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3HR Legal Weekly

Employment

How do I vary my employees' contractual terms of employment?

Q: We want to change our contracts so that we can reduce the number of Company sick pay days if an employee is off work due to sickness. Do we just write to those who currently receive this benefit advising them of the change?

A: A contract of employment is a legal agreement between the employer and the employee. It contains terms whether express or implied which cannot lawfully be changed or varied without the agreement of both parties. An employer will therefore need the employees' consent either individually or through a collective agreement before making any changes to their contract of employment. In some cases changes to existing terms can take place where the contract of employment includes a clear and express variation clause giving the employer flexibility to make changes to the contract of employment.

There are a number of reasons as to why it may be deemed necessary to amend the contract of employment and some changes may be more fundamental than others. It is not uncommon for an employer to seek to make changes to pay (including company sick pay) or alter working conditions. Whichever may be the case, an employer thinking about making changes to the contract of employment should carry out an early consultation before deciding to proceed.

An effective consultation process is one where the employer meets with the affected employee(s) or their representatives to explain why it is interested in making the change. Employees are far more likely to accept the change if they can understand the reasons for it and have an opportunity to express their views. Employees should be given reasonable time to consider the proposal following the consultation meeting.

During the consultation process, it may be worth offering incentives, particularly if there has been a removal of a benefit or where the employee would generally be left in a worse off position should the change go ahead. Such incentives do not necessarily need to be financial, for example extra paid or unpaid leave could be offered. Alternatively, the Employer might wish to introduce a new or enhanced employee benefits package. A proposed pay increase might also be an effective approach in getting employees' agreement to reduced sick pay days. In the event of any dispute, the employment tribunal is more likely to take the view that the Employer acted fairly if they offered something financial in return for the change.

Where changes have been agreed by the employee, the employer must give written notification of the change within four weeks of the change taking effect.

A one-sided variation of contractual terms will be a breach of the contract of employment and the fact that the employer may have given notice that the change will take effect will not make it lawful. The employee may well make claims at the employment tribunal for unlawful deduction of wages if the change affects their pay. It may also be constructive dismissal if the breach is fundamental, in that it goes to the heart of the contract. In addition, there is a risk that the employee concerned may claim damages for breach of contract at a civil court. However, where the employee accepts the change without protesting, there is a good chance that they will be viewed as having implicitly accepted the change and may well lose their right to object. Notwithstanding, it is not unusual for the affected employee to work under the revised terms and make it clear to their employer that they do not agree with the change(s) and even in such cases there could be a risk of legal action against the company.

As a last resort, and only after thorough consideration and consultation, an employer who is unable to reach an agreement with the employee(s) has the option to serve notice to terminate the existing contract and re-engage the employee under a new contract of employment. Employers should be mindful of the risks in doing so and should ensure that they follow a fair dismissal process.

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