THE GRAHAM AGENCY

Matching clients and prospective staff through personal service

ESSENTIAL GUIDE TO EMPLOYING DOMESTIC STAFF

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Please note that this guide reflects the law at the time of writing, and therefore is subject to change from time to time.

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Finding the RIGHT person to work in your home

In recent years there has been a huge up-turn in the employment of domestic staff: housekeepers, nannies, carers, etc. In some cases families are so busy working there is simply not the time to do these things, or perhaps we have ageing parents or other relatives increasingly in need of care and they wish to stay in the comfort and security of their own homes, so a live-in or live-out carer provides a potential solution.

It is essential that the most appropriate staff should be engaged and at The Graham Agency we would always recommend using an experienced agency to undertake this, i.e. not to advertise oneself. We can offer experience of: selecting the right staff, working with them, arranging aspects such as payroll, tax deductions, contracts of employment and establishing mutual working parameters that are necessary for the smooth functioning of the relationship.

The Graham Agency is, and has been for more than 26 years, consistently committed to providing the highest standards of personal service to clients and domestic staff candidates.

We pride ourselves on understanding the unique requirements of each client through personalised contact, discussion and appreciation of their individual circumstances. We recognise the special relationship between clients and their domestic staff, matching not just individual skills and experience, but also acting as both catalyst and link to establish a rapport for mutual benefit.

The Graham Agency – matching clients and prospective staff through personal service.

How do I check if someone has the right to work in the UK?

The UK government has an easy to use tool for checking someone's right to work, available at https://www.gov.uk/legal-right-to-work-in-the-uk. As rules may change dependent on rulings either from the UK government or the European Union, this provides the most up-to-date source of information.

You can be prosecuted for employing illegal workers, including students with expired visas, students working more hours than they're allowed to and people on a visitor's visas.

At the time of preparing this guide the fines for employing people illegally are severe, with penalties for those committing the offence being up to £20,000 per worker.

However, the UK government is strengthening its crackdown on the employment of illegal workers. In light of the Immigration Act 2016, there are now measures leading to those caught working illegally in England and Wales to be sentenced to up to six months in jail.

For an employer, claiming that one did not know that an employee was an illegal worker will not be an acceptable legal defence; an employer will have to show that they have carried out the three step right to work checks prior to offering a job. These are as follows:

- Obtain the employee's original documents as prescribed in the Home Office guidance.
- Check (in the presence of the prospective employee) that the documents relate to the individual and are original, unaltered and valid.

- Copy and keep the documents securely and record the date of the check and date for follow-up checks.

The maximum sentence for an employer found guilty is five years, in addition to the unlimited fines which may also be imposed.

Details of current penalties for employers employing illegal workers may be found at https://www.gov.uk/government/collections/employers-illegal-working-penalties. It is advisable to seek immigration law advice if you are unsure what your obligations are.

What constitutes an "employee"?

If you take someone on to work in your home, for example, a nanny, cleaner, carer or other domestic staff, their rights and obligations are dependent on whether or not they are an employee, self-employed contractor or a worker.

A worker is a broader category of staff (including employees) and may include, for example, those who are on the face of it a contractor but where there are certain factors that point towards employment. Therefore those who fail to reach the higher mark necessary to qualify as employees may still qualify as workers. A worker is essentially a lower threshold.

Certain factors can determine employment status, including the amount of control you have over the person in how they do their job, whether they offer a personal service and the mutuality of your working obligations.

The employment status of an individual is important as key legal rights only apply if an individual is an employee. These rights include for example:

- Statutory Sick Pay
- Maternity leave
- Paternity leave
- Adoption leave and pay

Additionally an employee must have minimum notice periods if their employment is to end (e.g. if an employer is dismissing them).

The statutory minimum notice periods an employer must give an employee are as follows:

- One week's notice if the employee has been employed by the employer continuously for one month or more, but for less than two years
- Two weeks' notice if the employee has been employed by the employer continuously for two years, and one additional week's notice for each further complete year of continuous employment, up to a maximum of 12 weeks. For example if an employee has worked for 5 years then they are entitled to 5 weeks' notice.

For employees, they must give their employer a minimum of one week's notice once they have worked for one month. This minimum is unaffected by longer service.

Many rights will also depend on whether the employee has the requisite length of service.

Employees also enjoy protection against unfair dismissal, have the right to request flexible working hours, and the right to receive statutory redundancy pay if they are made redundant. The web page www.gov.uk/redundant-your-rights explains this issue in detail.

Workers also have certain legal rights (for example the right to paid holiday and rest breaks). If you have never employed someone before, this can all sound a little daunting. However, at the time of preparing this Guide, advice is available by ringing the New Employer Helpline provided by HMRC (Her Majesty's Revenue & Customs) on 0300 200 3211, open 8.00am to 8.00pm, Monday to Friday, and 8.00am to 4.00pm on Saturdays.

