

Employment Law Audit

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1. Employment Law

2. OHS Law

3. Data Protection

Why is an audit important?

- What is an employment law audit?
- Why is it important?
- Is it a legal requirement?
- What is the aim of the audit?



Understanding
your workforce –
who is entitled to
protection?

- Who is an employee?



Definitions

- Chapter 452:

"employee" means any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of another person, including an outworker, but excluding work or service performed in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service"

Contract Requirements

Formation of contracts

Employer-employee relationship is a question of fact not only of contract;

Contract of employment – “an agreement, whether oral or in writing, in any form, whereby a person binds himself to render service to or to do work for an employer in return for wages”

Obligation of Employers: Transparent and Predictable Working Conditions – information which must be given to employees either in a contract or a statement.

Employer must also keep records with certain information of employees.

Transparent and Predictable Working Conditions

- Cut-off date – 1st August 2022
- 1/8/22 onwards – contracts need to comply with the new requirements.
- Prior to this date – contracts need to comply with the Information to Employees Regulations (now repealed) BUT employee can make a request to receive the additional information.
- However – still entitled to the minimum rights established in the regulations.
- Regulations also apply to seafarers with some exceptions.

Timing

- Information from a to e and g k l m – to be provided between the 1st working day and not later than the 7th calendar day.
- Other information mentioned – within one month of the first working day.

Information to be provided...

- (a) the name, registration number and registered place of business of the employer and a legally valid identification document number, gender, and address of the employee and the place of work:
- Provided that in the absence of a fixed place of work it should be stated that the employee will be employed at various places together with the registered place of business:
- Provided further that if there is no registered place of business, the domicile of the employer is to be stated

Continued...

- (b) the place of work. Where there is no fixed or main place of work, the principle that the worker is employed at various places or is free to determine his place of work, and the registered place of business or, where appropriate, the domicile of the employer;
- (c) the title, grade, nature or category of work for which the worker is employed;
- (d) brief specification or description of the work;
- (e) the date of commencement of the employment relationship;

Continued...

- (f) in the case of a fixed-term employment relationship, the end date or the expected duration thereof;
- (g) in the case of temporary agency workers, the identity of the user undertakings, when and as soon as known;
- (h) the duration and conditions of the probationary period;
- (i) the training entitlement provided by the employer, if any;

Continued...

- (j) the amount of paid leave to which the worker is entitled, including but not only, vacation leave, paternal leave, parental leave, maternity leave, carer's leave, urgent family leave, bereavement leave, marriage leave, quarantine leave, jury service leave, sick leave and injury leave, or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;
- (k) without prejudice to article 36 of the Act, the procedure to be observed by the employer and the worker, including the formal requirements and the notice periods, where their employment relationship is terminated or, where the length of the notice periods cannot be indicated when the information is given, the method for determining such notice periods;

Continued...

- (1) without prejudice to Title I of Part III of the Act, and every other legislation in force laying down the minimum remuneration, overtime and special rates of pay, the remuneration including the initial basic amount, any other component elements, if applicable, indicated separately, the frequency and method of payment of the remuneration to which the worker is entitled and the conditions under which fines maybe imposed by the employer and their quantum;

Continued...

- (m) without prejudice to the Organisation of Working Time Regulations, and other more specific provisions relating to the organisations of working time for certain occupations or occupational activities, if the work pattern is entirely or mostly predictable, the length of the worker's standard working day or week and any arrangements for overtime and its remuneration and, where applicable, any arrangements for shift changes;

Continued...

- (n) if the work pattern is entirely or mostly unpredictable, the employer shall inform the worker of:
 - (i) the principle that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours;
 - (ii) the reference hours and days within which the worker may be required to work;
 - (iii) the minimum notice period to which the worker is entitled before the start of a work assignment and, where applicable, the deadline for cancellation of the work assignment;

Continued...

- (o) any collective agreements governing the worker's conditions of work or in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of such bodies or institutions within which the agreements were concluded;
- (p) where it is the responsibility of the employer, the identity of the social security institutions receiving the social contributions attached to the employment relationship and any protection relating to social security provided by the employer.
- (q) any other relevant or applicable condition of employment.

