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# The Employment Contract: Drafting Woes

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## Subsidiary Legislation 452.83

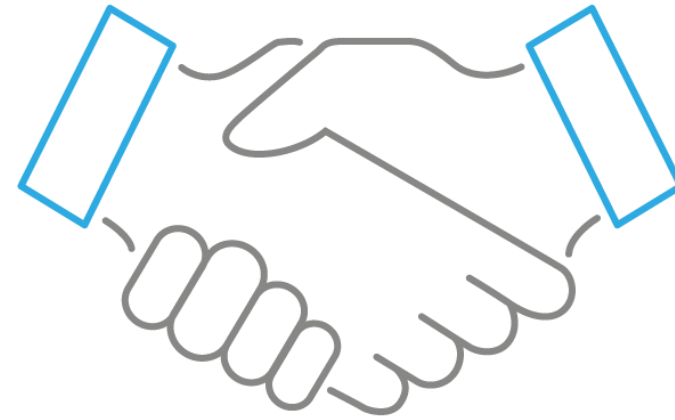
These Regulations apply to employees who:

- Have been employed with an employer for over a month
- Work more than 8 hours a week

The Regulations may in some cases not apply to employees appointed to perform a specific task.

The new Transparent and Predictable Working Conditions Directive is similar to the Information to Employees Regulations, with some new provisions which employers should take into account.

The Directive is planned to come into force in August 2022.



Preferably, provide a **written agreement**

If not, a **letter of engagement** or a **statement** signed by the employer may suffice

- How to decide which to provide?
- What do I need to include?
- Can I do away with having a written agreement or statement?



Currently, most basic information needs to be provided to the employees within **8 working days** of the first day of work.

Under the new Directive, most information will need to be supplied within **7 calendar days**. Certain other specific information may be provided within **1 month**.



Contracts may be of 2 types:

- Fixed term
- Indefinite

Employees may work:

- Full-time
- Part-time
- Casual





- Fixed term (also known as definite) contracts run for a specified period of time, which may or may not be renewed.
- The Contract of Service for a Fixed Term Regulations (SL 452.81) state that employees on fixed term contracts must be treated **equally** to comparative employees on indefinite contracts.
- Employees on fixed term contracts must be informed of indefinite posts which become available.
- You cannot change from an indefinite to a definite contract.

- Either party may terminate the contract by paying a penalty amounting to half the remaining salaries to be paid.
- If a new fixed term contract is entered into within **6 months from the termination** of a previous one with the same employe, it consitutes **continuous employment** if the main tasks and duties remain essentially the same.

## Employer details:

- Name
- Registration number
- Place of business (address)

## Employee details:

- Identification document number
- Sex
- Address

Having the **commencement date** noted in the contract is essential. Note that the commencement date may not always be the same as the date on which the contract is signed.

Why is this important?

- Charlene Vella vs. Banif Bank (Malta) plc (2012) - application of commencement date over agreement date is a definite answer



The period set for probation must be included. At the same time, take into account:

- If you will apply the 6 month or 12 month period (the latter applies for technical, executive, management or administrative roles whose pay is at least double the minimum wage)
- If you will come to an agreement for a short probationary period



The Directive provides that the probationary periods of fixed term contracts must be **proportionate to the expected period of duration of the contract.**

Renewals of fixed term contracts may not provide for renewed probationary periods.



Member States may legislate to provide for longer probationary periods where necessary by virtue of the nature of a given role.

Where a worker has been absent from work during the probation period Member States may provide that the probationary period can be extended correspondingly in relation to the duration of the absence.



“Congratulations. I hear you passed your first month’s probation.”



Will you provide for:

- An hourly rate?
  - A weekly rate?
  - A monthly rate?
- 
- ✓ How is overtime to be paid?
  - ✓ When will wages be paid? In what manner?
  - ✓ Budget 2020 – COLA increase of €1.75 per week





You should always provide for statutory bonuses – these are non-discretionary.

You may also provide for other bonuses or allowances, such as:

- Performance bonuses
- Car allowance
- Phone allowance
- Equipment allowance

## Working time:

- Will employees be working rigid hours, or on flexi-time?
- Will you provide breaks? Paid or unpaid?
- Will you set a time recording system?

