

D3 Employee Solutions Factsheet

No 2 Contracts of Employment

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The relationship between employer and employee (as opposed to other categories of worker – See Factsheet 1) are governed by the contract of employment.

Does the Contract need to be in writing?

The answer is no, a contract of employment is a common law construct and as such need not be in writing, much less signed. Legally the following conditions must be satisfied:

- There must be an **agreement** between two parties, usually consisting of an **offer** by an employer, followed by an **acceptance**. Agreement and acceptance may be implied by the parties' behaviour and might not be a formal thing; and an offer may be conditional e.g. upon references
- The agreement must be with the **intention** to create a legally-binding relationship
- The agreement must be supported by **consideration** i.e. a benefit must accrue to both parties – the employer gets 'work' done and the employee receives pay & benefits
- The terms of the contract must be sufficiently certain such that a court could give them meaning.

Contractual Terms

There are four main types of contractual term:

- Those **expressly agreed** by the employer and employee, either verbally and/or in writing
- Those **implied** by their behaviour and/or by custom & practice
- Those which are **incorporated** from other sources e.g. collective agreements or company rules
- Those derived from **statute** e.g. the Equal Pay Act inserts an 'equality clause' into every contract

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There are some terms which are **prohibited or unenforceable**. So although the parties (or at least one of them) believe they have a valid contractual term (e.g. a restriction on the employee's ability to work once (s)he has left), that term may be void. A void term however usually does not invalidate the rest of the contract. The most common void or illegal terms are:

- Subject to some very specific exceptions, a contract of employment cannot seek to exclude or limit the employment protection rights afforded by the Employment Protection Act 1996
- Similarly terms are void if they seek to contract out of: the various anti-discrimination laws; the national minimum wage; the Working Time Regulations; TUPE; statutory maternity pay
- Although certain deductions by the employer from wages are lawful if agreed, those which are deemed to be an unreasonable 'fine' or 'penalty' would fall foul of the common law, even if, on the face of it, agreed by the employee.
- A whole contract may be declared void, either totally or for a period of time if that contract is prohibited by statute e.g. the employment of a person under 18 to serve alcohol in a bar would be illegal under the Licensing Act; or a contract may be illegal and unenforceable for the period when a person was an 'illegal immigrant'
- Terms which are a 'restraint of trade' may be unenforceable. So employers need to be careful when seeking to contractually limit, via a 'restrictive covenant', a person's employment activities after they have left employment.

Written Particulars

Although a contract need not be in writing, the Employment Rights Act 1996 requires that:

1. No later than 2 months after employment begins, an employer must give the employee a written statement of certain 'particulars of employment'
2. No later than one month following a change to any of those particulars an employer must notify the employee in writing of the change

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D3 Employee Solutions has a checklist of the required particulars which must be in writing.

This checklist must be regarded as the minimum requirement; it is wise to set out other key terms in writing.

The statutory written statement is often inaccurately referred to as the 'contract of employment.' However, it is regarded by the courts as *persuasive* (though not necessarily *conclusive*) evidence of the contract agreed between the parties.

An employee who has not received a written statement (or who has received one which does not fulfil the ERA's requirements) may apply to an Employment Tribunal for a determination of what terms ought to be included. In addition, if in the course of other proceedings at an Employment Tribunal (e.g. an unfair dismissal claim) a Claimant can show that (s)he was not provided with written particulars, a Tribunal may award compensation amounting to 2 or 4 weeks' pay.

Termination of Contracts of Employment

A contract may be terminated by either party. The contract normally specifies the notice each party must give to terminate **and the Employment Rights Act mandates certain minimum periods of notice**. Failure to provide the notice required will be a breach of contract allowing the aggrieved party to sue for damages. Employers rarely sue for the failure by an employee to give adequate notice. When dismissing an employee, an employer may knowingly and deliberately breach the notice provisions, but compensate for the damages caused by giving 'pay in lieu' of notice. Dismissal without adequate notice is called 'wrongful dismissal'

Where one party has breached the contract so fundamentally that its continuance is impossible, the other may be entitled to terminate without notice e.g. dismissal following an employees' gross misconduct.

Note that a dismissal may not be wrongful (i.e. the correct notice has been given), but it may be unfair. Unfair dismissal is a statutory concept. Some dismissals are automatically unfair, irrespective of an employee's length of service, but in general only employees with 52 weeks' continuous service can complain of unfair dismissal.

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Termination (by either party) need not be in writing to be valid. An employee can, for example, believe they have been dismissed from the words used to them by their employer (e.g. "go home and don't come back" – the employer may say this in anger and not really mean to dismiss, but nevertheless the employee might validly interpret these words to mean "you're fired").

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