

CONTRACT OF EMPLOYMENT - GUIDANCE NOTES

When taking on a new employee the terms of the contract of employment should be discussed at the interview, and it may be sensible to send a draft "contract" with the job application information.

The law entitles new employees whose employment continues for one month or more to receive a written statement of particulars of employment within two months of starting work. It is generally accepted that the true "contract of employment" if committed to writing would be an extremely lengthy document and the purpose of the written statement is to focus on the key terms and conditions which form part of the said contract. Employees must be notified of any changes to the terms and conditions; however, if the proposed changes are to the detriment of employees then employers should discuss these with their professional advisors before they are put to employees.

Failure to provide a written statement does not give rise to a claim in itself but, if the employee is claiming something else, for example, unfair dismissal, the tribunal can add up to 4 weeks' pay to the award.

The written statement of particulars must include details of the following: names of employer and employee; date when employment began; date on which the employee's period of continuous employment began; scale/rate/calculation of pay; pay intervals (weekly, monthly, etc.); terms and conditions relating to hours of work; terms and conditions relating to holiday entitlement, including public holidays and holiday pay, and entitlement to accrued holiday pay on termination; job title or brief job description; place of work, or, if the employee is required or permitted to work at various places, an indication of that fact and the employer's address.

Further information. In addition to the principal statement, above, the employer must also provide the following information within the two-month period (either in further instalments or with the principal statement): terms and conditions relating to sickness/injury, including sick pay; details relating to pensions and pension schemes, including whether or not employment is contracted out of the State pension scheme; length of notice to be given by both employer and employee; if the contract is temporary, an indication of the expected duration, or if it is a fixed term, the date when it is to end; particulars of any collective agreements which directly affect the terms and conditions of employment. Additional information must be given to employees who are required to work outside the UK for more than one month.

Disciplinary and grievance rules. The statement must also include a note specifying any disciplinary rules applying to the employee or referring the employee to another document where he can find these rules. This other document should be reasonably accessible to the employee. The Statutory Statement should also tell the employee to whom and in what manner he may apply if he is dissatisfied with any disciplinary decision in his case, or if he has any other grievance, explaining any further steps in the disciplinary or grievance procedures, or referring the employee to reasonably accessible documents where he can find such an explanation.

A precedent disciplinary and grievance procedure is provided with the AOP's specimen contract.

The written statement can refer employees to another document or other documents for particulars on sickness, pensions, disciplinary rules and the various steps in the disciplinary and grievance procedures. This is only permitted where employees have a reasonable opportunity to read the reference document in the course of their employment or where the document is made reasonably accessible in some other way, e.g. where every employee is provided with a staff handbook. In addition, the employer can refer the employee to the statutory provisions or a collective agreement on length of notice periods. As above, the reference document must be readily accessible to employees.

No particulars. All of the categories which are listed above must be included in the written statement. If in any particular case there are no details to be given, then the statement must say so under the relevant heading.

Part-time and fixed-term contract employees and self-employed workers. Please note that part-time and fixed-term contract employees have substantially the same rights as full-time employees and must not be discriminated against in the terms and conditions of the employment. Self-employed workers may now be entitled to many of the benefits given to employees. For further details, seek legal advice.

NOTES ON THE COVERING LETTER TO OPT OUT OF THE 48-HOUR LIMIT ON AVERAGE WEEKLY WORKING HOURS.

Employees must agree in writing to opt out of the 48-hour limit on average weekly working hours. Employees have the right to terminate these agreements upon giving a minimum of one week's notice. The employer may require up to three months notice. A clause to this effect has been included in the covering letter agreement as follows : "You may terminate this agreement to opt out of the 48 hour limit by giving 14 days notice". The AOP specimen contract also informs employee of these rights, so this clause may be omitted from the covering letter.

GUIDANCE NOTES ON THE SPECIMEN CONTRACT OF EMPLOYMENT

You can use the specimen contract to which these notes refer as the basis for producing your own contract. (This is copyright of the AOP, but as a member you have permission to use it for any of your employees.) Please read these guidance notes to assist you in drafting your own contract(s) of employment.

Alternative clauses are provided to allow for different requirements. These are indicated by an asterisk (*). The alternative clauses which are not required should be deleted. Similarly, alternative wording is indicated by an asterisk (e.g. *hour/day/week/month) and those words not required should be deleted.

Apart from the clauses required in the written statement of particulars (see above), you may choose not to include some of the clauses which appear in the specimen contract.

The notes are numbered to correspond to the clauses in the specimen contract.