If you are employing someone to work in your home, then by law, you will need to provide your employee (and, from 6 April 2020, workers) with a written statement of their terms and conditions of employment within two months of their employment commencing (if their employment is continuing for a month or more, although from 6 April 2020 this service requirement will no longer apply). There are certain minimum terms that need to be included in the written statement. Further information about this can be found on page 8. Failure to do so may lead to a tribunal awarding the employee two to four weeks' pay (capped at the statutory amount) where the employee has already brought a successful claim against you (for example for unfair dismissal). The employee is also entitled by law to itemised pay slips and after two years' service, written reasons for their termination.

The rights under a contract of employment are in addition to other implied rights under law, such as, for example, the right to a national minimum wage and the right to paid holidays.

Generally, you and your employee can agree to whatever terms you wish to be in the contract, but you cannot impose a contractual term which gives your employee fewer rights than provided for under law.

It is also worth noting that if a domestic employee is provided with accommodation as part of their terms and conditions, it is important that this is documented appropriately in order to prevent that employee attaining any property rights and to include the ability to remove the employee from the property on termination of their employment. We would recommend you seek advice from a property solicitor to ensure there is adequate protection.

Employment status is also important to understand how they should be treated for tax purposes. If the person is an employee, you will be legally classed as their employer and will have to deduct income tax and National Insurance Contributions from their wages through the Pay As You Earn (PAYE) scheme. If they earn below a certain amount, you can operate a simplified PAYE scheme.

Whether or not a worker is an "employee" will depend on certain factors. See the HMRC ready check advice below for further guidance, although do note that just because a person is or is not treated as an employee by HMRC, this does not necessarily mean they will be treated as such by an employment tribunal which may affect the types of legal claims they could bring. If you require further advice or guidance on this, it is best you seek legal advice.

Special rules apply to workers supplied and paid by agencies, which mean that the agency has to operate PAYE. If an agency supplies someone to work in your home and you (not the agency) pay the worker, contact HMRC to register as an employer. The Graham Agency can assist in this regard.

Employing on a part-time basis

Many families consider employing a member of domestic staff on a part-time basis, some for the reason that there is insufficient work for a full-timer, some to save money and some who feel they are not as legally committed to someone employed on this basis.

Whatever the reasons, there are several important points everyone should be aware of regarding the status of part-time staff against full-time staff.

Full-time and part-time staff have equal rights regarding, for example, maternity, paternity and adoption leave (although payments depend on earnings) and holiday leave (adjusted pro-rata). All employees have the same rights in regard to grievance and disciplinary procedures.

Promotion and training opportunities should be available equally to all employees. If part-time workers feel they are treated less favourably than full-timers, they can ask for the reasons in writing and a response has to be given within a specified time frame. Part-time workers are protected by specific legislation and can bring certain tribunal claims if they are treated less favourably, detrimentally or dismissed in connection with their part-time status.

At the end of the day, every client chooses the employee and nature of their employment which suits them best, but everyone needs to be aware of employer obligations irrespective of the hours an employee works.

Registering as an employer

Where you do have an obligation to operate PAYE you should contact HMRC to register as an employer, you must register before the first payday. Most employers can register online at: https://www.gov.uk/register-employer.

Is the person working for you an "employee" or "self-employed" for PAYE purposes?

There are special rules for deciding if someone is employed or self- employed for tax purposes. This is called 'employment status'. If they are self-employed you don't need to worry about operating PAYE.

HMRC have prepared a useful guide if you wish to be absolutely sure of your position and this can be found at www.hmrc.gov.uk/calcs/esi.htm. The questions, provided by HMRC, are useful as a ready check.

Ask yourself the following questions and if the answers are YES, then they possibly count as an "employee":

- Do you require the person to work for you on a regular basis, unless they are away on holiday, or on sick, maternity or paternity leave?
- Do you ask the person to work a minimum number of hours and do they expect to be paid for that time worked?
- Do you have to you to provide materials, tools and equipment for their work?
- Does the person work exclusively for you, OR do they have another job?

Please note that if they DO have another job, then they may still be an "employee" if that job is totally different from their work in your home.

If you have given the person a contract of employment (and/or an offer letter) and it specifies terms and conditions and uses such phrases as 'employer' and 'employee' then this may be indicative of their employment status. However note that HMRC and/or employment tribunals will look behind any contract and at the actual working relationship to decide whether someone is an 'employee'. They could decide, for example, that the contract purporting a person to be a worker or a contractor is a sham if it does not reflect the actual working arrangements.

It is worth remembering that although a person may be an employee in the context of employment law, HMRC may regard them as having a different employment status for tax purposes.

New laws came into effect from April 2021 which apply to self employed workers who are engaged through service companies. These changes are only applicable to medium and large-sized private sector organisations and are unlikely to affect you. If you do have concerns you should check the government guidance https://www.gov.uk/guidance/april-2020-changes-to-off-payroll-working-for-clients

There have been some important cases recently that have decided the worker status of people working in the so-called "gig economy" - namely those working under short term contracts or freelance work and who are paid by reference to the "gig" they do. In February 2021, the Supreme Court upheld the finding that Uber drivers are workers rather than independent contractors, meaning that they were entitled to holiday pay, paid rest breaks and the national minimum wage.