Workers working outside Malta

- Workers working outside Malta in excess of 4 consecutive weeks – need to be in possession of required information before departure and must also include:
 - (a) the country or countries in which the work abroad is to be performed and its anticipated duration;
 - (b) the currency to be used for the payment of remuneration;
 - (c) where applicable, the benefits in cash or in kind relating to work assignments abroad; and
 - (d) information as to whether repatriation is provided for, and if so, the conditions governing the worker's repatriation.

Records to be kept by the employer...

- 9.(1) Every employer shall keep a register or registers indicating, in respect of each worker:
- (a) the name, address, gender, a legally valid identification document number and date of birth of the worker;
 - (b) the occupation of the worker;
 - (c) the date of commencement of employment;
 - (d) the nature of the contract of employment namely whether the contract is of an indefinite or of a fixed duration and in the case of fixed term contracts of employment the date of termination of such contract;
 - (e) the time, paid for at ordinary time rates, during which the worker is employed;
 - (f) the time, paid for overtime or higher rates, during which the worker is employed;
 - (g) the periods of daily and weekly rest accorded to the worker;
 - (h) the periods of leave accorded to the worker;
 - (i) the total wages paid to the worker each week; and
 - (j) any change or update in the conditions of the worker's occupational status.

Additional Information...

- (2) In the case of workers who are outworkers, or whose wages consist of a share in the profits or of a commission on sales or payments made or received by the employer, employers or the persons giving out work to the outworker, as the case may be, shall keep a register or registers showing:
 - (a) the name, address, gender, a legally valid identification document number and date of birth;
 - (b) the date of commencement of the agreement;
 - (c) the nature of the work;
 - (d) the rate of wages;
 - (e) the total amount of wages paid to the worker;
 - (f) the place or places where the worker ordinarily works if such place is not under the control and management of the employer;
 - and (g) the hours of work and daily and weekly rest awarded to the workers in so far as the employer is by law required to observe any such conditions of employment.

Director may request information re:

- (a) the name, gender, a legally valid identification document number and address;
- (b) the occupation;
- (c) the date of birth;
- (d) the wages paid;
- (e) the hours of work;
- (f) the date of engagement;
- (g) a copy of the registers or part thereof, kept in accordance with the provisions of these regulations; and
- (h) any other information which the Director may request in connection with the conditions of employment of the workers.

On Demand Contractors

- Prohibition of zero hour contracts:
- What is a zero hour contract?

A contract of employment or other work arrangement under which a worker is required to be available for work or services as and when needed by the employer, and where the employer promises payment on the basis of hours so worked without guaranteeing a minimum number of hours to the worker.

Zero Hour contracts prohibition...

- (a) where the nature of the activity concerned requires the availability of replacement workers on short notice; and as long as the zero-hour contract is not the whole-time employment of the worker;
- (b) where the worker is a full-time student, subject to any applicable laws, regulations and administrative or statutory provisions.

Parallel Employment

- The employer cannot prevent a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subject a worker to adverse treatment for doing so... BUT – an employer may prohibit a worker from taking up employment with other employers on the basis of objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interest.

Minimum Predictability

- If work pattern is mostly unpredictable, the following conditions need to be satisfied:
 - i. Work takes place within predetermined reference hours and days;
 - ii. Worker is informed of a work assignment within a reasonable notice period.
- Law provides for specific notice periods depending on length of work assignment.
- Conditions not satisfied – employee can refuse the work assignment without adverse consequences.

Transition to other form of employment

- Employee with at least 6 months service AND completed probation:
can request employer employment with more predictable and secure working conditions if available.
- Employer must provide a written reply within 1 month from request.
- Natural persons or SMEs – within 3 months.

Failure to provide information...

- Can submit a complaint to the Director – can impose a fine on the employer.
- Unfair dismissal if the reason for dismissal is that worker refused to comply with a requirement of the employer in contravention to these regulations.
- May request employer in case of dismissal to provide duly substantiated grounds in writing for the dismissal.



Periods of Probation

- New rules – 2 rules for every 6 month period...
- Fixed term contract cannot be shorted than 6 months.
- Suspension in case of leave for more than 2 weeks.

Contracts of Service v Contracts of Employment

- Employed persons – work under a contract of services;
- Self-employed persons – work under a contract for services;
- Main distinction as found in the definition of employee: works under the direction and control of another person with regard to the manner in which the work is done.
- Difficult to determine in the case of highly skilled workers / professionals.
- Employment Status National Standard Order (S.L. 452.108) – criteria to determine whether a person is an employee or self-employed;
- Independently of the intention of the parties or the designation in the contract;
- Presumption of an employment relationship if at least 5 out of 8 criteria are satisfied.
- Exemption may be granted by the Director.