NOTES ON THE SPECIMEN CONTRACT

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Parties to the contract and date of issue of the contract. Enter the name and address of the employee, the date of issue of this contract, and the name and address of the employer.

1. Commencement date

Enter the commencement date of the employment.

1.1* Use this paragraph with a new employee, or an existing employee for whom you are issuing a new contract.

You may wish to have a trial period (e.g. 3, 6 or 12 months) written into the contract to allow for dismissal of the employee if found to be unsuitable (see clause 7). Be careful to follow the precise wording of this clause as careless phraseology can result in the creation of a fixed term for the probation period.

1.2 Use this paragraph when the employee has been employed by a predecessor practice and the employment for the purpose of this contract is to be continuous. In these circumstances all previous conditions of employment will apply unless re-negotiated. Continuity of employment is not negotiable.

1.3* This clause sets out the term for temporary and fixed term contracts. If the contract is temporary, indicate the expected duration, or if it is for a fixed term, state the date when it is to end. After 12 months of employment in a job an employee has a right to bring a claim against the employer for unfair dismissal. One reason for such a claim may be the termination of a fixed term/temporary contract. The calculation of continuous service may take into account all or part of the notice period and legal advice should be sought if contemplating dismissal of any employee who is approaching 12 months of service

It is possible, but not always useful or advisable, to have a fixed term contract at the end of which the employee may be re-employed. However this will not circumvent the qualifying period for employment protection rights.

2. Job location

2.1* If the member of staff is always at the same practice use this clause and insert the address.

2.2* If the member of staff is normally based at one address, but may be sent to another practice as temporary relief, use this clause and insert the normal address.

2.3* If the member of staff has mobile duties, use this clause and insert the head office address.

2.4* These details must be provided in the written statement where an employee is required to work outside the UK for more than one month. If the employee is to begin work outside the UK within two months of starting, all particulars must be given before the employee leaves.

3 Remuneration

- 3.1 In most circumstances this clause will be used. Enter the amount and the period for which this amount is paid.
- 3.2 Enter the frequency with which the employee will be paid and how you intend paying them.
- 3.3 Omit this clause, if you do not have a bonus scheme.

4. Collective agreement.

- 4.1* Use this clause if you do not have a union agreement in force.
- 4.2* Use this clause if there is a collective agreement in force which you wish to be incorporated into the contract of employment.

- 5. **Job title.** Delete to leave the appropriate job title. If another title is to be used (e.g. Clinical Assistant, Optometrist-Manager) then enter this at "Other".

6. Hours of work and absence during working hours

- 6.1 Enter the hours that are to be worked on each day; or,
- 6.2 Enter the appropriate figures.

You may wish to insert a provision regarding a break for lunch, e.g. an hour, and when this break should be taken.

- 6.3. Delete method of communication as appropriate.
- 6.4 Delete rate of payment as appropriate.
- 6.5 The Working Time Regulations 1998 impose a 48 hour limit on average weekly working hours. An employee may opt out of this limit in writing but must be able to terminate the opt-out by not more than three months' notice in writing. Use clause 6.5 if your employee has agreed with you to opt out of these Regulations.

- 7 **Probation.** It is common to have an agreed period of "probation" before finally confirming the employment. Select how long you wish this period to last. However if clause 1.2 is used this clause should be deleted. In order to avoid claims of unlawful discrimination, it is important to set up a system to ensure that all probationers are reviewed similarly.

8. Conduct

- 8.1 To ensure a reasonable standard of work you should ensure that the job description is adequate and that the employee receives training.

- 8.2 You should establish who you wish to handle grievances by staff (e.g. who do they report to in the first instance and then if no resolution) and how you will proceed in disciplinary matters. A precedent disciplinary and grievance procedure is provided with this specimen contract. It is recommended that you reserve the right to take action without recourse to the disciplinary procedure during the first 12 months of continuous service.
- 8.3 State member of staff from whom authorisation to use the internet and e-mail, other than for business purposes, must be sought.

Disciplinary Procedure

Undertaking formal disciplinary action without holding a meeting.

Gross misconduct. It would be very unusual to dismiss an employee without any hearing at all, particularly an employee who has been employed for more than one year. This can be left in but members should always seek advice before dismissing in these circumstances.

When dismissal is not being considered. If no meeting is held, any warning would have to be regarded as informal and could not be relied on as a step in the formal disciplinary procedures.

Other Disciplinary Matters. Those marked with * may well be gross misconduct and you should consider removing them from this category as otherwise a dismissal for unauthorised absence (for example) may be deemed unfair as the employee had been misled into thinking it would not be taken that seriously.