In another high profile case, the Supreme Court upheld the judgments of an employment tribunal, the EAT and the Court of Appeal that a plumber working for Pimilico Plumbers was a worker. This finding was despite the plumber's contract labelling him as an independent contractor.

Employment Contracts

Since 6 April 2020, employers have been required to provide employees and workers with a *'written statement of particulars of employment'* by section 1 of the Employment Rights Act 1996 (ERA 1996). This written statement is often referred to as a "*section 1 statement".* A contract of employment is a type of section 1 statement.

The right to receive a section 1 statement applies to all employees and workers with limited exceptions and must be given to the employee or worker *'not later than the beginning of employment'* (s1(2)(b) ERA 1996). In practical terms, this means the employee or worker should be given their s1 statement on the date they commence work at the latest. We would recommend wherever possible providing the s1 statement in advance of work being commenced in case any issues arise.

In addition, the following information must be included in the s1 statement:

- The names of the employer and the employee or worker
- The date when the employee's employment, or worker's engagement, began.
- Where the statement is being given to an employee, the date on which the employee's period of continuous service began (taking into account any employment with a previous employer which counts towards that period)
- The scale or rate of remuneration or the method of calculating remuneration (section 1(4)(a), ERA 1996).
- The intervals at which remuneration is paid (i.e. weekly or monthly).
- The normal working hours, the days of the week which the employee or worker is required to work and whether or not such hours or days may be variable (and if so, how they vary).

- For employees, their holiday entitlement and rate of holiday pay, notification and approval of holiday and whether holiday can be carried forwards to subsequent years.
- The length of notice required by either party to terminate the contract
- Job title and a brief description of the work required
- Whether the arrangement is permanent or a fixed term.
- Any probationary period, including its conditions and duration
- The place of work and if the employee or worker is required or permitted to work at various places
- Whether the employee or worker is required to work outside the UK for more than one month
- What training will be provided – if no training is provided this should still be stated
- What benefits are provided – if no benefits are provided this should still be stated

Zero hours contracts – yes or no?

Zero hours contracts are a relatively new innovation in the work arena and are not without their issues. On the face of it, they appear to provide a way to only pay for someone when they are actually working for you. Typically a zero hour contract sets out that the person is a worker rather than an employee. However this does not necessarily mean that an employment relationship cannot be found by either HMRC or a tribunal.

So what does a zero hours contract mean, and can you offer one to your domestic staff?

A zero hours contract is generally a contract or agreement between an employer and worker where the employer makes it clear that there is no obligation to provide a minimum number of hours of work and the worker is only paid for the hours they actually work. On the other hand, there is no obligation for the individual to accept any of the hours of work offered.

There has been a lot of negative press recently about the use of zero hour contracts which include claims that such contracts exploit workers (given that they purport to deprive workers of employment rights and such workers can be left without work for indefinite periods of time). Any provision in a zero hours contract which prevents the worker from working elsewhere or from doing so without the employer's consent is void. It can also be incredibly complicated to work out issues such as holiday entitlements and tax obligations under such contracts. Further, the fact that the worker could decline to work may not suit all employers. Therefore, we would probably recommend that in the first instance, you use a standard employment contract. However, please do contact us if you would like further information on zero hour contracts.

When a job offer is subject to a health check

When an offer of employment to an applicant to work within your household has been made *subject to a health check*, what are the legal implications, both for the applicant and the employer?

Should the applicant refuse to have such a health check, where does the employer stand?

The advice we have received is that if the offer is conditional upon the health check and the applicant refuses, the condition is not fulfilled and therefore it will be difficult for the applicant to argue that a binding contract has been formed. The offer can be withdrawn.

However, if the applicant displays an obvious disability and this was a contributing factor to withdrawing the offer, then the employer runs the risk of a claim on the basis of disability discrimination.

Job offers may be made conditional on satisfactory responses to pre-employment disability or health enquiries or satisfactory health checks. However, employers must ensure they do not discriminate against a disabled job applicant on the basis of any such response. So you cannot reject an applicant purely on the grounds that a health check reveals that they have a disability. Employers should also consider at the same time whether there are reasonable adjustments that could be made in the working environment in relation to any disability disclosed by the enquiries or checks.

Where health enquiries are made after an applicant has been conditionally offered a job subject to such enquiries, employers must not use the outcome of the enquiries to discriminate against the person to whom a job offer has been made. An employer can avoid discriminating against applicants to whom they have offered jobs subject to satisfactory health checks by ensuring that any health enquiries are relevant to the job in question and that reasonable adjustments are made for disabled applicants.

Under the Equality Act 2010, it is unlawful for an employer to ask any job applicant about their disability or health until the applicant has been offered a job (whether on a conditional or unconditional basis) or has been included in a pool of successful candidates to be offered a job when a position becomes available. This includes asking such a question as part of the application process or during an interview. There are some limited exceptions to this (such as reasonable adjustments being needed for the recruitment process, monitoring purposes, where it relates to their ability to carry out a function that is intrinsic to the role).

