Although the contract does not say this and the employer has never sat down with the employee to specifically agree to it, it can form part of the contract through custom and practice. Custom and practice is unlikely to override an express term in the contract.

In general, this will be the case where the practice:

- Is clear, notorious and certain
- Is fair and reasonable
- Has been going on for a long period of time (the law does not set out a specific length of time)
- Is known to employees, and they have a reasonable expectation of receiving it
- Has been consistently applied to employees.

Important
The law will override the agreed terms that do not fulfil statutory duties.

Incorporated terms
The terms that are included in other documents, such as the Employee Handbook, may be incorporated into the Contract of Employment.

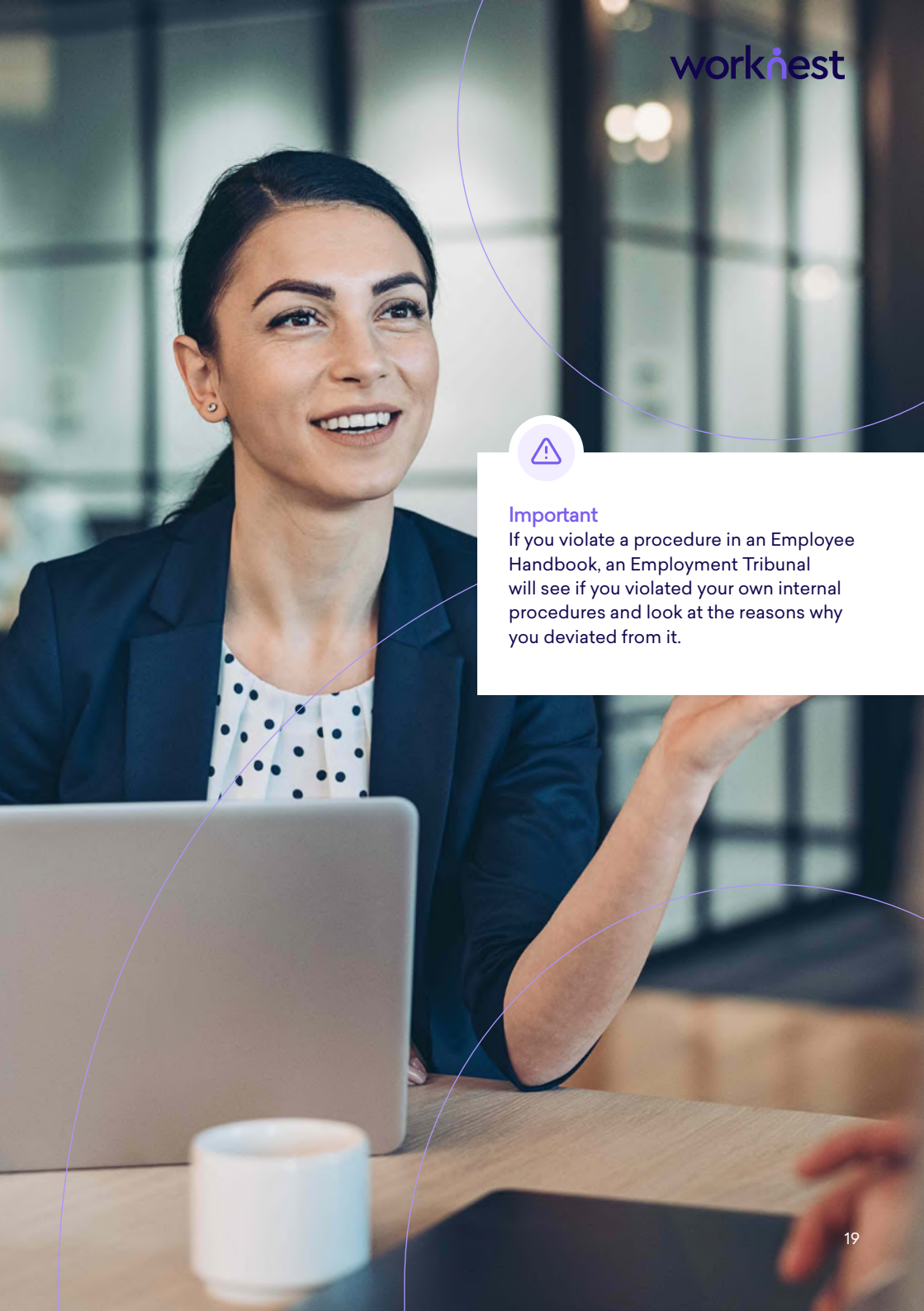
Typically, employers will need to consult before making a change to a Contract of Employment. If the Employee Handbook is not contractual, it allows employers to vary its contents without requiring the formal consent of its employees.

