sportscotland Key Considerations in becoming an employer

An overview of responsibilities

sportscotland
the national agency for sport

HM Harper Macleod LLP

1. Registering as an employer with HMRC

1.1 If your organisation is going to employ an employee or a worker, you must register with HMRC before the first pay day.

1.2 HMRC guidance states that it usually takes up to five days to receive your employer PAYE reference number. It is important to remember that you cannot register more than two months before you start paying people. Accordingly this should be factored into proposed start date with prospective staff. This process can be completed only at the following link: https://www.gov.uk/register-employer

1.3 Should you fail to register with HMRC you could be subject to a fine and compliance order.

1.4 The level of fine will be dependent on the number of employees and how long the breach has persisted for. HMRC has discretion in determining what level of fine will be appropriate and much of this will depend on whether they take the view that there is a "reasonable excuse" or whether they deem that the organisation has acted deliberately.

1.5 Remember, without registering with HMRC you will be unable to administer the pay-as-you-earn statutory tax regime, you will not be able to adhere to requirements such as real-time tax reporting and ultimately, as a result, you will not be able to properly administer payroll. This could lead to an inability to make the appropriate returns of tax and national insurance and ultimately, criminal sanctions can follow.

Notes:

2. Identifying who can manage your payroll

2.1 If your organisation chooses to become an employer the organisation will be responsible for collecting and keeping records of your employees' details. Your payroll provided will need these to run payroll for you.

2.2 Some payroll providers can offer more support than others but it is important to remember that as an employer you are legally responsible for completing all PAYE tasks – even if someone else provides these services for you.

Specifically, as an employer you must collect and keep records of:

- What you pay your employees and the deductions you make.
- Reports and payment you make to HMRC.
- Employee leave and sickness absences.
- Tax code notices.
- Taxable expenses or benefits.
- Payroll giving scheme documents.

2.3 Your records must show that you have reported accurately, and you need to keep them for three years from the end of the tax year they relate to. HMRC may check your records to make sure you are paying the right amount of tax.

2.4 Should you fail to keep the required records or make the required reports to HMRC you may be subject to a penalty charge. This will depend on the number of employees you have.

2.5 Where HMRC discovers careless or deliberate errors, the penalties that could apply will be based on the behaviour that led to the error and the amount of potential lost revenue for that return.

2.6 Errors that arise despite taking reasonable care attract no penalty. Penalties for errors due to failure to take reasonable care can be reduced to zero with full and unprompted disclosure to HMRC.

2.7 It is understood that **sport**scotland can provide access to a service to do this for you.

Notes:

3. Ensure that people have the right to work in the UK

3.1 A system of civil and criminal penalties exists for organisations who hire illegal workers.

3.2 A person is an illegal worker if he is a person aged 16 or over who requires leave to enter or remain under the Immigration Act 1971, and:

- he has not been granted leave to enter or remain in the UK, or
- his leave to enter or remain is not valid or has ceased to have effect for any reason, or
- his leave to enter or remain is subject to a condition precluding him from taking up employment

3.3 For the purposes of illegal working legislation, employment is considered to be any employment relationship that is under a contract of service or apprenticeship, whether expressed or implied and whether oral or written.

3.4 It is important to note that EEA nationals and their family members who have a right of residence in the UK under EU law do not fall within the definition of those who are required to have leave to enter or remain under the Immigration Act 1971. However, when a new country accedes to the EU, its nationals may be subject to restrictions on accessing the labour market of EU member states for up to seven years.

3.5 Under the regime, employers who unwittingly employ an illegal worker are liable to pay a civil penalty unless they can benefit from the statutory excuse. Under the regime, there is a maximum civil penalty of £20,000 for each illegal worker employed.

3.6 Employers who are found to have employed an illegal worker either knowingly or (with effect from 12 July 2016) when they had reasonable cause to believe that the individual was an illegal worker could, depending on the seriousness of the offence, incur an unlimited fine, and/or be sent to prison for up to five years.