Criteria:

- (a) he depends on one single person for whom the service is provided for at least 75% of his income over a period of one year;
- (b) he depends on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out;
- (c) he performs the work using equipment, tools or materials provided by the person for whom the service is provided;
- (d) he is subject to a working time schedule or minimum work periods established by the person for whom the service is provided;
- (e) he cannot sub-contract his work to other individuals to substitute himself when carrying out work;
-

Criteria:

- (f) he is integrated in the structure of the production process, the work organisation or the company's or other organization's hierarchy;
- (g) the person's activity is a core element in the organization and pursuit of the objectives of the person for whom the service is provided; and
- (h) he carries out similar tasks to existing employees, or, in the case when work is outsourced, he performs tasks similar to those formerly undertaken by employees.

Why is the difference relevant?

- Issues of income tax, social security contributions and VAT registration;
- Issues of employee registration with JobsPlus;
- Issues of employee rights – leave, sick leave, other leave, government bonus.
- Issues of protection from termination, contract renewal – reinstatement and compensation.
- Jurisdiction of the Industrial Tribunal – only in the case of ‘employees’.

Why is the difference relevant?

- Issues of jurisdiction in the case of disputes:
- Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- *In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.*
- General rule → *persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*
- What is domicile?

Jurisdiction

Article 21

1. An employer domiciled in a Member State may be sued:
 - (a) in the courts of the Member State in which he is domiciled; or
 - (b) in another Member State:
 - (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or
 - (ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Jurisdiction

- Article 22
 - 1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.
 - 2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.
- Article 23
 - The provisions of this Section may be departed from only by an agreement:
 - (1) which is entered into after the dispute has arisen; or
 - (2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

Pre-Brussels Regulation

- 1991 case (Decision 427) – Maria Dal Pane Ciarlo and Scuola Elementare Dante Alighieri: employer with the Italian government but paid by the Italian Embassy in Malta.
- Tribunal – since the employer was an Italian entity (Italian Ministry for Foreign Affairs), proceedings could only be instituted in Italy.
- Application of Private International Law rules.
- Today?

Choice of Law

- Regulation 593/2008 on the law applicable to contractual obligations (Rome I)
- Article 8 Individual employment contracts:
 1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

Choice of Law

- 2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.
- 3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.
- 4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

Engaging workers in other countries

- What contract can be provided for workers of a Maltese company working abroad?

Roski v Emperor Aviation (CoA) 91/2019

- Tribunal considered – he was not registered with JobsPlus + never paid tax or social security contributions in Malta; he had refused to furnish documents to prove that his only income was through the defendant company and that he had paid his taxes and social security in the UK; he had issued invoices in the name of a company;
- Other factors such as being subject to time schedules and using equipment of the company – no other choice since he was a pilot – did not mean he was an employee.



Case 3527/HW

Bourgeais v Sara Grech Ltd

15/12/20

- Sub-agents / estate agents working with a company – can they be deemed to be an employee or is there a general exemption for them issued by the DIER?



Albert Falzon v Melita Mobile Ltd (CoA 30/1/2017)

- Tribunal decision – worker did not satisfy at least 5 of the criteria (6/11/2014)
- CoA – considered again whether the applicant met the criteria or not and reconfirmed decision of the Tribunal.



Special Considerations....

- Young Persons (Employment) Regulations S.L. 452.92 – persons employed under 18 years of age.
- 10.(1) An employer who employs a young person shall:
 - (a) before employing the young person, require the production of a birth certificate, or other satisfactory evidence attesting to the age of the young person;
 - (b) before employing a young person, obtain the written permission of a parent of the young person; and (c) maintain a register, or other satisfactory record, including, in relation to every young person employed, the following particulars:
 - (i) full name;
 - (ii) date of birth;
 - (iii) the time the young person commences and finishes work each day;
 - (iv) the rate of wages or salary due to the young person for his or her normal working hours each day, week, month or year, as the case may be; and
 - (v) the total amount actually paid to each young person by way of wages or salary.
 - (2) An employer shall keep, at the place where a young person is employed, such records as are necessary to show that the provisions of these regulations are being complied with. Such records shall be retained by the employer for at least three years.