## Place of work:

- Will employees be working at several locations?
- Will employees be working abroad?



- What are the maximum regular working hours per week?
- What are the basic permitted overtime hours?

Employers should consider having signed opt-out agreements to allow cases of employees working over the statutory maximum working hours. Such agreements should be signed following the contract of employment being entered into.

Employees must be informed of:

- All paid holidays – covering public and national holidays
- Vacation leave
- Budget 2020 – one more day of leave from 2021!

Will you allow carry-over of vacation leave?



Employees must be informed of:

- Sick leave entitlements (which may differ depending on your applicable Wage Regulation Order)
- When they have to submit a doctor's certificate
- If you may send a company doctor to check on them
- Provisions on longer periods of leave



Other leave entitlements, such as:

- Birth leave
- Bereavement leave
- Injury leave
- Jury leave

An outline of the employee's role, including:

- Job title
- Job grade
- Nature and category of work (where applicable)
- Reporting lines

What about providing a job/role description? Substantial changes to the employee's role post-signature may require the employee's express consent.

Your contract should provide that the employee must adhere to the content of the handbook, which should contain basic policies and procedures (such as disciplinary and grievance procedures, anti-harassment and bullying policies, leave policies etc.)

Employers should not include handbook content in the contract for ease of amendment. Furthermore, in this way a breach of a policy won't result in a direct breach of contract.



- What fines will you impose?
- When may an employee be liable to a fine?

IMPORTANT – to be able to impose fines on employees, you must be in possession of a **fines permit** issued from the DIER. Without it, the imposition of fines is illegal.



Is the employee (in one's role or grade) covered by a collective agreement?

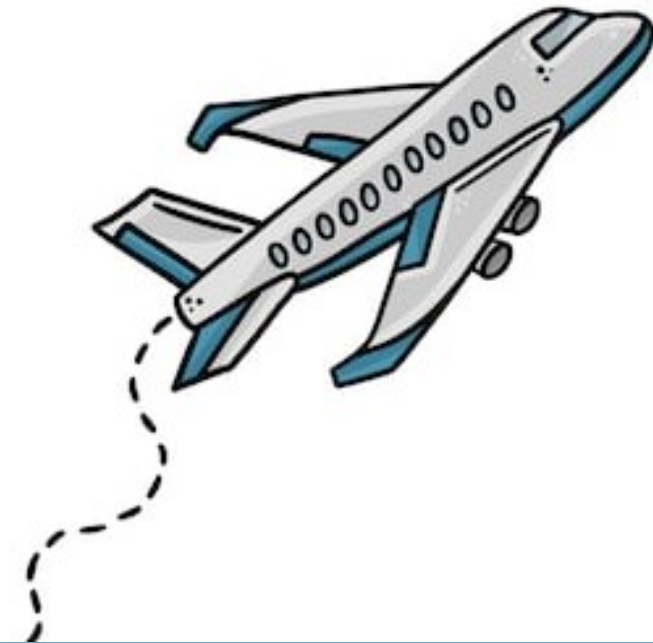
It is **essential** to check out whether your industry falls under the competence of a **Wage Regulation Order**, which may provide for distinct conditions of employment depending on the sector or industry.

**IMPORTANT**

When an employee works abroad for over a month, they must have their contract or statement in hand **before they leave!**

They must also be informed about:

- How long they will work abroad
- In what currency they'll be paid
- Any benefits (cash or kind)
- Any conditions regarding return to Malta



Employees may sometimes find a second job, or be engaged in a self-employed venture

- How, if at all, will you limit employees from having second jobs?
- Will such limitation be limited to jobs in the same industry?
- Will you oblige employees to request written authorisation from you?

The new Directive provides for a prohibition from such restrictions where the other work is done outside of the employee's work hours with you. Such employees cannot be treated less favourably due to such circumstances.

Confidentiality is a crucial element in various businesses as employees may be exposed to a significant amount of **confidential business information**.

Ensure that employees are obliged to **return or delete (from own devices) any company property or information** which they possess upon termination.



What kind of restrictions may be placed on employees in the contract?