This is a complex area and the above is just a general guide and not definitive advice. As always, we recommend seeking relevant legal advice before taking any action in this area.

Money, tax and benefits

PAYE

The biggest change to the operation of PAYE since it was introduced over 60 years ago, is what the government has termed the move to reporting PAYE information in real time, referred to as RTI.

Now that the change has been introduced, employers and pension providers – or agents, payroll bureaux and other intermediaries acting on their behalf – will need to report information about tax, National Insurance Contributions (NICs), student loans and other deductions before a payment subject to PAYE is made to an employee. Previously such information had to be reported only once a year, on the Employer's Annual Return.

If you are not already aware of this and it falls within your area of responsibility you MUST acquaint yourself with the facts of the system which came into force in April 2013. The Graham Agency can assist in this regard.

You must include on your payroll everyone you employ, no matter how short a time they work for you, or how little they are paid and this includes temporary and casual staff, and those who are paid below the PAYE threshold as well as those who are paid below the Lower Earnings Limit for National Insurance Contributions.

To help you get to grips with this, the government regularly produces their Employer Bulletin available on the web which spells out how the system works and what you need to do. You can register for this bulletin at www.hmrc.gov.uk/gds/payerti/forms-updates/forms-publications/register.htm. Alternatively, The Graham Agency can assist in this regard.

When to operate PAYE

Whether or not you need to operate PAYE (deduct Income Tax and National Insurance contributions from the employees earnings and pay employer's National Insurance contributions) depends on your employee's overall earnings.

If your employee has another job – or other taxable income, such as a pension – you'll need to operate PAYE no matter what they earn. This is because their tax-free allowances will normally be set against the pay from their main job or pension, which means tax may be due on their earnings from you.

There is a Simplified PAYE Deduction Scheme which is a way of operating PAYE that requires less form-filling than the PAYE schemes operated by most employers.

You can use the scheme if your personal or domestic employees' taxable earnings don't exceed certain levels.

If their taxable earnings are more than the current levels you must operate PAYE. The Graham Agency can assist in this regard.

Issuing pay statements

At the end of each pay period you must give your employee a record of pay and deductions and these must include the following items:

- their gross pay – which is to say before the deduction of tax or National Insurance contributions as well as any other deductions,
- the amount deducted for their Class 1 National Insurance
- the actual tax that has been deducted.

However, there may also be other deductions made, dependent on the persons individual circumstances and these also have to be itemised.

Lastly, at the end of each tax year you must also give each employee who was working for you on the last day of the tax year (5 April) a form P60 end-of-year certificate. Form P60 provides a summary of the employee's total pay and tax/NICs deductions for the year. You have to provide this for your employee by 31 May.

Using a payroll agency

If you don't want to operate PAYE yourself, there are payroll agencies that will do it on your behalf. You send them details of your employee's gross wages (before tax) and they operate PAYE and prepare payslips for you. The responsibility for PAYE remains yours where you engage a payroll agent to act on your behalf. The Graham Agency can make appropriate recommendations in this regard.

Statutory Sick Pay

As an employer you're liable to pay Statutory Sick Pay (SSP) to employees who are off work sick and who meet certain qualifying conditions, including notification requirements. This sick pay is deemed to provide a minimum level of pay to employees while they are unwell. SSP is payable where an employee has been sick for 4 days in a row (including non-working days) – you would start paying from the fourth day (if that is a normal working day). In general it is payable for 28 weeks. The employee must notify you within 7 days of any day of sickness and after 7 days you can request a doctor's note as evidence of illness. As of 6 April 2021, Statutory Sick Pay is currently £96.35 per week, although the rate tends to increase each year with inflation.

In terms of payment, simply treat the SSP as you would their wages and continue to make all the deductions we have itemised above in the normal way and pay the employee on the normal payday.

It is important to remember that when and if you do pay SSP to an employee you must record the SSP paid on the employee's payroll record and report the information on what is known as Full Payment Submission (FPS).

See https://www.gov.uk/employers-sick-pay/overview for further information.

See also When employees become ill on page 14.

Statutory Maternity Pay, Statutory Paternity Pay or Adoption Pay and Shared Parental Pay

Employees who become parents – either through birth or adoption – are entitled to pay and time off work, provided they meet certain qualifying conditions. As an employer you must make the appropriate payments to qualifying employees. See www.hmrc.gov.uk for further information.

Such payments include.

- **Statutory Maternity Pay**
- **Statutory Paternity Pay**
- **Statutory Adoption Pay**
- **Shared Parental Pay**
- **Parental Bereavement Pay**

You must only pay the above payments if the employee meets certain qualifying conditions. You should pay these in the same way as you would make normal payments of wages and salaries. You should be able to recover some or all of the payments made from HMRC. There is a helpful guide and calculator at www.hmrc.gov.uk/payerti/employee/statutory-pay/smp-calc.htm

See also What is the situation if your employee becomes pregnant / adopts – or their partner does? on page 18.