3.7 A correctly conducted right to work check can provide an employer with a statutory excuse against a civil penalty for employing a person illegally, should it be that the employee in question does not have, or loses, the right to work at some point during their employment. To obtain the excuse, the employer must show that it has taken particular steps during the right to work check. Obtaining relevant documentation is not sufficient in itself.

3.8 The checks must be carried out by the individual's employer and cannot be delegated to a third party.

3.9 A right to work check should be performed in the case where an individual is employed under an employment contract.

3.10 Home Office guidance suggests that a check is made in the first day of employment and would be satisfactory if it was made before the start of the working day. In practice, it is not advisable. If an individual forgets to bring the documents with them they will have to be sent home and so lead to a delay in work, upset and a temptation to allow the employee to start enrol the check over to the next following day by which time the check will be invalid.

3.11 As an employer, you should ask the employee to produce any documents from list A and B at the attached link that show they have the right to work. It is inadvisable to insist on a particular document as this may not necessarily be available. A checklist can be found here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/378926/employers_right_to_work_checklist_november_2014.pdf

3.12 You should be provided with original documents. Photocopies or scans will not suffice.

3.13 Thereafter you are required to take a copy of the documents so that they can be securely retained. You should also make and maintain a record of the date the check was made for the check to be valid.

3.14 When a list A document is relied upon then no repeat check is necessary. Therefore it will only be necessary to diarise a repeat check when a list B document is relied upon.

Health Warning

The above information is correct at the time of writing and may be subject to change. There are a number of "unknowns" surrounding the Brexit process.

If you are proposing to recruit an EU, EEA or a Swiss citizen they will require to apply for settled or pre settled status if they wish to continue living in the UK after 30 June 2021.

Notes:

4. Consider if a PVG check is necessary

4.1 Not all organisations need to perform background PVG checks.

4.2 However, it is an offence for an organisation to employ someone to work with children or protected adults if they are barred from doing so.

4.3 An employer would only be able to establish if someone is not barred by ensuring the relevant person is a scheme member.

4.4 The PVG Scheme does not apply to all roles (paid or voluntary). It only applies to 'regulated work'.

4.5 There are two types of regulated work – work with children and work with protected adults.

4.6 Regulated work is usually jobs including:

- caring responsibilities
- teaching or supervising children and/or protected adults
- providing personal services to children and/or protected adults
- having unsupervised contact with children and/or protected adults

4.7 It can also apply to certain positions of trust within organisations, even where the role doesn't involve any direct contact with children or protected adults. Examples of this include:

- membership of certain council committees
- trustees of charities focused on children
- trustees of charities focused on protected adults

4.8 You may therefore wish to consider whether or not you believe a PVG check would be necessary for the current or future positions.

4.9 Should you engage an individual either as an employee, worker or volunteer who is barred under the PVG scheme this could result in imprisonment or fine.

Notes:

5. Agreeing a rate of pay on or above the national minimum wage

5.1 Employers are under an obligation to ensure that their staff (employees and workers) are paid at least national minimum wage. This does not apply to those who are volunteers.

5.2 The national minimum wage legislation also creates:

- a duty on the employer to keep records sufficient to establish that it is paying workers their national minimum wage entitlement
- a right for a worker to access relevant records if he reasonably believes that he is or may be being, or has or may have been, paid less than his national minimum wage entitlement
- a right for the worker to bring a claim in the employment tribunal if the employer fails to produce pay records or fails to allow him to exercise his right of access in accordance with the National Minimum Wage Act 1998

5.3 If an employer fails to pay national minimum wage workers cannot only make a complaint to the Employment Tribunal but also HMRC.

5.4 If a worker has not been paid the national minimum wage:

- the worker can enforce his entitlement by way of his contract by making a claim for breach of contract or a claim for unlawful deduction from wages
- HM Revenue and Customs can enforce the worker's entitlement by issuing a notice of underpayment or suing on the worker's behalf
- the employer may be guilty of a criminal offence, if he has refused or wilfully neglected to pay the worker his entitlement

5.5 An officer of HMRC may issue a notice of underpayment requiring the employer to pay arrears if in his opinion the employer has not paid a worker the minimum wage or has not fully repaid arrears due.