- **Attilio Vassallo Cesareo vs Anthony Cilia (2006)** – a restraint of trade provision must be favourable to both (quid pro quo) and not only to one party)



- **Antonio's Barbershop case (Camilleri vs. Sicurella, 2018):**
  - **Restraint on working with any type of competitor (barbers, hairdressers, sale of men's hair products etc.) anywhere in Malta:** this restrained the entirety of the plaintiff's working ability in Malta, and thus violates the very right to work enshrined in the Constitution of Malta (even if a non-citizen).
  - **Restraint on soliciting clients/recent ex-clients:** should only apply to the clients with whom the plaintiff had direct dealings
  - **Restraint on soliciting employees to work with competitors:** totally illegal as employees are not the employer's 'assets' (*FirstUnited Ltd v. Farrugia Wismayer*) – confidentiality restrictions will nonetheless apply



Fixed term contracts ***must*** include:

- A provision on the expected termination date of the contract

Fixed term contracts ***may*** include:

- Information on penalties if a party terminates the contract before the envisaged termination date

Indefinite contracts should include **notice periods**, which may be:

- As per law
- As agreed between the parties

You may also include:

- Grounds for dismissal (and examples)
- Obligations upon dismissal



Ensure that your employees are informed that they are obliged to delete or erase any employer information which they possess.

The clause should also include a reservation of the employer's right to take legal action in case of non compliance.



You should ensure that employees are informed of 2 basic criteria:

- That the information you collect about them will be safeguarded through the **Employee Privacy Notice**
- That they will abide by your data protection standards and rules when handling data while on the job



You may opt to provide for the possibility of funding employee **training courses or professional development schemes.**

Whilst you may include such a clause, make sure that the specifics are not regulated by the contract, but in a separate agreement.



Under the new Directive, any training to be provided must be mentioned in the contract of employment.

If you are required (by law/collective agreement) to provide training to workers to carry out the work for which they are employed, **such training shall be provided to free of charge, shall count as working time and, where possible, shall take place during working hours.**



The Entire Agreement clause provides that the written agreement being entered into between the employer and the employee is the only agreement which is to apply in the circumstances and that no other agreement (whether in the form of anything in writing, any mutual oral agreement etc.) shall apply despite what might have been acceded to before.

In a contract, you should indicate:

- Which jurisdiction's law applies to it
- Which jurisdiction's courts or tribunals apply