Annual leave and holidays

Holiday entitlement

All workers (and therefore all employees) by law have a right to a minimum of 5.6 weeks paid annual leave. So, someone working five days a week would be entitled to 5.6 x 5, a total of 28 days per year. The number of days of annual leave may include the usual 8 public or bank holidays in England and Wales. Someone working two days a week would be entitled to 5.6 x 2, a total of 11.2 (which can be rounded up to 11.5) days a year.

There is no statutory right to public holidays, so an additional public holiday does not increase any entitlement to holiday under the Working Time Regulations. Whether or not an employee will benefit from the extra public holiday will depend on the wording of their contract.

As an employer you may, of course, offer more than the statutory minimum. However the exact number of days can also be dependent on specified working hours or working pattern.

See https://www.gov.uk/holiday-entitlement-rights for further information.

Building up and carrying over holiday entitlement

Some employers run an 'accrual system' for holiday entitlement. Alternatively you should operate a leave or holiday year which sets out the period in which you should take your leave. Employees should give you reasonable notice before taking a holiday and this period can be agreed and built into the contract of employment.

In the first and last year of employment, holiday entitlement will be pro-rated according to the number of months worked in those years.

You cannot pay in lieu of an employee's statutory holiday entitlement (except on termination of employment). So if an employee says that they would rather not take any holiday and would prefer to be paid their holiday at the end of each holiday year, you cannot by law pay them in lieu. When their employment comes to an end, you must pay them in lieu of any accrued, but untaken, holiday.

However, it is worth noting that employees on Maternity leave and sick leave continue to accrue holiday and are entitled to this on their return to work.

Calculating holiday pay

Your employee has the right to know how much holiday they are entitled to and how much they will be paid for that holiday, the information being sufficient to enable their precise entitlement to be calculated (including on termination). This information should be contained in their employment contracts (or written statement of terms and conditions).

Workers are entitled to be paid a week's pay for each week of holiday taken. When calculating how much is a week's pay, you will need to do so by reference to the kind of hours the person works and how they're paid for the hours. As of 6 April 2020, the

reference period for calculating holiday pay is 52 weeks, or the number of complete weeks for which the worker has been employed. This includes full-time, part-time and casual workers. You may also need to take into account other payments that are closely linked to the performance of their jobs, such as overtime, commission, allowances and bonus. The calculation of holiday pay can in certain circumstances be complex and therefore if you require advice on this, please contact us.

What is the National Minimum Wage?

As an employer you're legally obliged to pay your workers at least the National Minimum Wage (NMW). The NMW applies to most workers above the school leaving age. The amount that you must pay depends on the age of the worker. HMRC is responsible for enforcing the NMW and prevailing rates can be checked on their website www.gov.uk/national-minimum-wage-rates.

The National Minimum Wage is the minimum pay per hour almost all workers are entitled to by law. If found guilty of not paying the National Minimum Wage, HMRC may require you to pay the affected workers arrears at the most recent rate as well impose a financial penalty of up to £20,000 per worker. In additional to this, failure to pay the National Minimum Wage is a criminal offence.

It does not matter how small an employer is, they still have to pay the minimum wage which varies according to a worker's age and if they're an apprentice.

There is also guidance on the website on working out the minimum wage for different types of work.

How much guidance should you give your employees on carrying out their work?

The contract of employment you must give your staff should spell out their duties and obligations. The best way of doing this is by attaching a job description to the contract.

It is also a good idea to provide safe working guidelines. Below are some tips you may wish to consider giving your staff.

With regard to cleaning materials and disinfectants, for example, stipulate where and how they should be stored. All such materials should be stored out of the reach of children, or ideally in a locked cupboard with the key safely out of reach.

All cleaning materials used should be kept in containers which are labelled correctly with the contents and any first aid treatment necessary. Any chemicals not labelled correctly should not be used.

Providing protective gloves is a good idea where any cleaning materials are being used, and a First Aid box with eye wash, etc. should be provided and staff advised where it is kept. Stress that strong cleaning materials should not be used unless you are consulted first.

Electrical equipment

Before using electrical equipment, the user should check the electric cord for frays, breaks and defective plugs.

Before plugging in an item of equipment, the user should check to see that the equipment is switched to the off position.

If staff notice an item of equipment overheating, sparking or smoking , the user should turn off the power supply and report the incident to their employer. Under no circumstances should the equipment be used again until checked and repaired by a competent person.

Never unplug an item of equipment by tugging on the lead, which is dangerous and can cause damage, instead always unplug an item by pull firmly on the plug.

Wet hands and electrical equipment don't mix well, staff should ensure their hands are quite dry before using an electrical item.

Lastly, your staff should never attempt a repair to defective wiring or electrical equipment, unless suitably qualified. As stated, they should report the problem and ensure it is repaired by someone with appropriate experience.

Kitchens / food handling

Cleanliness in kitchens is essential to prevent the spread of potentially harmful bacteria.

It is in your own interest to provide colour coded kitchen cutting boards to reduce the risk of cross contamination. i.e. the transfer of harmful bacteria from one food product to another via the most common routes, equipment, tools, hands and cutting/chopping boards. Wall charts are available which specify which colour boards are to be used with which products. Without wishing to insult your domestic staff, it is wise to discuss with them their understanding (or not) of safe practices including washing hands after handling raw meat for example and not using the same knife for raw meats and other products, or at the very least thoroughly washing them after each type of usage.