5.6 The notice of underpayment will require the employer to pay a financial penalty to the Secretary of State within 28 days of the service of the notice of underpayment. The financial penalty is reduced by 50% if the employer complies with the notice within 14 days of its service.

5.7 In addition, the government operates a non-statutory scheme under which it publicly 'names and shames' employers who fail to pay the minimum wage. The intention is that employers are deterred from failing to pay the minimum wage by the thought that if they do so they may have their name, and details of the breach, published in a press release which is posted on the government website and widely reported.

5.8 There has been some judicial consideration of limitations on how long a claim for failure to be paid NMW can be backdated. Judicial comment would seem to suggest that there is potentially no limit on how far a claim can go.

Notes:

6. Offering Terms of employment or engagement

6.1 If an organisation chooses to employee an individual they are under an obligation to provide a contract of employment to that individual within eight weeks of their start date. It is therefore important that you consider just how the person will be engaged by you and what the specific terms are.

6.2 The contract of employment is a document which sets out the rights and obligations of both parties. As a result, the contents and the construction of the contract are of primary importance in determining the extent of the obligations and in deciding when one party is acting outside the scope of the employment contract and is, therefore, in breach.

6.3 All employees have a statutory right to be given a written statement containing the key details of their employment terms and conditions. These are normally included in a contract of employment.

6.4 Key terms in most employment contracts include:

- how the contract can be terminated, how much notice has to be given, and whether the employer can pay in lieu of notice
- the scope of the employee's duties, and whether the employer has any flexibility to change them in special circumstances
- how much the employee will be paid, how often, how he will be paid, and when the rate may be increased
- the place where the employee will work, and whether the employer has any right to change this
- who will own any intellectual property created by the employee during their work. If no agreement is made, the employer will generally own all IP created in the course of employment; any other arrangement needs to be agreed at the beginning of the employment
- how expenses will be reimbursed
- whether the employer will have the right to make a payment in lieu of the employee's entitlement to a period of notice (known as a PILON clause)
- whether the employer will be able to require the employee to remain away from work and/or undertake alternative duties during the notice period

6.5 Consideration can also be given to including specific terms on how confidential information is to be treated as a means of protecting the organisation. In certain circumstances it may be appropriate to insert restrictions on the employee's ability to compete with the employer following termination of employment.

6.6 Where an employer fails to provide a contract of employment the employee could be entitled to an award of between two and four weeks' pay.

Notes:

7. Pension auto-enrolment requirements

7.1 The Pensions Act 2008 introduced a new statutory duty on employers to enrol their workers automatically into a pension scheme meeting minimum standards ('a qualifying scheme') and to pay a minimum level of contributions. The next increase will happen on 6 April 2019 to a total of 8% of qualifying earnings of which 3% must be paid by the employer.

7.2 Workers can opt out of the auto-enrolment regime if they wish but employers are prohibited from seeking to induce (or taking any action to cause) workers to do so.

7.3 Employers may be able to postpone the date on which the auto-enrolment duty applies to an eligible jobholder for three months.

7.4 The auto-enrolment legislation applies to 'workers', including 'agency workers'. However, only workers that meet certain criteria relating to their age and qualifying earnings must be enrolled automatically into a qualifying scheme. Such workers are called 'eligible jobholders'.

7.5 Certain workers who do not meet the age or 'qualifying earnings' criteria do not need to be enrolled automatically but have the right to opt in to a qualifying scheme. If they do elect to join, and the relevant scheme is a defined contribution scheme, the employer must pay a minimum level of contributions to the scheme on their behalf. These workers are referred to as 'non-eligible jobholders'.

7.6 A third category of workers are referred to as 'entitled workers' and have a right to join a pension scheme sponsored by their employer. However, the scheme does not have to be a qualifying scheme under the auto-enrolment legislation, and employers are not required to pay contributions on their behalf.

7.7 As soon as employment begins you should be ready to comply with your legal duties. If you fail in your duties you could be fined.

7.8 There are many pension providers in the marketplace however the government has provided for a default scheme known as NEST.

