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Secondment agreements

This article will be useful reading for all employers who are considering, or who already have in place, secondments agreements. It is also useful for employees who are on, or who are about to go on secondment. It outlines the employment relationship between the primary employer and the secondment employer, as well as other important employment issues.

The article is comprehensive. We have provided a list of linked contents so you can jump down the page if you wish.

Introduction

A secondment takes place when an employee (or group of employees) is temporarily assigned to work for another organisation or a different part of their employer.

Here are some possible reasons for the secondment:

- career development
- chance to gain new skills or experience
- enabling the employee to remain with the original employer and so preserve specific benefits, for example a pension or share option scheme
- income generation for the employer
- providing staff for short-term projects
- providing cover for short-term absences
- avoiding redundancies
- charitable (where the secondment is to a voluntary organisation)

There are a number of different terms that are used for the three parties involved in a secondment arrangement. In this article it is assumed that the secondment is to another organisation, the original (or seconding) employer is referred to as the "employer" or "seconder", the employee may also be called the "secondee" and the organisation which is to have the services of the secondee is referred to as the "host".

Internal secondments

Secondments can occur within an employer or group of employers. In these cases, the agreement may be relatively informal.

If the secondment is to another part of the same employer then there may be fewer legal issues. However, small changes to the secondee's terms of employment may be necessary. These might include their duties, place of work or manager for the period of the secondment.

If the secondment is to a separate legal entity, for example another member of the employer's group, then the employer and host may want a formal arrangement.

Recruitment of the secondee

In most cases the arrangement involves the secondment of a particular individual. However, if either the seconder or host are going to select which employee is going to provide the services, the process should be carried out in the same way as a normal recruitment.

This will involve an (internal) advertisement, an application process and then some form of selection.

Who is the employer?

The idea behind a secondment arrangement is that the secondee will remain employed by the original employer during the secondment, and will, following the termination of the secondment, "return" to the seconder.

However there is a risk that the secondee may (technically) become the host's employee, despite the parties' intentions. This depends on the facts of the particular case.

The question of who is the employer is important, particularly for the host. This is because the law imposes a number of liabilities on an employer and a number of rights on the employee.

In order to avoid the risk of the secondee becoming the host's employee the parties should ensure that:

- the secondee does not owe any duties directly to the host, but only to the seconder
- the host does not owe any duties to the secondee, but only to the seconder
- the seconder retains day to day control of the secondee
- the seconder carries out any appraisals and disciplinary or grievance procedures
- the secondee does not become integrated into the host's organisation (for example it should be clear on any staff list that they are a secondee). This could cause particular difficulties as the secondee may hold management or supervisory roles and attend team briefings or social events).

Even if the secondee does not become an employee of the host, they may be held to be the host's "worker (<http://www.practicallaw.com/6-200-3640>)". This concept appears in various pieces of legislation and is defined as an individual who works under a contract (of employment or otherwise) under which they undertake to personally perform work for another who is not a client or customer of a profession or business undertaking carried on by the individual. If the secondee could be found to be the host's worker, there are a number of statutory employment rights that they would be have against the host.

Continuity of employment

If the secondee remains employed by the seconder, their statutory period of continuous employment (www.practicallaw.com/4-200-3108) will be unbroken. This will be important for the secondee as any there are a number of employment rights that require a qualifying period of service (for example unfair dismissal). The secondee may therefore want reassurance that their continuity will be unbroken and possibly a contractual promise that they will be treated as if their statutory continuity was unbroken if there is a break in continuity.

The terms of the secondment

Prior to putting in place a secondment arrangement, it is necessary to review the existing terms of the secondee's contract of employment, in particular to establish:

- whether the contract entitles the employer to second the employee to work for another employer
- the job description

- the place of work and any mobility clause
- any restrictive covenants and confidentiality clauses
- any intellectual property clauses

How to start the agreement

There are numerous ways of starting the arrangement. The options include:

- a simple letter of secondment between the employer and secondee. This is most likely where the secondment is within the employer or its group, and may include details of agreed changes to the employee's contract. If so, the employee will need to consent to the changes
- an agreement between the original employer and the host, possibly with a separate letter to the employee, as described above
- a tripartite agreement between all three parties.

Duties

The secondee can only be required to carry out any work that falls within the duties specified in the contract of employment. If the contract is well drafted then the duties clause should be sufficiently wide to cover any work that the host will want the secondee to do. If not, the seconder will want to vary the secondee's contract to cover the appropriate duties.

