



Employment Law update February 2017

When employment ends.....

A common issue can occur when an employee resigns giving notice, but the employer prefers them not to continue to work on the premises because they do not want the employee to be able to access company data. This is particularly relevant for senior roles or roles in sales.

Employment contracts normally contain a clause relating to payment in lieu of notice but may not specify that garden leave can be imposed on an employee. We discuss the options below:

Payment in lieu of notice (PILON)

PILON is money paid to an employee by the employer on termination of employment as an alternative to him or her serving out the full notice period. It means that the employee can be removed quickly from any further contact with customers and staff. PILON is very common practice after a redundancy or a dispute at work.

If the employer wishes to exercise a contractual PILON they must take account of the following:

- Notify the employee in writing in clear and unambiguous language that payment has been made and that it is a contractual right to terminate the employment with immediate effect in accordance with the PILON.
- If there is no PILON clause in the employee's contract, the employer will need to explain the situation and obtain the employee's agreement to receive payment instead of working notice.

Garden leave

"Garden leave" describes the practice where an employee leaving a job — having resigned or otherwise had his or her employment terminated — is instructed to stay away from work during the notice period, while still remaining on the payroll.

If there is a garden leave clause in the employee's contract of employment there is a right after notice of termination to require the employee to remain at home, but on full salary. He or she remains an employee but is forbidden to contact fellow employees and customers. The employee must not take other employment during the period of garden leave and may be asked to return items such as company laptop and phone during the period of garden leave.

The position is much more complicated, however, if there is no contractual provision to place the employee on garden leave. Without this contractual clause the employer risks being in breach of contract — even if the employee is on full pay and benefits. Indeed, the courts have shown some hostility to the use of garden leave and have even implied a right to work into some contracts of employment.

In the light of this, unless there is clause in the contract entitling garden leave, the safest course of action to secure an employee's immediate exit company by making a PILON.



If you feel that you wish to add a Garden Leave clause into some senior contracts or would like to discuss this in more detail, please contact us on 0800 9995 121

Absence Statistics in the UK

The 2016 Chartered Institute of Personnel and Development absence management survey has been published. It reports on absence management trends, policy and practices in the UK.

The key statistics are:-

- Overall absence levels have fallen slightly from an average of 6.9 days of absence per employee in 2015 to 6.3 days this year;
- On average public sector employees have 3 days more absence per year than those working in the private sector;
- The overall median cost of workplace absence was £522 per employee per year, although the median in the public sector was £835 per employee;
- Stress remains a significant cause of absence. Mental ill health was also a significant cause of long term absence.

If absenteeism is a problem for your organisation then it is important to consider issues such as:-

- Management reporting
- Being clear who is responsible for absence management and ensuring that line managers are
- given appropriate training in absence management
- Being proactive in dealing with any issues without delay
- Return to work interviews
- Being aware of any underlying disability issues

QUESTION AND ANSWER CORNER

Q: An employee has failed to return to work after annual leave. This is not the first unexplained absence. How should I be dealing with this situation?

A: This may be an unauthorised absence. In such circumstances the following procedure is suggested:



- attempt to contact the employee (telephone and/or recorded delivery by post) about the unauthorised absence
- if and when the employee returns to work, investigate the matter and explain that any unauthorised absences will be unpaid
- if the employee fails to provide an adequate explanation for the absence, initiate your disciplinary procedure
- if the employee has still not made any contact, inform him or her that the disciplinary hearing will be held in his or her absence and that dismissal for gross misconduct is an option.

A dismissal for gross misconduct in these circumstances is likely to be fair if you have followed a correct procedure. Make sure that you keep records of all developments and communications.

Q: *We received a resignation from one of our employees who is on maternity leave. She will leave when her paid period ends. Is she still entitled to notice pay?*

Yes, under the Employment Rights Act 1996 s88, if an employee is “absent from work wholly or partly because of pregnancy or childbirth or on adoption leave” the employee is entitled to be paid at the normal rate of pay for the length of statutory notice period.

Q: *I have an employee who is having elective surgery to remove a tattoo – this means he will be off work for two weeks. Do I have to pay him statutory sick pay (SSP)?*

Yes, the normal rules apply. As long as his absence (after the first week in which he can self-certify is sickness) is covered by a fit note provided by his GP, his entitlement to SSP is unaffected.

If you have a particular question that you would like answered email training@scottishwholesale.co.uk or call 0800 9995 121 and we will publish next month – all names will be removed to ensure confidentiality.