7.9 The link to setting up with NEST can be found here: https://www.nestpensions.org.uk/schemeweb/nest/employers/set-up-your-workplace-scheme.html

7.10 It is important to note that even if an employee opts out of auto enrolment they will be automatically re-enrolled after three years. You should therefore keep this under review.

Notes:

8. Employer's Liability Insurance

8.1 If your organisation employees an employee, the organisation must get Employers' Liability (EL) insurance as soon as it becomes an employer - cover must be at least £5 million and come from an authorised insurer.

8.2 If an organisation does not have Employer's Liability insurance in place it runs the risk of being fined up to £2,500 for each day it is not properly insured.

8.3 In addition, the organisation could be fined £1,000 if it does not display its Employer Liability Certificate or refuse to make it available to inspectors when they ask.

Notes:

9. Conduct an analysis of working time and consider how to monitor

9.1 If your organisation becomes an employer it will be subject to the terms of the Working Time Regulations 1998.

9.2 Workers and employers are free to agree any hours of work they choose up to the maximum working hours set out in the Working Time Regulations 1998.

9.3 Where there is any chance that a worker may have to work hours or shift patterns that are close to the WTR 1998 maximums, contractual terms relating to hours should be drafted with the main provisions of the WTR 1998 in mind.

9.4 The areas of the WTR 1998 which impact on working hours are:

- **the 48-hour maximum working week**

  Unless a worker opts out of their rights, he has the right to work no more than an average 48-hour working week.

  To work out the average working week:

  - work out the average number of weekly hours over a 17-week period
  - if the worker has not yet worked for 17 weeks, the average is calculated over the actual number of weeks that he has worked
  - do not include periods of basic annual leave or sickness in the calculation. Additional annual leave is included in the calculation
  - use a 26-week reference period where there is a 'special case' exemption
  - extend the reference period up to a maximum of 52 weeks where there is a collective agreement

- opting out of the 48-hour maximum working week

9.5 It is possible for employers and workers to agree that the worker will work more than 48 hours a week. In order to be valid, an agreement must:

  - be in writing
  - be made with each individual worker that it applies to separately
  - state that it is disapplying the 48 hour maximum working week rather than simply specifying a number of hours of work

- **daily rest periods**

A 'rest period' means a period which is not working time, other than a rest break or leave to which the worker is entitled under the WTR 1998. Rest periods are therefore simply periods free from working obligations between successive periods of working time. Contrast a rest 'break' (see below) which is a period within a period of working time during which the worker is freed from the obligations of work.

A worker is entitled to at least eleven hours of rest in any twenty-four hour period. The eleven hours do not have to be in the same day; so if the worker leaves work at 11 pm on Monday, he can start work at 10 am on the Tuesday, as he will have had eleven consecutive hours off.

Where there is a 'special case' exemption, the worker may be required to work without a daily rest period but must be given an equivalent period of compensatory rest to make up for the time lost or, where, in exceptional cases, it is not possible (for objective reasons) to grant compensatory rest, he must be given appropriate protection to safeguard his health and safety.

- **weekly rest periods**

  Under regulation 11 of the WTR 1998, a worker is entitled to at least one 24-hour period of uninterrupted time off work every week. The twenty-four hours must be consecutive but can run across two days.

- **rest breaks**

  If a worker works for more than six hours a day, he is entitled to leave his workstation (if he wishes) to take a rest break (for a minimum of 20 minutes). Workers are entitled to only one rest break, no matter how long beyond six hours they work.

  A rest 'break' is therefore a period within a period of working time during which the worker is freed from the obligations of work. Contrast a rest period (see above) which is simply a period free from working obligations between successive periods of working time.

  A rest break must be a period which:

  - the worker knows in advance will be uninterrupted
  - is uninterrupted, and
  - the worker can use as he pleases

- **special case exemptions and working through breaks**

  Where there is a 'special case' exemption, the worker may be required to work without a rest break (or daily or weekly rest period) but must be given an equivalent period of compensatory rest to make up for the time lost or, where, in exceptional cases, it is not possible (for objective reasons) to grant compensatory rest, he must be given appropriate protection to safeguard his health and safety.