For reference, The different colours of chopping boards and their uses is as follows: Red – Raw meat, Blue – Raw fish, Yellow – Cooked meat, Green – Salad and Fruits, Brown –Vegetables and White – Bakery and Dairy.

Information should be given to anyone preparing food within your home, regarding any food allergies of family members, and if that is the case, advice as to how to avoid these substances. Typical substances will be: milk based products, wheat, gluten, peanuts. Similarly, if there are religious requirements or vegetarians/vegans, details should be explained to the new member of staff.

Advice should be given as to what actions to be taken should someone ingest something to which they are allergic. Your doctor will advise you in this respect.

The name of your family doctor should also be given to your domestic staff member in the event that someone becomes ill while you are absent.

COVID-19 – What are my obligations?

As an employer, you may now have certain obligations in the post-covid 19 workplace that weren't in place before, including specific health and safety measures to ensure the workplace is covid-secure.

As this is an ever changing area of law, we would recommend you keep an eye on the following resources:

Working safely during coronavirus (COVID-19) - Guidance - GOV.UK (www.gov.uk)

https://www.acas.org.uk/coronavirus

When employees become ill

A domestic staff member, housekeeper, carer, nanny, etc. can very quickly become someone who is heavily relied on (nobody really being indispensable, although we often use that term).

When they are off sick, we generally manage or muddle through in the anticipation that they will not be away from work for too long a period.

But what happens when that sickness absence becomes extended? What can you do and what are your options?

Of course it depends upon a whole variety of circumstances and the relationship you and perhaps your family has with the person in question. In many instances you will cut them as much slack as possible and hope that the issue will be resolved.

But there are occasions when the sickness absence becomes a long term issue. But do we know when that is? What our rights are? How to resolve the unsatisfactory situation?

So let's look at some of the rules and some of the guidance.

- Employees who are off work sick for more than 4 weeks may be considered long-term sick.
- Before considering dismissing an employee on long term sick, a proper procedure should be followed and we would recommend you take appropriate legal advice before you do so to minimise the risk of any claims being brought against you, including disability discrimination.
- If an employee has a disability (within the meaning of the Equality Act 2010), it is important that you consider and implement appropriate reasonable adjustments to enable the employee to do their job (for example adjusting working hours or providing appropriate equipment). This is a duty required by law. If you require assistance with this duty, then we would recommend legal advice is sought before any action is taken.
- You may need to obtain a medical report to determine whether an employee has a disability and what adjustments may be appropriate in the circumstances.

An employee only needs to provide a sick note (called a "fit note") after seven days of sickness absence to satisfy the certification requirement for statutory sick pay. Employers can ask employees to fill in a form when they return to work to confirm they've been off sick. This is called 'self-certification'. Some employers provide their own version of this form.

The fit note issued by a GP, or doctor at a hospital, will say the employee is either 'not fit for work' or 'may be fit for work'.

If it says the employee may be 'fit for work', employers should discuss any changes that might help the employee return to work (e.g. different hours or tasks). The employee must be treated as not 'fit for work' if there's no agreement on these changes.

Employers can take a copy of the fit note but the employee should keep the original.

Don't pay employees in cash

If you are paying your domestic staff in cash, beware. HMRC will be looking for YOU.

Make no mistake, the authorities have embarked on a determined drive to catch those who often pay cash to staff so that the level of legitimate pay entitles that person to state benefits, thereby avoiding the necessity of complying with tax regulations, paying income tax and National Insurance contributions.

Other methods of avoiding payments include: providing free accommodation, or staff sharing with another family. If an employee lives in the same house as their employer this is not treated by HMRC as a benefit in kind, however if separate accommodation is rented by the employer for the employee, this is a benefit in kind and is therefore taxable.

It's simply too expensive for the government to ignore. It is estimated that in just one recent year HMRC lost an estimated £57 million through tax evasion as a result of cash payments to just one category of domestic staff – nannies.

Of the 30,000 nannies working in the UK, a survey recently indicated that a fifth worked on a cash basis. The new penalties will be high: all the back tax, plus a 100% fine, HMRC have already stated that the culprits are not difficult to find as when an employee leaves and starts a new job, the previous payment and avoidance becomes immediately apparent.

Discrimination

By law, you cannot discriminate against your workers because of their age, disability, gender reassignment, marital or civil partner status, pregnancy or maternity, race, colour, nationality, ethnic or national origin, religion or belief, sex or sexual orientation.

There are many types of discrimination including but not limited to direct discrimination (e.g. treating an old person less favourably than a young person because of their age) and harassment (e.g. subjecting someone to unwanted conducted related to their disability which violates their dignity or creates an intimidating, hostile, humiliating or degrading environment).

For further information, see https://www.gov.uk/employer-preventing-discrimination and http://www.acas.org.uk/media/pdf/1/0/Equality_discrim_understand_basics_Nov.pdf. It is best to seek independent advice if you have any issues relating to discrimination.