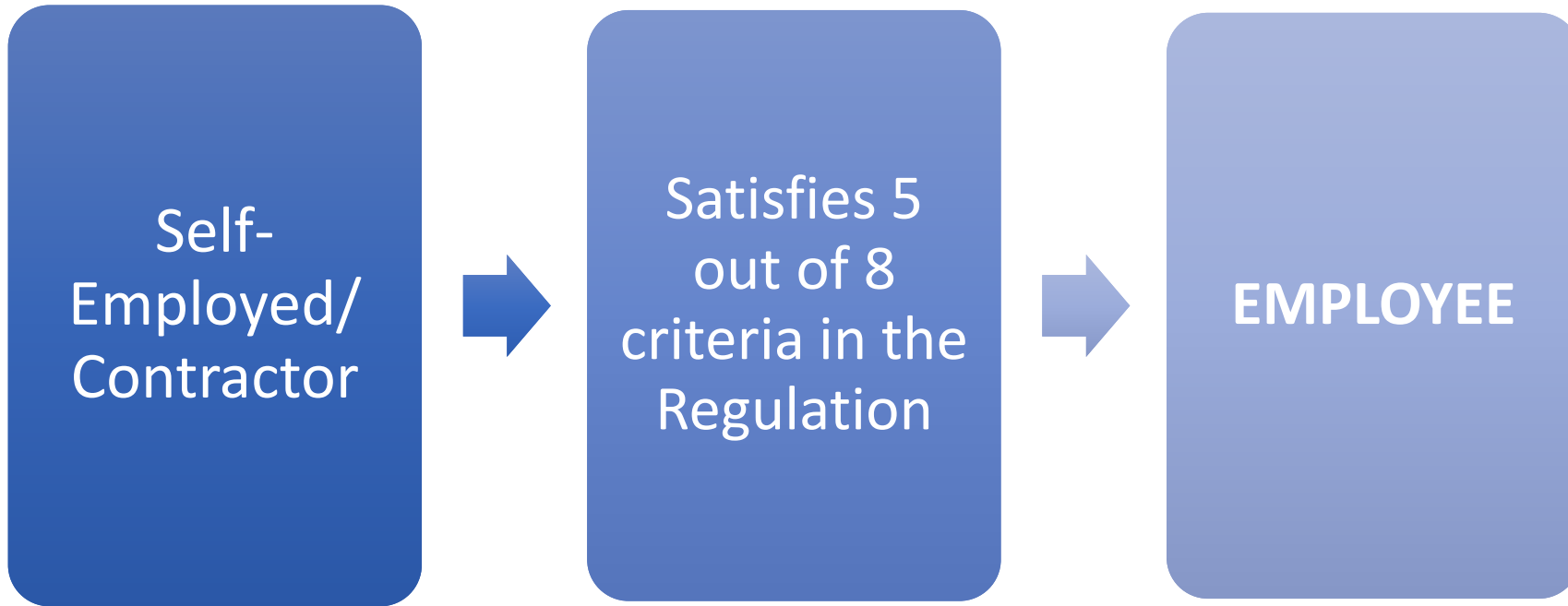


If you want to make changes to conditions laid out in employment agreements or statements, changes must be made **in writing** via a **signed statement or annex**.

Changes in writing must be delivered within **8 working days** from the change.

These instructions also apply to changes in conditions in the law.



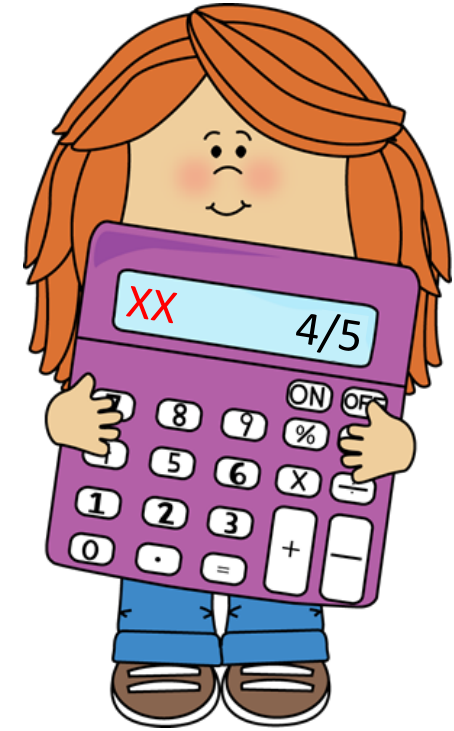


- 75% of the worker's annual income comes from the person for whom the service is carried out
- One person determines what work is assigned, how and from where it is to be carried out
- Equipment, tools and materials are provided by the person for whom the service is carried out
- The worker is subject to a schedule or minimum work periods established by the person receiving the service

- The worker cannot sub-contract to other individuals
- The worker is integrated into the service receiver's work structure (or hierarchy) and production process
- The worker's activity is a core element in the organisation and pursuit of objectives in the service receiver's business
- The worker carries out similar tasks to those of existing employees (or former ones)

## Albert Falzon vs. Melita Mobile Ltd – Court of Appeal, 2017

- The employee was responsible for taking care of a mobile trailer for Melita as a **contractor, not an employee**
- The Tribunal found that he satisfied only 3 of the 8 criteria and therefore dismissed the case
- The plaintiff appealed, claiming that he satisfied at least another 3 criteria, however the Court of Appeal only found he satisfied 1 other criterion, which still did not reach the threshold of 5



During the **2020 Budget**, various measures relating to employment were announced, namely:

- An extra day of leave (total of 28)
- COLA increase of €1.75 per week
- Increased work inspections
- Wage supplement scheme & other economic regenerations schemes extended to March 2021
- Extension of 1.5% tax concession on transfer of business
- Incentives to encourage better Work-Life Balance ...



## Legal Notice 402 of 2020 (Public Health Act):

Masks must be worn **all the time** when a person is outside of their residence (with a few exceptions), which should mean that this applies to workplaces too! **Stay safe** 😊









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