9.6 Under the Working Time Regulations employers must keep adequate records to show that certain specific limits are being complied with. These are:

- The weekly working time limit – although records such as payroll records can be used for this purpose;
- The length of nightwork, including nightwork involving 'special hazards or heavy physical or mental strain' (where a strict eight-hour time limit is in place for each 24-hour period);
- The requirement to provide health assessments for nightworkers, including, for each individual:

  - their name;
  - when they were assessed; and
  - the result of the assessment; and

9.7 The names of all workers (kept up to date) who have agreed to work more than 48 hours a week (the '48 hour opt-out').

9.8 These records must be kept for two years.

9.9 With regards to monitoring the number of hours worked you may consider a simple step such as requesting time sheets from staff detailing what they have been working on and also the hours worked.

9.10 Should your organisation fail to keep and maintain appropriate records it may be subject to a fine.

Notes:

10. Setting up appropriate policies and procedures

10.1 As an employer your organisation will need to consider what is appropriate and proportionate for the size and needs.

10.2 Handbooks are not mandatory, and their format (eg presented on an intranet or in a written document) and precise content will differ depending on the organisation. They are, however, useful ways of providing information in respect of an organisation's:

- formal procedures, such as those on sickness absence, and disciplinary and grievance issues
- other policies, such as an equality or equal opportunities policy
- rules and procedures for the smooth and efficient running of the business, such as a company dress code
- aims and culture

10.3 Policies are often put into a handbook, to avoid making them contractual. However not all policies in handbooks are non-contractual. Whether or not a policy has contractual force depends on factors including how it is referred to in the contract of employment, and the status of other policies within the handbook. If an employer wishes a particular policy to be contractual or non-contractual, it is advisable to state this expressly in the policy.

10.4 Policies are similar to guidelines: they are statements of usual practice, and of good practice, but they are not statements of universal practice. It is inherent in the nature of a policy that there may be circumstances where it would be inappropriate for it to be followed. It is accepted that employers will need to make rules to regulate the minutiae of daily working life without these rules becoming set in contractual stone. Such policies can also help protect an organisation's interests with regards to confidentiality and sensitive information.

10.5 Common polices to have in place are:

- Discipline
- Grievance
- Sickness
- Equality
- Harassment and bullying
- Health and safety
- GDPR information security
- Internet and communications
- Capability
- Whistleblowing

10.6 Failure to put appropriate policies in place may put the organisation at risk of individuals not following the standards expected of them.

10.7 In addition failure by an employer to follow its own policies and procedures may open up that employer to legal risk in that if an employer commits to a course of action or to behave in a particular way then it should do so.

10.8 We understand that policies and procedures may be available through **sport**scotland's expert resource.

Notes:

11. Meeting your health and safety requirements

11.1 In general, health and safety laws apply to all organisations.

11.2 When your organisation becomes an employer. It will be responsible for health and safety in your business. Health and safety laws are there to protect the organisation, its employees and the public from workplace dangers.

11.3 The approach taken should be proportionate to the size of your organisation and the nature of your activities. For most small, low-risk organisations the steps needed are straightforward. If an organisation has fewer than five employees it does not have to write down its risk assessments or health and safety policy.

11.4 As part of managing health and safety the organisation, must control the risks in its workplace.

11.5 To do this the organisation needs to consider what might cause harm to people and decide whether it is taking reasonable steps to prevent that harm – perform a risk assessment. A risk assessment is not about creating huge amounts of paperwork, but rather about identifying sensible measures to control the risks.

11.6 Your organisation should record significant findings, but there is no need to record everyday risks.

11.7 The law does not expect your organisation to remove all risks, but to protect people by putting in place measures to control those risks, so far as reasonably practicable. Your organisation's risk assessment need only include what it could reasonably be expected to know – you are not expected to anticipate unforeseeable risks.

11.8 For most low-risk businesses controlling risks is straightforward. HSE has created tools to help you.

11.9 Online risk assessment tools can be found at: www.hse.gov.uk/risk/assessment.htm.

11.10 Example risk assessments can be found at: http://www.hse.gov.uk/risk/casestudies/

11.11 Should you fail to take adequate steps to control the risks in your workplace then the HSE may consider whether or not enforcement action is appropriate.