Policies





Policies

- Which are the policies required by law?



1. Whistleblowing: Who is a whistleblower?

Reporting Person: *“A natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities.”*

Whistleblower: *“Any employee who makes a disclosure to a whistleblowing reporting officer or a whistleblowing reports unit, as the case may be, whether it qualifies as a protected disclosure or not under this Act.”*

The protection afforded to a whistleblower shall also be extended to:

- Facilitators – natural persons who assist a reporting person in the reporting process in a work-related context, and whose assistance should be confidential;
- third persons who are connected with the reporting persons and who could suffer retaliation in a work-related context, such as colleagues or relatives of the reporting persons;
- legal aid in criminal and in crossborder civil proceedings, and in further proceedings and legal counselling or other legal counselling.



What is whistleblowing?



Who is an employee for the purposes of the Act?

Any person who:

- *has **entered into or works** under a contract of service with an employer; **including a contractor or subcontractor** who performs work or supplies a service or undertakes to perform any work or to supply services; or*
- *has **undertaken personally to execute any work or service for, and under the immediate direction and control of another person**, including an **outworker**, but **excluding** work or service performed in a **professional capacity** to which an obligation of professional secrecy applies in terms of the Professional Secrecy Act [...]*

Who is an employee for the purposes of the Act?

Any:

- **volunteer** in terms of article 2(1) of the Voluntary Organisations Act even when such work or service is not regulated by a specific contract of service;
- **candidate for employment** only where **information** concerning improper practices has been **acquired during the recruitment process** or **other pre-contractual negotiations**:

Who is an employee for the purposes of the Act?

A very important addition to the definition of 'employee' in the Act:

Shareholder and persons belonging to the administrative, management, or supervisory body of an undertaking, including non-executive members, and paid or unpaid trainees;



Before:



**MORE THAN 250
EMPLOYEES**



**TOTAL BALANCE SHEET
EXCEEDING €43,000,000**



**ANNUAL TURNOVER
EXCEEDING €50,000,000**

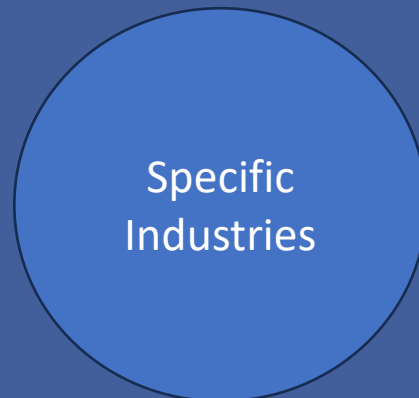
Currently:



50 OR MORE WORKERS



WHERE A RISK ASSESSMENT REQUIRES AN ORGANIZATION IN THE PRIVATE SECTOR WITH LESS THAN 50 WORKERS TO ESTABLISH AN INTERNAL DISCLOSURE CHANNEL AND PROCEDURES