It will also mean that if you violate a procedure or policy in the Employee Handbook, it will not constitute a breach of contract.

Expert Tip

You should clearly state that the contents of the Employee Handbook do not form part of the terms of their Contract of Employment unless otherwise stated and that you may need to amend any policy or procedure to ensure that it remains relevant and consistent with the law and the needs of the business.

However, changes should not be made which could breach trust and confidence between you and the employee(s). You should also state that you will notify them and provide them with an up-to-date copy of the handbook when changes occur.



Important
If you violate a procedure in an Employee Handbook, an Employment Tribunal will see if you violated your own internal procedures and look at the reasons why you deviated from it.

5.
Can I vary an employee's Contract of Employment?

Unfortunately, changing a term or condition of employment, such as varying an employee's duties, pay, or place of work, is not as straightforward as you might like it to be.

Why would employers want to make a change?
You may wish to change an employee's Contract of Employment for a number of reasons, for example because of changing financial circumstances of the company, a business restructure, or to harmonise contract terms across different teams or divisions.

Do I need to consult the employee before implementing the change?
In most cases, if an employee does not agree to a proposed variation, employers will need to consult with the employee before they go ahead and make a change to a Contract of Employment. Making changes without the agreement of the employee will be considered a breach of contract.

An employer who wishes to make changes should consult with the employee or, if applicable, their trade union or other employee representatives. It is likely the employee will be more receptive to the change if you explain the reasons and allow them to express their views and offer alternative suggestions. This should be done as part of consultation obligations.

Important
If you are implementing a change for multiple employees, you will need agreement from each employee. This means you may find yourself with some employees who do accept them and others who don't.

Can I insert a clause into a Contract of Employment that gives me the flexibility to make changes?
Employers do tend to insert clauses that allow them to make changes to the terms and conditions of employment.

However, for example, you cannot ask an employee to relocate to another country and give them extremely short notice to do so. It is also important that the right to make the change is written in specific terms as a clause that is too general is less likely to be enforceable.

Expert Tip
Once the employee has agreed to the change, get them to confirm this in writing.

What if the change is marginal?
In practical terms, there are instances where contractual terms will change from time to time without needing formal consent from the employee. A good example of this is pay rises. Rather than varying the contract, it is necessary to send the employee a brief note about their pay change and keep a copy for their staff file. Realistically, an employee is not going to complain about a positive change to their terms.

Do I need to provide employees with information about the change in writing?
Where it has been agreed to vary the contract and the change relates to any of the particulars in the written statement, the employer must give written notification of the change to the employee. This must take place within a month of the change taking effect.

If you change terms and conditions that are not included in the written statement, you must inform your employees of where they can access information about the change, for example, in the Employee Handbook or on your intranet.

