

HR Clinic - brought to you by HJS People



Dan Jenkins
Director of HR Consultancy

KEEPING up with the latest changes in legislation affecting how you run your business can be a bit of nightmare...

Most of the time you are so busy bringing in the business and looking after your customers, that the intricacies of changes in the law can pass you by.

That's where this column will help you keep up to speed and allow you to be more able to deal with challenges that might crop up in the workplace.

My background is as an HR Consultant with more than 20 years experience in HR and managing people. At HJS People we specialise in supporting employers with every aspect of managing their staff, ensuring legal compliance and protecting the business against the cost of expensive employment litigation.

This column is aimed at anyone running a small to medium sized company. If you started out on your own and have grown your company to the stage where you employ a number of people, you need to be aware of employment law and how it affects you as well as how to deal with employee issues.

In the coming weeks I will cover many topics including controlling absence, health and safety responsibilities for employers, the rules affecting retirement.

The information will be presented in a Q&A format to keep it focused and to the point - but if you would like more in-depth information I can be contacted via the email address at the end of this column.

It would be great to hear from you about any HR subject that is puzzling you - and I will do my best to cover the topics that you ask for guidance on.

Watch out for the next column in a fortnight's time when I will be looking at how to deal with staff absence.

IF YOU have a question you would like Dan to discuss in a future column, email him at info@hjspeople.co.uk

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I have staff that regularly fall ill, and are always taking off the odd day here and there. Can I do anything about this?

Staff absences cost the UK economy billions of pounds every year, and for small businesses it is the inconvenience and additional workload that causes the most disruption and pressure.

As an employer, you have to “control” absence levels, and ensure that staff taking the odd day off here and there are made aware they are being missed within the workplace.

A good start point is to check your absence policies and procedures on how sickness absence will be dealt with, and ensure management are trained to adopt consistent approaches across the business.

Here are some top tips on how businesses can effectively control sickness absence and create an attendance culture

1. Developing an understandable procedure is the first step in effectively controlling short term and dealing with long term sickness absence.
2. Ensure procedures are clear on how sickness absence will be dealt with including reporting procedures, sick pay rules and any triggers for sanctions.
3. Train management to conduct return to work interviews without delay to establish trends or underlying reasons for absence.
4. Adopt consistent practices throughout the business to enhance a positive healthy working culture.
5. Communicate rules surrounding Access to Medical Records Act for long term or related short term absences.

If you do not have a policy in place, or you would like your current procedures reviewed, then send me an email or give me a call on 02380 234222 to see if we can assist.

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Do members of staff lose their annual leave entitlement if they are off sick?

There have been two important rulings from the European Court of Justice (ECJ) that need to be considered when looking at this issue.

In the case of *Stringer v HMRC* it was held that employees can accrue holiday pay whilst on long term sick and if the entitlement is unable to be taken during the current annual leave year it can be carried forward to the next annual leave year.

It is therefore important for businesses to address their approach on how to control their long term sickness absence and ensure an effective procedure is in place by supporting and working with employees to get them back into the workplace as soon as they are able. If an imminent return is not possible then other approaches should be looked at such as reasonable adjustments in the workplace or dismissal on the grounds of capability.

Secondly, a recent case in the ECJ has established the principle that an employee should not lose his or her right to statutory holiday if they are off work sick. In this case an employee was due to go on holiday and fell ill just before it began. The ECJ said the time he was certified as unable to work due to illness could not also be taken as statutory holiday leave. Yet to be tested in the British Employment Tribunals, employers should take advice if such a situation occurs in their business.

If you are currently experiencing long term sickness from an employee, or you would like your procedures reviewed, send me an email or give me a call on 02380 234222 to see if we can assist.

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I am planning an office party, as an employer what are my responsibilities?

Whether you hold the party on or off Company premises, Company rules and procedures still apply. You need to ensure that this is clearly communicated to staff prior to the event. If you are faced with a member of staff breaching your rules of conduct at the event then your normal disciplinary procedures would apply.

As an employer you need to think about how your employees will get home after the event. You have a duty of care to ensure that they do not drive home if they have been drinking, for example ensuring there are adequate alternative methods of transport available from the event such as late night buses and taxis. You would not be expected to pay for these but should ensure they are readily available.

If there is any damage to the venue by an employee, then as the organiser/ employer you may be liable to any costs associated as a result of the damage. However, this would be considered as misconduct and therefore your disciplinary rules would once again apply.

In summary, as an employer you have a duty of care to ensure the safety of your employees and can be liable for the conduct of your employees whilst at a Company event. Your employees have a duty to observe the Company rules and behave accordingly. If you experience any staff incidents, or have any concerns resulting from your Christmas party, give me a call on 02380 234222.

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Q: One of my employees is approaching retirement age, what do I have to do?



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*Director of HR
Consultancy*

You can set a retirement age within your company at or above 65. Anything lower than 65 must be "objectively" justified. Your employee has the right to request to work past retirement age and as an employer you must notify your employee in writing that they are due to retire and inform them of their right to request to work beyond their retirement date.

You are legally obliged to consider any such request. Firstly, hold a meeting with the employee "within a reasonable period" to discuss the possibility of continued working and allow your employee to bring a colleague of his or her choice to the meeting. Following the meeting provide a decision in writing as soon as is reasonably practicable giving the right of appeal against any refusal to agree to the employee's request. If your employee does appeal, set up an appeal meeting with a more senior manager within a reasonable period and then confirm the final decision in writing.