9. **Holidays.** For the purpose of the Written Statement of Particulars of employment enough information must be given to enable entitlement to be calculated precisely, including any entitlement to accrued holiday pay on termination. Also, it is important to specify details of the requirements for the notification of holidays in the statement otherwise the default provisions set out in the Working Time Regulations (WTR) will apply.
- 9.2 You may wish to omit, but this covers those employees who are always prone to be absent immediately before or after a Bank Holiday. You should note that statutory holiday has been increased and will by April 2009 include public holidays or other days in lieu. Although you may rely on this clause, you must not allow the employee's paid holiday to go below the statutory minimum.
- 9.3 The employer's decision must be reasonable.
- 9.4 Enter the start of the holiday year, which for simplicity can be the same for all employees, irrespective of when they started work. If you fail to specify the holiday year, the Working Time Regulations state that the year shall be deemed to start upon the commencement of employment.

- 9.5 Under the Working Time Regulations 1998 (as amended) an employee is entitled to 4.8 weeks leave, increasing to 5.6 in April 2009. This may include public and bank holidays. The Regulations state that during their first year of employment workers accrue their entitlement to paid holidays monthly in advance. Detailed rules govern how this leave must be taken, but many of the requirements may be varied by agreement between employers and workers.
- 9.6 You may choose to pay staff holidays at just the basic rate, or include any bonus etc. that they may normally have received had they been working. Any contractual overtime pay must be taken into account.
- 9.7 When an employee leaves the employee may still be entitled to some of their holiday entitlement. You may choose to pay the employee instead, or demand that the employee takes this holiday in the notice period. If the employee has taken more than the entitlement pro-rata for that year up to the date of leaving you can, with the employee's prior written permission [this will be covered where the employee has signed a copy of the contract agreeing to this], deduct the pay for the excess days from the salary, or insist on a repayment of the excess if this is impossible and you have included this in the Contract.
- 9.8 You may wish to restrict the days which count towards holidays if the employee is absent through sickness; however, the employee is entitled to a minimum of 4.8 (increasing to 5.6) weeks paid holiday; in the holiday year, even where on long-term sick leave. This clause must not be relied on where the absence is due to maternity leave.
- 9.9 It can be inconvenient for an employee to carry forward large amounts of holiday entitlement from one year to the next, but it can also be convenient for the employer to allow this.

10. Sickness or accident

Contact ACAS or see the ACAS website at www.acas.org.uk for sickness and accident procedures.

- 10.1* Use this clause if you choose not to operate a sick pay scheme except the Statutory Sick Pay (S.S.P.) scheme.
- 10.2* Use this clause if you operate a sick pay scheme. Enter the rates of entitlement that you consider fair at **. Be aware that there may be problems of entitlement when an employee moves from one scale to the next. You can terminate employment on the grounds of absence through ill health in certain circumstances, although legal advice will need to be taken. Lay down the procedure for how they notify you of their sickness in an Appendix to the contract. [*Guidance notes on drawing up these procedures are available from ACAS. See the ACAS website at www.acas.org.uk.*] Delete any of the notes that you prefer not to apply.

11. Pension

11.1 and 11.2. Delete if it does not apply. Note: In cases where there are fewer than five employees there is no requirement to have a stakeholder scheme, so neither may apply.

11.1 The Welfare Reform Pensions Act 1999 states that many employers must offer their employees access to a stakeholder pension scheme. This means that employers have to designate a stakeholder pension scheme for employees to join. However, there are certain exemptions. If an employer employs fewer than five people, or if the employer offers an occupational scheme that all staff can join within a year of starting work, then the requirements to provide access to a stakeholder pension scheme may not apply. Another exemption is where an employer offers employees access to a personal pension scheme which meets the following conditions:

- it is available to all employees who should have access to a stakeholder pension scheme;
- the employer contributes an amount equal to at least 3% of the employee's basic pay to the personal pension;
- the scheme has no penalties for members who stop contributing or who transfer their pension; and,
- the employer deducts the employee's contributions from their pay and sends them to the personal pension provider if the employee asks the employer to do so.

If you have an existing occupational scheme or an arrangement with a personal pension provider you should check with the provider of that scheme to find out if it meets the exemption conditions.

As an employer, you have various obligations, and you will need to designate a stakeholder pension scheme and give employees the name and address of the stakeholder pension scheme provider and contact details such as a named representative at the company, telephone and fax numbers and e-mail addresses.

