

# Founder Focus: FAQs for Start-Up Success

## Understanding Employment Contracts

Starting a new business is an exciting prospect but it comes with many responsibilities, particularly for businesses looking to recruit. When a business is ready to move beyond engaging contractors and hire its first employee, it is essential to put in place an employment contract that not only complies with the law but builds in protections for the company. This guide explains the mandatory legal terms of an employment contract and also explores additional clauses that are not only important for your business but are also valued by future investors.

### Key Terms of an Employment Contract

Employers are required to provide all employees and workers with a written statement of particulars of employment under section 1 of the Employment Rights Act 1996, most often contained in the employment contract. This statement must be given on or before the first day of employment and should include the following key terms:



- Employer's name and address
- Employee's name
- Start date and the date that the employee's continuous employment began
- Job title or job description
- Place of work
- Details on pay, including the amount and how often and when it will be paid
- Working hours, including which days the employee or worker must work and if and how their hours or days can change
- Holiday and holiday pay, including an explanation of how its calculated if the employee leaves
- Sick leave and pay
- Any other paid leave
- Any contractual benefits
- Any non-contractual benefits
- The notice period required by the employer and employee
- Term of the role (if fixed)
- Any probation period, including its conditions and how long it is
- If the employee will work abroad, and any terms that apply
- Any training that must be completed by the employee, including any unpaid training

Details on pension arrangements, non-compulsory training, the disciplinary and grievance procedures and whether there are any collective agreements can be provided within 2 months of employment commencing, although in most cases they are included in the main contract itself. An Employment Tribunal may award between 2 to 4 weeks' pay to an employee who has not been provided with a s1 statement by their employer.

### Additional Clauses

Beyond the mandatory contents, there are a number of additional clauses which start-up businesses should consider including in their employment contracts in order to best protect their business as it and their workforce grow.

### Restrictive covenants

Restrictive covenants seek to restrict an employee's actions both during and after their employment. For example:

- a non-compete restriction seeks to prevent an employee from working for competitors or starting a competing business for a specified period (e.g. 6 months) after termination of employment;
- non-solicitation clauses seek to prevent an employee from approaching or enticing away the employer's key clients or staff for a specified period after termination of employment; and
- non-dealing restrictions seek to prevent an employee from having any business dealings with the employer's key clients for a specified period after termination of employment, even if the client approaches them first.

If former employees act in breach of their covenants their former employer can take court action, including seeking an interdict to prohibit them continuing to act in breach. Even if such action is not ultimately pursued, restrictive covenants can have a powerful deterrent effect, giving the business time to consolidate key relationships in the wake of the departure of a key employee. That being said, it is important to note that these clauses must go no further than is necessary to protect the legitimate interests of the business to be enforceable, so it is crucial to tailor these clauses to the specific circumstances of the business and employee.

### *Intellectual Property*

Although intellectual property created during the course of employment generally vests in the employer, we would recommend that all employers include standard intellectual property right clauses within employment contracts to clearly establish that any intellectual property created by employees during their employment (such as copyright, inventions, designs and written materials) legally belongs to the employer. Without such clauses, employers may face ambiguity over ownership of IP, which increases the risk of disputes or exploitation of IP by former employees or competitors. This could potentially lead to significant financial and reputational damage.

### *Notice*

Statutory notice is the minimum notice period required by UK law: employers must give at least one week's notice to employees who have been employed for one month to two years, and for those who have been employed for more than two years, one week for every year of employment, up to a maximum of 12 weeks (other than in exceptional circumstances such as where the employee is dismissed for gross misconduct). Under statute employees must give one week's notice.

As noted above, under s1 it is mandatory to include the notice period in an employment contract. We frequently see notice periods that go well beyond the statutory minimum stipulated in the contract. Deciding on the length of a notice period involves balancing various factors and will depend heavily on the needs of the business. For example, a long notice period (e.g. 6–12 months) can be useful if a business is seeking to prevent a departing employee going into the market for as long as possible, as they could require the employee to work or remain on garden leave for the duration of the notice period. A substantial notice period can also facilitate an effective handover. That being said, a long notice period can be a disadvantage for a business looking to expedite the departure of an employee. Even if the business decides to dismiss and pay in lieu of notice, this can be expensive if they are paying in lieu of a long notice period. In general, the more senior the employee and more key to the business, the longer the notice period.

### *Payment in lieu of notice ("PILON")*

Including a PILON clause gives the employer the contractual right to terminate employment quickly and pay in lieu of notice rather than having to allow the employee to work/ remain on garden leave until expiry of their notice period. Terminating with no notice in circumstances where there is no PILON clause would be a breach of contract, meaning that important protections, such as restrictive covenants, could fall away.

### *Garden leave*

Including a garden leave clause gives the employer the contractual right to exclude an employee from the workplace and restrict/ stop their duties during their notice period. The employee remains on the payroll and continues to receive their salary and benefits. The benefit of such a mechanism is that the employer is able to keep the employee out of the market and retain better control than if employment is terminated and the employer is left to rely on enforcing restrictive covenants.

### **Summary**

Creating an effective employment contract that works well for your business is a combination of meeting statutory requirements and building in a matrix of additional clauses that work well together and best protect your business both now and in the future. It can be a useful tool in terms of attracting talent, guarding against future threats to the business as people leave or relationships sour and in showing future investors that you take the people aspect of your business seriously. Please do get in touch with our CMS Employment team who can assist in developing an employment contract fit for your business.

#### **Any questions?**

#### **Get in touch with our employment team**



#### **Sarah Judge**

Associate

**T** +44 141 304 6198

**E** sarah.judge@cms-cmno.com



#### **Catriona Aldridge**

Partner

**T** +44 131 200 7350

**E** catriona.aldridge@cms-cmno.com