There are three options you can consider which are: (a) to refuse the request outright, (b) grant them the right to work on past their retirement age indefinitely or (c) grant them the right to work on past their retirement age for a fixed period with the agreement that they will then retire on a certain date.

You must follow through the duty-to-consider procedure correctly. Failure to do so will render the employee's termination as automatically unfair dismissal. It is also worth noting that the government has said it will review the retirement age during 2010 and potentially allow people to work beyond the age of 65, a move that may signal the end of the default retirement age in the UK altogether.

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Q : One of my employees has requested to change their working hours, do I have to agree?



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Certain employees have a statutory right to ask to change their working hours. This right is available to male or female employees who are the parent, guardian, adoptive parent or foster parent of a child under the age of 17 (under the age of 18 if the child is disabled), or they care for a dependant adult. The employee must have 26 weeks continuous service with you, and the request must be made in order that the employee may undertake their care activities.

There is no legal right for employees to be granted flexible working, however, employers are required to consider any such request and explain their reasons if they refuse.

If a request is received, then within 28 days the employer must either accept the change or arrange a meeting with the employee to discuss the application. The employee has the right to bring a fellow employee. Within 14 days of the meeting the employer must give the decision in writing.

Employers can refuse the request but only if it satisfies one or more of the following criteria; the burden of additional costs, a detrimental effect on the ability to meet customer demand, an inability to reorganise work among existing staff, the inability to recruit additional staff, a detrimental impact on quality or performance, insufficiency of work during the periods the employee proposes to work or planned structural changes.

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Q: I have noticed one of my members of staff is always late and it is having an effect on my business, what can I do to stop this from continuing?



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Normally minor acts of misconduct can be dealt with informally and sometimes a quiet word will have the effect you are looking for. It would also give your employee an opportunity to bring to your attention why they are always late; perhaps they are having temporary transport problems which is making them late.

You would not be obliged to make a change to their start time but if you could agree to be flexible for a specified period of time, it may help them until they can make more permanent arrangements.

If your employee has no reasons for their lateness and after your informal chat their lateness continues, then you should consider invoking your formal disciplinary procedure to deal with the problem.

As an employer, you should have in place a procedure on how you will deal with discipline in the workplace, and your employees should have access to these details so that they understand the implications of discipline within the workplace.

Whilst there are no longer any statutory disciplinary and dismissal procedures in place (these were repealed in April 2009), you should follow the guidelines set out in the ACAS Code of Practice on Discipline.

Please contact me if you do not have a discipline policy in place, or would like your current procedures reviewed to ensure they are up to date.

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Q : What are the key Employment Law changes being introduced in April?



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Statutory maternity, paternity and adoption pay increases from 6 April 2010 to £124.88 per week.

There is additional Paternity Leave & Pay effective from 6 April 2010 for babies born on or after 3 April 2011. A mother will be able to transfer up to 26 weeks maternity leave to the father which can be taken once the mother has gone back to work.

Additional Paternity Leave may be taken from 20 weeks after the child's birth with up to 13 weeks of Additional Paternity Pay paid at the same rate as Statutory Maternity Pay if it is taken during the 39-week maternity pay period and subject to certain criteria.

There will be no increase to the weekly amount of statutory sick pay which remains £79.15 per week. New "fit notes" will replace "sick notes" from 6th April, and the Regulations change the format of the medical statement and the rules associated with its completion. Doctors will be able to indicate whether their patient is unfit for work or may be able to work with appropriate support.

Right to request time off for training is introduced from 6 April 2010. Modelled on the right to request flexible working, it will effect organisations with 250 or more employees from this year and all organisations from April next year. Employers will be obliged to consider requests that they receive.

If you would like a **FREE** Review of your employer documents to ensure you are legally compliant, please call **Dan Jenkins** on **023 8023 4222** or email: **info@hjspeople.co.uk**

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Q : When is an individual working for me not considered an employee?

There are a variety of working arrangements employers can consider to respond quickly to external pressures and remain competitive. Contracting-out and using

self-employed staff can provide employers with the flexibility they need but employers need to be clear about the basis on which their workers are employed as these affect an individual's employment rights. Employees are protected by a range of legal provisions in areas such as payment of wages, dismissal, redundancy and maternity, whereas self-employed workers have limited statutory rights.

When an individual is taken on as an employee to work in the service of the employer, then a contract of employment is formed – a contract of service. However, when a self-employed person provides the employer with his or her services, but remains independent, a contract for services is agreed.

In order to help you to decide whether a worker is employed or self-employed there are a series of tests which can help. What degree of control does the individual have on what and how a job can be done? Does the individual form part of the organisation or are they in business and could send a substitute to complete the work on their behalf? Is the business obliged to offer any work and is the individual obliged to complete it? Is the individual paid through PAYE or by invoice? Does the individual have the right to sick and holiday pay or does the business have no involvement if the individual is not available for work? Is the equipment the individual uses provided by the organisation or do they use their own premises, tools and materials?

If, 'mutuality of obligation', that is to perform work for remuneration and 'control' as the minimum legal requirements are identified to a sufficient extent then this calls for the existence of a contract of employment.

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