For further information concerning stakeholder pensions you can call the Inland Revenue Employers' Helpline on 0845 714 31 43 or visit the following websites: www.stakeholder.opra.gov.uk or www.pensionguide.gov.uk

11.2 The employer is required to state whether a contracting out certificate is in force in respect of the employee's employment. This will depend on the type of pension scheme.

11.3 and 11.4 You should have rules which lay down the conduct of the pension scheme. Delete if no pension scheme.

12 Retirement Age. It is unlawful to require an employee to retire under the age of 65 in most cases. If you want to retire an employee at 65 you must inform them of this between six months and one year before the retirement date. This is regardless of any provisions as to notice or retirement date that may be in the contract. At the same time,

you must also advise the employee of his right to request that the employment continue after the retirement age. There is a specific procedure to be followed if such a request is made and you should seek legal advice if this situation does arise.

- 13 **Notice.** If 13.1* is used then 13.2.1* and 13.2.2* should be deleted, or vice-versa. Under 13.2.2 you can lay down the amount of notice that you expect and this may depend on the type of employment. It is more reasonable to expect 3 months notice from an optometrist than a receptionist. With clause 13.3, an indication should be given as to what constitutes gross misconduct, unless this is specified in the disciplinary rules contained in the Appendix. Clause 13.4 is optional but is recommended particularly for inclusion if you intend to enter into a restrictive covenant with the employee (see 24, below).
- 14 **Standards and working methods.** You should lay down the ground rules in your staff training. You should also have a disciplinary and grievance procedure (a precedent procedure is provided with this specimen contract) and seek advice before taking any precipitate action. **Never** dismiss a member of staff on the spot, but in the event of a serious breach of discipline suspend the employee and then consider the position carefully. Ideally, you should give staff a statement of the transgressions which you consider to be gross misconduct.
16. **Uniform.** Even if you do not provide a uniform it is reasonable to expect a satisfactory standard of dress, and you should lay this down before employment commences. If you do provide uniform you should specify who is responsible for its cleaning, repair and replacement.
17. **Changes in terms and conditions.** You can only change the contract by consent, but if you advise the employee that you wish to change that contract and no objection is raised then this should be adequate. However it is wise to issue a new version.
18. **Health and Safety.** The Health and Safety at Work Act 1974 imposes a duty on every employer of five or more persons to have a written health and safety policy statement which is given to all employees or displayed as a notice to bring it to their attention.
19. **Equal opportunities.** You may wish to lay this down in more detail by means of a statement given to the staff. Remember that once incorporated into the contract, you will be bound to honour the statement or else you will be in breach of contract.
- 20 **References.** It is recommended that satisfactory job references are obtained. Ideally one should be from a previous employer. You may also wish to undertake a criminal records check with the appropriate national criminal records service.

PROFESSIONAL STAFF'S RESPONSIBILITIES. *(Clauses 21 to 27 cover additional responsibilities which apply to professional staff.)*

- 21 **Standards of practice.** You should expect staff to be up to standards of their peers and conform to the law relating to practice. Delete the professional body as appropriate.

22 Professional fees

- 22.1 This will ensure that qualified staff are registered with the GOC. It is common for the employer to pay this. It is tax deductible.
- 22.2 This will ensure that qualified staff are covered by clinical negligence insurance. It is common too for the employer to pay this. It is tax deductible. [Remember: an employer's AOP membership does not cover other GOC registered staff against claims for clinical negligence.]
- 22.3 You may wish to reclaim sums paid from the employee. In order to be able to deduct such monies from the employee's pay, you are required to have the employee's written agreement. A copy of the contract containing this clause, signed by the employee, will be deemed to be agreement for this purpose.

23 **Continuing Education (CE).** The contract should take account of the need for the optometrist to keep up-to-date with developments in optometry through undertaking continuing education. Where CE will be undertaken by way of courses the employer should decide 23.1* whether s/he will pay for the course, or 23.2 whether the employee will be expected to pay for the course, and/or 23.3 whether the employer will pay the employee for the time off of work to take the course. Whatever is decided should be stated in the contract as should any terms agreed in relation to the repayment of fees in the event that the employee leaves employment before an agreed date.

24 Restrictive covenant (i.e. clause in restraint of trade)

This clause, known as a 'restrictive covenant', can cause problems. It is unenforceable unless reasonable and necessary to protect the practice's legitimate business interests, you cannot protect yourself from competition itself. It would be expected that the employer would take positive action to protect his own practice (for example by writing to patients informing them that there has been a change but that the practice has replaced the employee and will continue to offer them the same service.)

