Spring clean your employment contracts: Pensions and PILONs may need attention

Summary and implications
Spring is in the air and it is an excellent time to refresh your employment contracts.

Even contracts which are kept under regular review may have become a little outdated as a result of all the new developments in employment law over the last 12 months. It is also a good time to plan for forthcoming changes, particularly where you will have new statutory duties to take into account.

Which provisions in your contracts might need a spring clean? Key issues to consider include the following:

• Legal updates/compliance: Are your contracts up-to-date and legally compliant? In particular, you may need to make changes to your contractual pension provisions as a result of auto-enrolment. Check to ensure your contracts contain all the information required under s.1 of the Employment Rights Act 1996.

• Interplay with company policies and practices: Do your contracts operate in harmony with your company’s policies and practices? In particular, you may need to make changes to your pay in lieu of notice provisions (and/or internal practices) as a result of the Geys case.

• Flexibility for the future: Do your contracts provide your company with the rights and the flexibility you need to allow for future changes, such as the Government’s flexible working proposals, the expansion of the law on whistleblowing, and various changes to pensions and benefits?

Want to know more? Read on…

As the law changes, so should your contracts: regular reviews will ensure legal compliance

Auto-enrolment: pension benefits
In the flurry of preparing to meet their auto-enrolment staging dates, some large employers are leaving contractual amendments to the last minute. Yet new hire contracts will, typically, need to be amended to reflect the new auto-enrolment regime.

Standard employment contracts often make a generic statement about eligibility to join a pension scheme. For example: “The Company operates
a stakeholder scheme, which you are eligible to join. Full details are available from the HR department”.

Post auto-enrolment, a generic statement such as the above example will no longer be sufficient. Eligible jobholders will, of course, have to be automatically enrolled into a pension scheme, although they will have the opportunity to opt out. Employment contracts should reflect the new statutory requirements.

Employers may require more extensive contractual changes in certain circumstances. For example, if you intend to operate auto-enrolment in conjunction with a salary sacrifice scheme, you will require very specific wording in the contracts of new hires to enable you to do this. You may also need consent to vary your existing employees’ contracts. You should seek specific legal advice if you are intending to operate auto-enrolment in conjunction with a salary sacrifice scheme.

**Outdated references**

Do your contracts contain any out-of-date references? Is there still a lurking reference to the Sex Discrimination Act 1975, statutory disciplinary procedures, or an outdated bonus scheme? Sweep away all the dusty references to repealed acts, old policies or past practices! References to out-of-date policies and legislation can cause confusion and might even lead to claims for breach of contract.

**Written statement of particulars**

Are your contracts legally compliant? Employers are required to provide their employees with a “written statement of particulars” under section 1 of the Employment Rights Act 1996 (ERA). This Act specifies the information which must be provided to the employee within two months after starting employment. It includes, for example, information about remuneration, hours of work, holiday, notice, pension benefits and disciplinary procedures. Contact us to review your contracts for compliance if you don’t know whether they meet the requirements of the ERA.

Your contracts of employment ought to operate in harmony with your policies and practices

**Contractual powers to suspend or impose other sanctions**

Do your policies set out practices which you do not have the contractual right or powers to enforce? Disciplinary policies commonly permit an employer to suspend an employee prior to a disciplinary investigation; and may allow an employer to impose an alternative sanction to dismissal (such as demotion or reduction in pay). These practices need to be backed up by a contractual right of enforcement, to minimise the risk of a possible claim for constructive dismissal.

**Pay in lieu of notice (PILON)**

Following the recent case of Société Générale, London Branch v Geys [2012], you should consider whether your contractual PILON provisions suit your business needs.

In this case, the Supreme Court held that an unlawful summary termination of the employment contract will not bring it to an end unless and until the employee “accepts” the termination or the employer
otherwise terminates the contract validly. Further, if an employer terminates the contract under a PILON clause, it must make this expressly clear to its employee. We reported on this case in more detail in our January Employment briefing (click here to go to the briefing).

If you do have PILON provisions in your contracts, you should check that they do not fall foul of the decision in the Geys case. In particular, you should ensure that your employees are given proper notice of termination and the PILON payment.

If you do not have PILONs in your contracts, you should consider including them. Otherwise, you may not be able to terminate your employee’s employment with a PILON, unless he/she “accepts” your breach of contract in doing so. You could end up being stuck with your employee for the full period of his/her notice.

Ensure your contracts provide you with flexibility for the future

How confident are you that your contracts give you the rights and flexibility you need to make changes, e.g. to reflect legal or business changes?

For example, do your contracts anticipate the future changes to the minimum employee pension contributions which are planned as part of the auto-enrolment regime? You may wish to think about including a provision to the effect that employee pension contributions will be increased in line with any statutory changes and deducted from the employee’s wages. See the table to the right for a summary of the minimum future contributions which employees will have to contribute once they have been auto-enrolled into a pension scheme.

Have you considered whether your contracts will be affected by the Government’s plans to make changes to pensions and benefits (which include scrapping the State Second Pension and childcare vouchers)?

Or you may wish to update your contracts to take into account the proposal that all members of staff should have the right to request flexible working arrangements (currently proposed for 2014). It never hurts to be prepared!

There are nearer changes at hand, too. For example, the Government’s changes to the whistleblowing legislation are due to come into effect very shortly. Individual employees will be liable, and employers vicariously liable, for harassment and/or victimisation on the grounds that someone has made a protected disclosure.

Whilst you can’t provide for every change to employment and benefits which the Government may or may not make, you can at least ensure that you have sufficient flexibility in your contracts to put you in the best position to manage change when it comes along.

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<thead>
<tr>
<th>Timing</th>
<th>Minimum employee percentage</th>
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<tbody>
<tr>
<td>October 2012 to September 2017</td>
<td>1%</td>
</tr>
<tr>
<td>October 2017 to September 2018</td>
<td>3%</td>
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<tr>
<td>October 2018 onwards</td>
<td>5%</td>
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