Do I have to pay my employee a pension?

Pension deductions

"I don't have to enrol my nanny/housekeeper/carer et al, into a pension scheme, I'm not a company so it doesn't apply to me!" If that's what you think, you are wrong!

It does, you ARE an employer and as such fall within the government's new automatic enrolment of staff into a pension scheme AND make a contribution for them. It is a changing world with changing responsibilities.

The main reason for requiring employers to automatically enrol their staff into a pension scheme is to ensure people are saving for their own retirement and to take pressure off the state.

All employers in the United Kingdom are required to automatically enrol eligible workers in a pension scheme and make mandatory minimum contributions. Employers may use an existing or new occupational pension scheme or personal pension scheme, provided

the scheme meets certain statutory requirements. Alternatively, they may if they wish enrol eligible jobholders in NEST, a central scheme set up by the government. Further information can be found on http://www.nestpensions.org.uk/schemeweb/nest.html

The rules apply to everyone who is aged between 16 and 74 who works in the UK and for whom you are obliged to deduct income tax and National Insurance contributions from their wages.

As an employer your duties will be based on the ages and earnings of your staff. However, the Pensions Regulator website has a calculator which if you input your current staff age(s) and gross earnings will give you an overall picture of your obligations.

What is the situation if your employee becomes pregnant / adopts – or their partner does?

If your female employee becomes pregnant, she is entitled to the following rights:

- Time off for antenatal appointments.
- Health and safety protection while pregnant and breastfeeding.
- Up to 52 weeks' maternity leave, regardless of length of service. The first two weeks from childbirth must be taken by all employees as compulsory leave.
- Statutory maternity pay (SMP) for up to 39 weeks (subject to eligibility).
- The right to return to the same job (or a suitable alternative in certain circumstances).
- Priority for alternative employment in redundancy cases.
- The right to request flexible working conditions on return to work.
- Protection from dismissal, detriment or discrimination by reason of pregnancy or maternity.

A woman must notify her employer no later than the end of the 15th week before the expected week of birth (or, if that is not reasonably practicable, as soon as is reasonably practicable) that she is pregnant and provide the expected week of birth and when she intends her Ordinary Maternity Leave to start.

The partner must also notify their employer no later than the end of the 15th week before the expected week of birth (or, if that is not reasonably practicable, as soon as is reasonably practicable) that their partner is pregnant (and that they are an eligible partner) and provide expected week of birth and when they intend for their Ordinary Paternity Leave to start.

Adoption

An employee who adopts is entitled to the following:

- Up to 52 weeks' adoption leave (subject to minimum qualifying requirements).
- Statutory adoption pay for up to 39 weeks (subject to eligibility).
- The right to return to the same job (or, in certain circumstances, to return to a suitable and appropriate alternative job).
- Protection from detriment or dismissal relating to adoption leave.

- Priority to be offered suitable alternative employment in a redundancy situation.
- An employee who qualifies to take ordinary adoption leave (i.e. the first 26 weeks – OAL) must comply with applicable notification and evidential requirements to take their OAL.

For further information, see https://www.gov.uk/employers-adoption-pay- leave

Shared Parental Leave

The government's shared parental leave scheme has a direct impact on many employers, including households which employ just one member of domestic staff.

Both parents are able to share the one year maternity leave period, dividing time between them or even to take time off together. This is an optional scheme for parents, but could have a major impact on the availability of your staff.

During the 52 weeks of maternity leave, a mother can end her maternity leave early and, with her partner, opt for shared parental leave instead so that whatever time is left to run on her original year can be:

- taken off by her partner instead; or
- divided between the two of them (i.e. each taking short periods in turns);

or

- taken together (i.e. if the couple take 6 weeks off together, this will use 12 weeks of the leave); or
- utilised in separate blocks (i.e. the mother could return to work for 2 months then take a further period of time as shared parental leave)

Note that the mother must take the first two weeks of maternity leave herself as compulsory maternity leave.

Other rights for working parents include unpaid parental leave of up to18 weeks for children aged up to 18and the right for men to take unpaid leave to attend two antenatal appointments with their partner.

For more information see www.hmrc.gov.uk.

Parental Bereavement Leave

Employees may be entitled to Parental Bereavement if their child or a child in their care has died or been stillborn after 24 weeks of pregnancy.

Parental bereavement leave can be one week, two consecutive weeks, or two separate weeks. It can be taken at any time during the first 56 weeks after the child's death.

The current rate for eligible employees is £151.97 a week or 90% of your average weekly earnings (whichever is lower).

For further information please see Statutory Parental Bereavement Pay and Leave - GOV.UK (www.gov.uk).

See also Statutory Maternity Pay, Statutory Paternity Pay, Adoption Pay and Shared Parental Pay on page 11.

Flexible working

All employees with 26 weeks' continuous service are entitled to make a request to their employer for flexible working arrangements.