The same restrictions cannot be used for all staff and should be the minimum required to protect the interests of the practice. These will vary according to the type of staff and location of the practice: e.g. a junior assistant optometrist may leave and join another employer or set up independently without causing potential loss of patients to the practice, in which case an onerous restrictive covenant would be unnecessary and could be challenged in the courts. The same may not apply to a practice manager who has used your client base to build up a reputation and then leaves. The potential loss here could be considerable and it is reasonable to protect yourself against this for a reasonable period of time.

If you believe a former employee has breached the restrictive covenant, it can be fatal to your chances of success if you do not act quickly. Therefore, you should seek advice from a solicitor immediately you become aware of a potential breach. It is important to note here that the instigation of such proceedings is likely to be costly and so should not be undertaken lightly.

25. **Sole employment.** Ensures that the employee works for you and no one else. This should be enforceable providing that consent is not unreasonably withheld.
26. **Activities outside of work.** This can protect the employer against the actions of an employee who takes on an outside job which may reflect badly on your practice, or who has outside activities which make them unfit to work.
27. **Practice records.** This protects the employer against the employee who takes away a list of the patients of the practice, whether as a "hard copy", computer disk or in memory and then uses it against the interests of the practice. It also gives the employee access to a patient's records should they need this to defend a claim against them. This access is the same access which is given under section 35 of the Data Protection Act 1998.

PRE-REGISTRATION STUDENTS. (*Clauses 28 - 31 apply to pre-registration students only.*)

28. Duration of employment.

One of the circumstances which can give rise to a claim for unfair dismissal is where a fixed term contract expires and is not renewed. To qualify as an optometrist the pre-registration student must complete the necessary assessments during a training contract of around one year's duration. A claim for unfair dismissal could be brought if the employment is discontinued after a year, or even shortly before a year from the commencement. One way to reduce the possibility of the dismissal being unfair is to bring it about in accordance with terms set out in the employment contract. (In addition to this, though, the procedures by which the dismissal is handled have to be fair, and legal advice should be sought on this.) Clauses 28.2.1 and 28.2.2 set out alternative terms to allow the dismissal in accordance with the terms of the contract.

28.1 This clause will be used together with either clause 28.2.1 or 28.2.2 to ensure that at the end of the stated term the pre-registration student's contract is terminated and thereby reducing the risk of any successful claim for unfair dismissal. The alternative is the use of clause 28.3, see note below.

28.2 The alternatives in clauses 28.2.1* and 28.2.2* provide contractual terms which, if met, would mean that the termination of the contract in accordance with those terms may be lawful and, perhaps, fair. These relate, respectively, to the passing or failing of the assessment at the end of the Pre-registration Period. The contract should state the date by which this should happen (see clause 1.3). If the student wished to claim unfair dismissal at the end of the contract, the employer may be able to justify the dismissal as fair because it arose for the reasons stated in the contract.

Note. Should the employer allow the fixed-term contract to run on after the expiry date, this could adversely affect the employer's chances of avoiding a claim for unfair dismissal upon later termination of the contract, unless the contract provided for circumstances in which the contract would then be terminated. Such circumstances are provided for in clause 28.3 in the specimen contract.

28.3 This alternative to clauses 28.1 and 28.2, allowing the employer to leave the options open, may permit a claim for unfair dismissal when the contract is terminated after more than a year. By setting out the circumstances in which the contract may be terminated after 12 months ó passing the qualifying assessment, or failing the qualifying assessment, as stated ó this should provide the contractual terms which may make a dismissal for the stated reason lawful and, potentially, fair. Employers, however, must be aware that in addition to a stated reason for dismissal making it fair, the manner in which it is carried out, e.g. adequate notice, must also be fair in order to avoid a claim for unfair dismissal, and legal advice should be taken.

29 **Payment of expenses.** Decide what expenses you wish to pay, or you may decide to pay them only if the student stays with you. 29.1* and 29.2* are alternatives.

30. **Preparation for final assessment**

30.1 It is in your interests to help the student pass the qualifying assessment, but this can be abused.

30.2 & 30.3 You can insist that the student is properly prepared for the assessment

31. **Duties.** The Pre-registration Period is designed to give an all round training in addition to the clinical experience but some students object to more menial tasks, such as reception/ filing/ checking etc.

Please note: The Association of Optometrists has made every effort to ensure that the information in this specimen contract is correct, however, we cannot accept any liability for the accuracy or content. People relying on this specimen contract do so at their own risk, but you may check with the Association for guidance.

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