11.12 Similarly, having appropriate risk assessments in place can assist in defending a claim for personal injury.

Other considerations – vicarious liability

11.13 As an employer your organisation will be liable for the actions of its employees. This is known as "vicarious liability".

11.14 To an employer, the doctrine of vicarious liability creates potential liabilities even without fault. The risk of those liabilities can be reduced by ensuring, as far as possible, that employees are carefully chosen, properly trained and subject to appropriate controls, so that the likelihood of wrongdoing is minimised. The coverage of any policy of insurance to acts of employees is of course of central importance.

11.15 Victims of negligence or deliberate wrongs can turn to the doctrine to provide them with a full remedy. The individual wrongdoer will often be impecunious and uninsured. However, if they were acting on behalf of an enterprise, then that enterprise can be required to take corporate responsibility for the loss caused.

11.16 One of the significant features of vicarious liability is that, by making the employer liable, redress can be obtained from a party which is more likely to be insured or otherwise in a position to pay. Nothing however prevents a claimant from also proceeding against the guilty employee as an individual. Particularly in the case of a wrong, redress against the individual may appear just. There may also be some cases where it is the employee is the most solvent of possible defendants.

11.17 Claims for discrimination under the Equality Act (EqA 2010) can, by virtue of EqA 2010, ss 109 and 110, be brought against both the employer and the guilty individual employee in the same proceedings. This is a right which is frequently invoked and entitles the claimant to declarations and damages against both the individual and the employer. Unless the employer is relying on the EqA 2010 defence to vicarious liability (which is relatively rare), the benefit of bringing proceedings against the individual as well as the employer is not always clear although it is commonly believed that this move, which personalises the proceedings, might put additional pressure on the other side to settle.

11.18 In some cases, the employer or the employer's insurer will provide coverage for the employee's legal expenses and/or any award of damages made against them. There may however be instances where the guilty employee and the vicariously liable employer have incompatible defences. Care must be taken in these circumstances to avoid conflicts of interest and separate legal representation is sometimes appropriate.

11.19 There are also situations where the vicariously liable employer may wish to add the guilty employee to the proceedings and may wish to be indemnified against any award of damages. Although there is nothing preventing an employer from doing this in cases of negligence, it is a legal move usually reserved for deliberate delicts. Obviously, an organisation's reputation would be at risk if it sued its employees who had merely been careless.

Other considerations – deciding appropriate employment status

11.20 In employment law there are different "statuses" which determine an individual's rights.

11.21 When an employer recruits someone it is important for them to determine at an early stage what status they consider that person should have, whether it is as an employee, an employee shareholder, a worker, an agency worker, an intern, a volunteer or as a genuinely self-employed person. It is important because the rights which attach to each of them are different.

Employee status

11.22 Employees are the most protected under employment legislation. The distinction between who is and who is not an employee is therefore important. For an individual to be an employee:

- he must generally offer his own work in return for pay
- he must be subject to a sufficient degree of control by the other party
- there must be mutuality of obligation
- the other provisions of the contract must be consistent with a contract of employment

11.23 Various other criteria go towards determining status, but there is no single test. Any determination by HM Revenue and Customs as to whether or not, for tax purposes, an individual is an employee will be persuasive but not determinative of the issue.

11.24 Employees are entitled to a wide range of employment rights, including all those to which a worker is entitled.

11.25 Examples of employee rights include:

- written statement of employment
- itemised pay slip
- the National Minimum Wage
- holiday pay, maternity and paternity pay etc
- the right to request flexible working hours
- the right not to be discriminated against
- protection from unfair dismissal in certain circumstances.