The right is only to make a request, so they do not have an automatic right to work flexibly. They may request a change to working hours or working location. This encompasses a wide range of working patterns, such as job sharing, part-time working, compressed hours and flexitime. For example, an employee might make a request to work flexibly alongside a further education or training course, or in order to combine working with helping to care for dependents. However, an eligible employee might also make a request simply in order to spend less time at work.

Employees are only permitted to make one request in any 12-month period.

As an employer, you have a duty to deal with requests in a "reasonable manner". In any event, all requests (including any appeals) must be considered and decided within three months of receipt, unless an extension is agreed by both parties.

What is reasonable in one situation may not be reasonable in another, so it is important that you consider each case on its facts. If you receive a request, you must arrange to meet with the employee to discuss their request as soon as possible. You must consider the request objectively, on its individual facts, and come to a decision by weighing up the benefits and costs of the requested change to both the employee and you.

Employers may only reject flexible working requests for one or more of the following eight specified business reasons:

- the burden of additional costs;
- detrimental effect on the ability to meet customer demand;
- inability to reorganize work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;
- detrimental impact on performance;
- insufficiency of work during the periods the employee proposes to work;
- planned structural changes.

The ACAS Code of Practice and its accompanying ACAS Guide provide some helpful guidance on these grounds for rejecting requests, including when they might apply. The ACAS Guide may be found at: http://www.acas.org.uk/media/pdf/g/r/11287_CoP5_Flexible_Working_v1_0_Accessible.pdf. You may treat a request as withdrawn if the employee fails to attend meetings to discuss the request or appeal on two pre-arranged occasions without good reason.

Data protection

The General Data Protection Regulation ("GDPR") is the new EU regulation which came into force on 25 May 2018 and replaced the old data protection regime . Every employer is impacted by the GDPR, which extended pre-existing data protection rights

for individuals across the EU and there are now stricter obligations all employers must follow. Employers should therefore review how they process the personal data of their clients as well as their staff to avoid falling foul of the GDPR. Employers should also provide their employees with a Privacy Notice setting out how they process their employees data.

For more information, please visit the ICO website: https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr.

Terminating employment

If you have continuously employed a person for at least 2 years or more, then they are entitled not to be unfairly dismissed (although there are certain circumstances where the 2-year rule does not apply).

If you wish to terminate an employee's employment, to avoid a claim for unfair dismissal, it must be for a "potentially fair" reason (as prescribed by law) and must also be reasonable. It is important that you follow a proper procedure before terminating employment to minimise the risk of a finding of unfair dismissal. It is a good idea to have a written procedure for dealing with grievances or disciplinary issues for this purpose. The Advisory, Conciliation and Arbitration Service (ACAS) has a statutory Code of Practice containing a minimum procedure which you can adopt for your own use. Visit http://www.acas.org.uk/media/pdf/p/f/11287_CoP1_Disciplinary_Procedures_v1__Accessible.pdf for more details.

You must also ensure you provide the employee with their full notice entitlements before dismissing them (unless you are dismissing for gross misconduct – in which case further advice should be sought). Employees are entitled to minimum notice periods prescribed by law (or you can provide for longer periods of notice in their employment contract). As a minimum, employers should give the employee:

- one week's notice if the employee has been employed by the employer continuously for one month or more, but for less than two years; and
- two weeks' notice if the employee has been employed by the employer continuously for two years, and one additional week's notice for each further complete year of continuous employment, up to a maximum of 12 weeks. For example if an employee has worked for 5 years then they are entitled to 5 weeks' notice.

We would recommend you seek legal advice before terminating someone's employment, to ensure that you do not fall foul of the law.

When employees leave, do you have to write a reference?

As an employer of domestic staff you will either have been asked to provide a reference to a staff member leaving your employ, or have asked for a prospective candidate to provide a reference.

But are YOU, as that employer, obliged to provide a reference?

As nearly always, nothing is quite as simple as it seems. In essence, the answer is, no, you do not HAVE to (unless the person's contract of employment specifies so) however, there are potential pitfalls here.

If you do decide to provide a reference, ensure it is truthful and accurate to avoid any claims for negligent misstatement.

Do be aware that an ex-employee could try to rely on your refusal to provide a reference or provision of a negative reference in claims for victimisation, detrimental treatment, discrimination or for reputational damage. Therefore, if you do not wish to provide a positive reference, you could provide a factual reference, simply confirming the person's dates of employment and role. We would also recommend that any oral references given are consistent with the written reference.

The person asking you for the reference does not have the right to see it before it is sent, even though they may ask.

With respect to all the issues addressed in this guide, we would always recommend taking professional advice before taking any actions and ALWAYS use a reputable and experienced specialist employment agency to find your staff and assist with such issues. The Graham Agency fulfils this role professionally.

August 2021

About The Graham Agency

The Graham Agency is and has been for 26 years consistently committed to providing the highest standards of personal service to clients and domestic staff candidates.

We pride ourselves on understanding the unique requirements of each client through personalised contact, discussion and appreciation of their individual circumstances. We recognise the special relationship between clients and their domestic staff, matching not just individual skills and experience, but also acting as both catalyst and link to establish a rapport for mutual benefit.

The Graham Agency – matching clients and prospective staff through personal service.

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