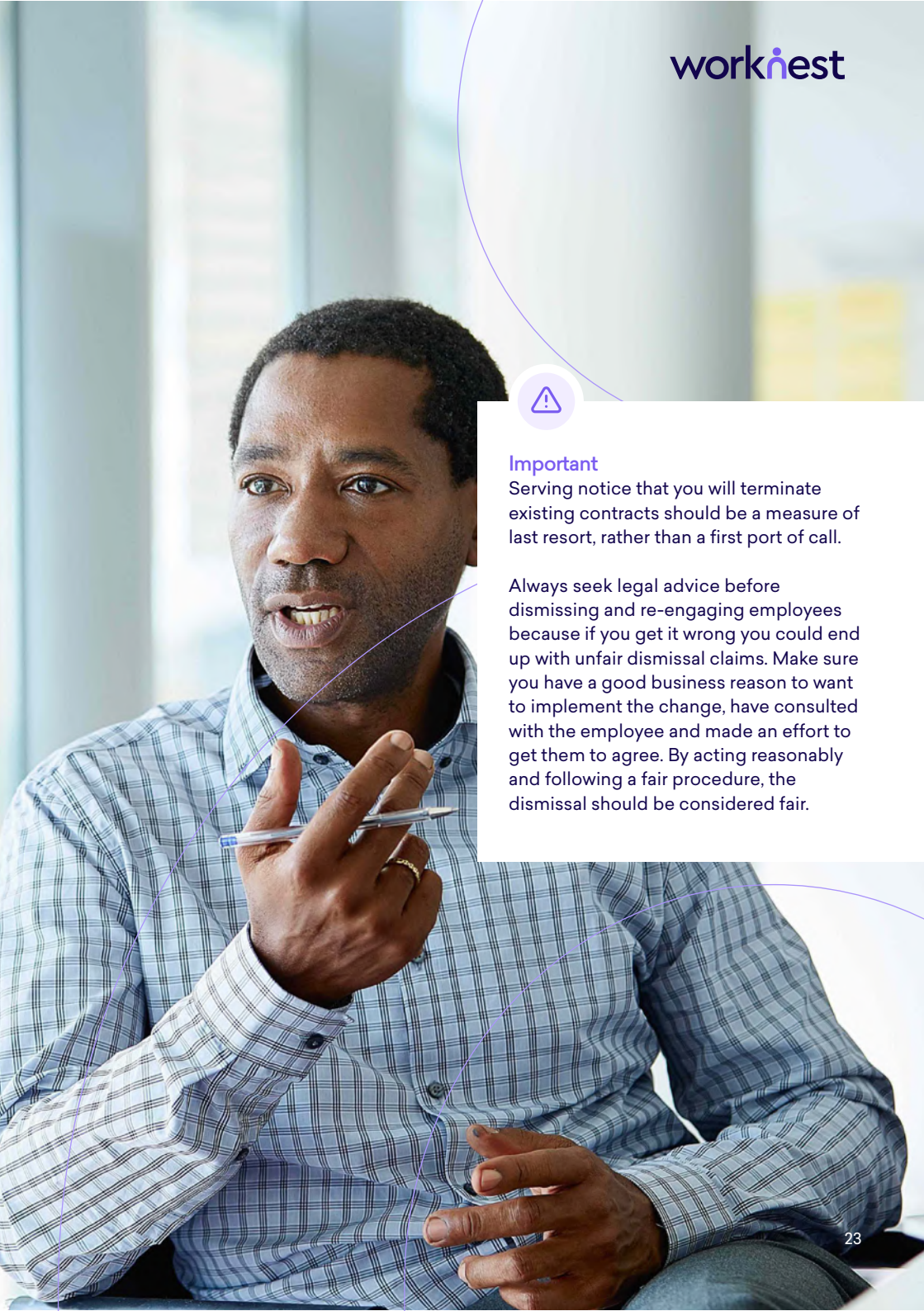
What happens if an employee does not want to accept the change?
You should try to be flexible and be willing to compromise. Talk to them and give them time to consider and respond to your proposal.

If, after lengthy consultation and negotiation, you cannot reach agreement, you can serve the individual employee notice that you will terminate the existing contract and offer a new contract with the new employment terms and conditions.

If you wish to do this with 20 or more employees, you have an obligation to consult collectively with employee representatives or, if applicable, trade union representatives.

Important

You should speak to your HR Adviser for advice on how to draft these types of clauses and on their enforceability.



Important
Serving notice that you will terminate existing contracts should be a measure of last resort, rather than a first port of call.

Always seek legal advice before dismissing and re-engaging employees because if you get it wrong you could end up with unfair dismissal claims. Make sure you have a good business reason to want to implement the change, have consulted with the employee and made an effort to get them to agree. By acting reasonably and following a fair procedure, the dismissal should be considered fair.

6. How is a Contract of Employment terminated?

This can occur in a number of ways.

Resignation
In order for an employee to resign, the employee must give you the required amount of notice, which should be stated in the Contract of Employment. If there is no provision in the contract, they should at least respect the statutory minimum of a week. You should ask the employee to confirm their resignation in writing.

Depending on the terms of the contract, employers have a few options:

- You may ask the employee to work their notice period.
- You may place the employee on garden leave. This means that they do not come into work during their notice period in order to keep the employee away from the business, sensitive information and from clients or suppliers. This must be expressly laid down in the contract.
- You can ask them to leave immediately, but you will need to make them a payment in lieu. This must also be explicitly expressed in the contract.