Worker status

11.26 Under the ERA 1996, a 'worker' is defined as 'as an individual who has entered into or works (or worked) under:

- a contract of employment, or
- any other contract... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual

11.27 This definition of 'worker' can be found in similar forms in the Working Time Regulations 1998, the National Minimum Wage Act 1998 and the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

11.28 All employees are therefore workers but not all workers are employees.

11.29 The wider category of workers has protected rights in relation to:

- unlawful deductions from wages
- whistleblowing
- the right to be accompanied
- the national minimum wage
- paid holiday
- part-time working
- certain rights relating to trade union membership
- pension auto-enrolment

Genuinely self-employed independent contractors

11.30 If an individual has a contract whereby they undertake to do or perform personally any work or services for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual then that individual will not be an employee or a worker of the other party but will be a genuinely self-employed independent contractor.

11.31 If the parties treat the individual as a self-employed contractor but the contract and the working arrangements do not bear this out then, when the employer ends the contract, it risks the individual bringing employment rights claims, such as unfair dismissal and for holiday pay. In addition HM Revenue & Customs may make a claim against the employer for unpaid PAYE and National Insurance contributions.

11.32 An individual's employment status will ultimately be determined by a tribunal or by HMRC according to the overall picture of the relationship.

Other considerations – handling personal information

11.33 Employers must keep their employees' personal data safe, secure and up to date.

11.34 An employee has a right to be told:

- what records are kept and how they're used
- the confidentiality of the records
- how these records can help with their training and development at work

11.35 If an employee asks to find out what data is kept on them, the employer will have 30 days to provide a copy of the information.

11.36 As an employer you are required to ensure that your data is kept securely so that you comply with your obligations under the GDPR. Where an employer fails in their obligations under the GDPR they may face substantial fines (up to 20m, or 4 per cent of annual worldwide turnover).

11.37 To process your employees' personal data, you must comply with the six 'data protection principles'.

11.38 Personal data must be:

- processed lawfully, fairly and in a transparent manner;
- collected only for specified, explicit and legitimate purposes;
- adequate, relevant and limited to what is necessary for the purpose for which it is collected;
- accurate and kept up to date;
- kept for no longer than is necessary; and
- kept securely.

11.39 There is a further overarching 'accountability principle' that requires you to demonstrate your compliance with the six data protection principles.

11.40 For personal data to be processed lawfully, an organisation must establish at least one lawful basis for the processing.

Those that are relevant in an employment context include:

- Consent: the employee has given clear consent for you to process their personal data for a specific purpose.
- Contract: the processing is necessary for you to comply with your contractual obligations to the employee.
- Legal obligation: the processing is necessary for you to comply with your legal obligations.
- Legitimate interest: the processing is necessary for the legitimate interests of you or a third party and is balanced against any impact on the employee's interests.

11.41 Information about an employee's health will be 'special category data'. This is personal data that the GDPR says is more sensitive, and so needs additional protection. As well as the above lawful bases for processing, special category data can only be processed where at least one further condition for processing special category data is fulfilled.

11.42 Those potentially relevant in the context of handling information about an employee's health when managing sickness absence include where the employee has given explicit consent. However, a problem for employers in relying on consent as a lawful basis for processing personal data under the GDPR is that consent must be 'freely given' and as easy for the data subject to withdraw as it is to give.

11.43 Alternative conditions under which special category data can be processed include where the processing is necessary for:

- the purposes of performing or exercising obligations or rights of the employer or employee under employment law, such as not to discriminate against an employee or dismiss them unfairly;
- establishing, exercising or defending legal claims; or
- the assessment of an employee's working capacity, subject to confidentiality safeguards.

11.44 An organisation must inform its employees of the nature of any processing it carries out – including the lawful bases relied upon for any processing – in a concise, transparent, intelligible and easily accessible form, using clear and plain language. This should be done by way of a privacy notice available to all employees.

11.45 Where an organisation intends to rely on the 'necessary for employment obligations or rights' or 'assessment of an employee's working capacity' conditions for processing special category data, it must have an appropriate policy document in place explaining its procedures for complying with the data protection principles, and its policies for retention and erasure of the special category data. The organisation must also maintain a record of its processing activities.

Your organisation should therefore think about ways to keep its data secure and consider who has access.

For example there will be a risk to the organisation of having important business information being lost if personal email addresses are used.

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JMc/ES_200319