The host should ensure that the secondee can be compelled to carry out any work that it is likely to require during the secondment, and should therefore try to identify any probable changes in the work required over the period.

Who pays the employee?

Usually the seconder will continue to pay the secondee's wages and all connected costs (in particular income tax and national insurance contributions). If the secondment is a commercial arrangement then the host will usually reimburse these costs. However, it should be clear:

- who will be paying any additional costs, for example overtime, bonuses, expenses (especially relocation expenses), training costs and membership fees.
- what occurs if the secondee is absent for a substantial period (for example, maternity leave, long-term absence or persistent short-term absences).

The host will normally pay a secondment fee to the seconder at regular intervals during the secondment period. This fee may just be an amount which covers the seconder's costs or, more probably, include a profit element. Either way, the secondment fee will attract VAT if the seconder is registered for VAT. The secondment agreement should provide for changes in the fee during the secondment period, in particular to reflect any increases in the secondee's salary.

Liability

When establishing who bears any liabilities relating to the secondee it is essential to identify their status, that is whether they are an employee, worker or (less probably) independent contractor of the seconder and/or the host . This will affect which statutory employment rights will apply, how any payment is taxed, what health and safety obligations apply and to what extent there will be a duty of care in relation to the secondee.

Whatever the legal position, the seconder and host may agree contractually who will bear any costs relating to liabilities to the secondee (for example, for their health and safety) and for acts of the secondee during the secondment, and include appropriate indemnities in the agreement.

An employer is vicariously liable (www.practicallaw.com/9-200-3629) for the tortious acts of its employees, even while they are seconded to another organisation. However, the host may also be found to be vicariously liable for the secondee's actions despite the fact that they remain employed by their original employer, depending on the circumstances - for example, who had control of the secondee at the time.

Employee's rights

The secondee will be able to bring the usual employment claims against the seconder. If they are also found to have become the employee of the host during the secondment period, they may bring associated claims on termination of the secondment (even if they return to work for the seconder). However, they will need an appropriate period of continuous employment with the host.

Data protection

Both the seconder and the host will hold personal data (and possibly also sensitive personal data) relating to the secondee and so will be subject to obligations under the Data Protection Act 1998 (DPA).

The seconder will have to disclose personal data relating to the secondee to the host as part of the secondment, and this disclosure is unlikely to require specific consent from the secondee, as it will be in the "legitimate interests" of the employer (Paragraph 6, Schedule 2, DPA). However, if the seconder wishes to disclose sensitive personal data, it will need the secondee's explicit consent.

If the disclosure will involve the information going outside the European Economic Area, then the seconder will have to ensure that there is appropriate protection in place, and may have to include specific provisions in the secondment agreement.

Confidentiality and restrictive covenants

Both the seconder and the host will be concerned to protect any of their business secrets to which the secondee may have access.

The seconder may have sufficient protection as a result of existing provisions in the secondee's contract of employment. However, it is likely to want to stress the need for confidentiality during the secondment and may want to introduce new restrictive covenants to prevent the secondee from competing with, or soliciting employees from, the seconder.

The seconder will also want protection against the host either employing the secondee directly at the end of the secondment period, or competing with the seconder as a result of information obtained during the secondment.

The host will be concerned about confidentiality, in particular in relation to information that the secondee may obtain during the secondment, the solicitation of its employees and the risk that either the secondee or the seconder could set up in competition.

Termination

The duration of the secondment should be agreed in advance and, in particular, it should be established if it is to be:

- for a fixed term.
- for a fixed term which is terminable on notice during the term.
- terminable on notice at any time.

If it is possible to give notice, it is necessary to establish the length of notice and if the secondee will have the ability to serve notice to terminate the secondment, or merely their employment with the seconder.

The secondment agreement should also address what will happen if the secondee terminates their employment during the secondment. The most likely option is that the secondment will terminate on expiry of the secondee's notice, but the seconder will want to provide that the secondment will summarily terminate if the secondee leaves without giving notice.

There will be certain circumstances when it will be necessary for the secondment to terminate with immediate effect. The agreement is likely to specify certain events which will result in termination, for example, the secondee's misconduct or long-term sickness.

Net Lawman document templates relevant to this subject:

- Employment contracts
- Letters to employees
- Employment policies
- Employment problems and termination
- Confidentiality Agreement
- Confidentiality Letter

<http://www.netlawman.co.uk/info/secondment-agreements.php>)