Whatever you decide, you will need to confirm to the employee when their last day is and how the notice period will be handled.

Dismissal
An employer may dismiss an employee. A dismissal will be considered potentially legally fair when an employer can show that the dismissal was for one of the following reasons:

- Related to an employee's conduct, e.g. theft
- Related to the employee's capability or qualification for the role, e.g. long-term sickness absence or performance
- Redundancy, e.g. business closure
- A statutory restriction that prevents the employment continuing, e.g. a driver loses his driving licence
- Some other substantial reason, e.g. employee is handed a long prison sentence.

It is not enough that the employer has a valid reason – you must have acted reasonably in the circumstances in treating it as a sufficient reason for dismissing the employee.

Misconduct
In a nutshell, the employer will be able to dismiss on the ground of conduct if they carry out any necessary investigation, inform the employee in writing of the issue, invite them to a disciplinary hearing, show them copies of any evidence, allow them to be accompanied to the meeting, and allow an appeal.

The Tribunal will look to see whether the employer's response to the misconduct fell within the 'band of reasonable responses'. If, in the Tribunal's view, no reasonable employer in the circumstances would have dismissed the employee, the dismissal will be considered unfair. Typically, employees need two years of service with you before they can submit a claim to an Employment Tribunal for unfair dismissal.

Gross misconduct is an act which is so serious that it justifies dismissal without notice, or pay in lieu of notice, for a first offence. They must be acts that destroy the relationship of trust and confidence between the employer and employee, making the working relationship impossible to continue.

Redundancy

In redundancy situations, there are certain elements which are crucial to a **fair redundancy process**, such as warning employees of redundancies, creating and applying fair and non-discriminatory scoring criteria, consulting with employees, and thinking about suitable alternative employment options. Getting the selection or consultation process wrong can render the dismissal unfair.

There are more added hurdles when you are conducting a 'collective redundancy', i.e. where you want to make 20 or more employees at one establishment redundant within the space of 90 days.

Long-term sickness

In cases of dismissals for long-term sickness absence, an Employment Tribunal will look to see that you consulted with the employee and explored how to support them back into work, made the necessary reasonable adjustments, especially if the employee is disabled, sought medical evidence that confirmed that the employee is not likely to return at all or for a prolonged period, and warned the employee that their long-term absence could lead to dismissal.

Fixed-term contracts

If a Contract of Employment is for a fixed-term period, the contract will automatically terminate when the period ends. The non-renewal of a fixed-term contract constitutes a dismissal in law. This means that they may be able to claim unfair dismissal if they have over two years of service. Employees may be able to succeed in their claim if they show that the employer failed to renew their contract for a fair reason or for not following a fair procedure.

As is frequently the case, the non-renewal of a fixed-term contract will be potentially fair on the basis of redundancy if there is not enough work for the employee. Sometimes, the reason may be fair for 'some other substantial reason', for example, the fixed-term employee has been clearly recruited to cover maternity leave and their employment will be terminated when the other employee returns.

Notice periods

An employer must provide at least one week's notice if the employee has worked for the employer on a continuous basis for one month or more, but less than two years. You must provide two weeks' notice if the employee has worked for you on a continuous basis for at least two years and an extra week for each further year of completed service, up to 12 weeks' notice.

The employee's Contract of Employment may also expressly have a provision that permits making a payment in lieu of notice, known as a PILON.

7. Six key takeaways

1. A Contract of Employment does not have to be in written form to be legally valid. However, if you entered into a Contract of Employment verbally, you are still required to provide each worker with a 'statement of written particulars of employment'. This must be provided by day one of the worker's start of employment.

2. It is highly advisable to issue a written Contract of Employment to each and every employee. Having a written contract can give you more protection than an unwritten implied contract as it lays down your obligations and their obligations and rights.

3. Although it is not a legal requirement, it is best practice to have the employee sign and date the contract and return it back to you. This will be particularly important when looking to rely upon restrictive covenants and rights to deduct monies owed by the employee from their salary.

4. Some terms may be implied if there is a long-standing or established practice occurring.

5. In most cases, making changes without the agreement of the employee may be considered a breach of contract.

6. A contract can be terminated if an employee resigns or they are dismissed.

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