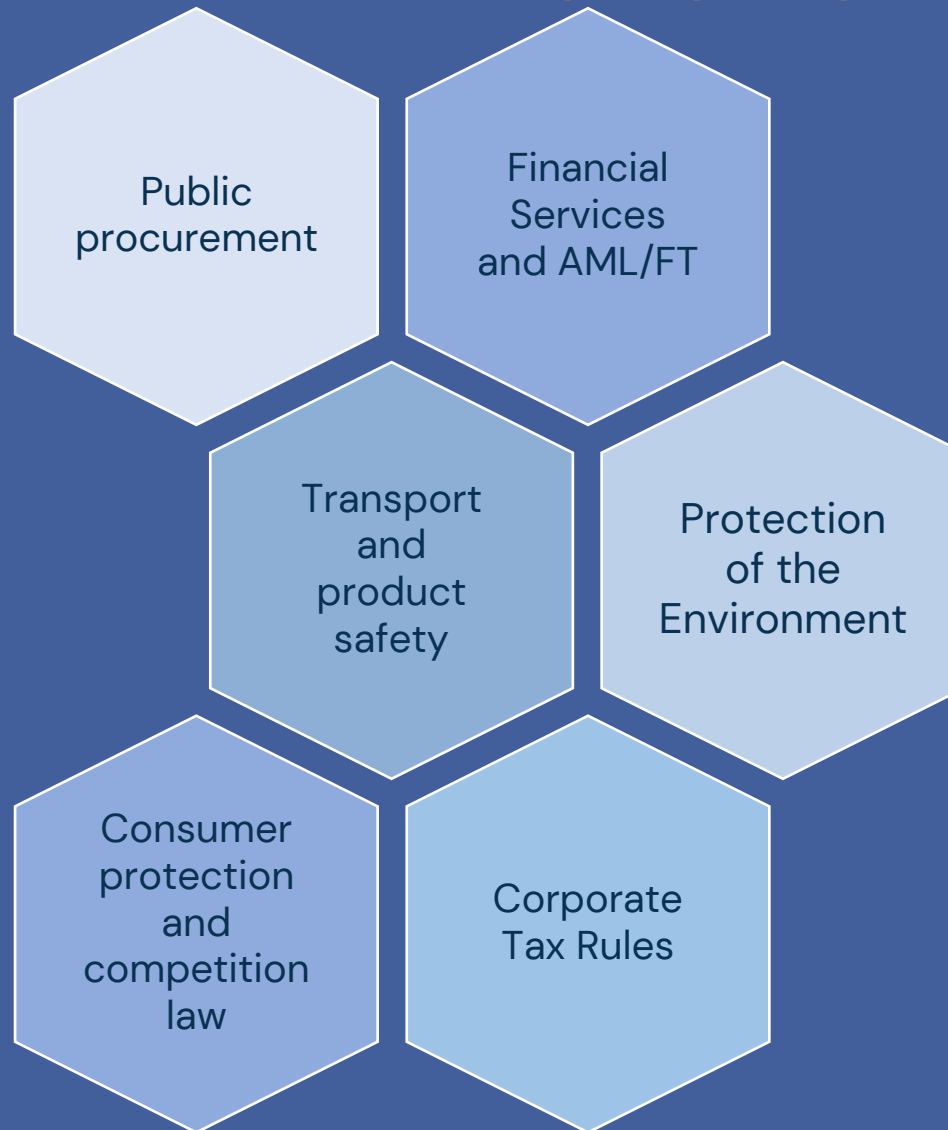


What can employees report?

Improper practices:

- a) Person's failure to comply with any law to which he is subject
- b) Where the health and safety of an individual has been endangered
- c) Damage to the environment
- d) Corrupt practices
- e) Criminal offences
- f) Miscarriages of justice
- g) Bribery

By virtue of the amendments, improper practices now extend to:



What are employees protected from?

Detrimental Action:

- i. Action causing injury, loss or damage; and /or
- ii. Victimisation, intimidation or harassment; and/or
- iii. **Occupational detriment; and/or**
- iv. Criminal prosecution relating to calumnious accusations and/or;
- v. Civil or criminal proceedings or disciplinary proceedings



What are employees protected from?

Occupational detriment:

- a) Suspension, lay-off, dismissal or equivalent measures;
- b) Demotion or withholding of promotion;
- c) Transfer of duties, change of location of place of work, reduction in wages, change in working hours;
- d) Withholding of training;
- e) A negative performance assessment or employment reference;
- f) imposition or administering of any disciplinary measure, reprimand or other penalty, including a financial penalty;
- g) Coercion, intimidation, harassment or ostracism;
- h) Discrimination, disadvantageous or unfair treatment;
- i) Failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he would be offered permanent employment;



What are employees protected from?

Occupational detriment (cont'd.)

- j) Failure to renew, or early termination of, a temporary employment contract;
- k) Harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;
- l) Blacklisting on the basis of a sector or industry-wide information or formal agreement, which may entail that this person will not, in the future, find employment in the sector or industry; early termination or cancellation of a contract for goods or services;
- m) Cancellation of a licence or permit;
- n) Psychiatric or medical referrals;
- o) Being subjected to any disciplinary action including for breach of ethics or confidentiality;
- p) Being subjected to a term or condition of employment or retirement which is altered or kept altered to his disadvantage.



Disclosures



PROTECTED



UNPROTECTED

Reporting Channels

**Internal
Disclosures**

**External
Disclosures**

**Public
Disclosures**

Employers' Information Obligation



Clear and accessible information on internal and external reporting should be made available



Whistleblower Policy Document

What should a Policy contain?



2. Sexual Harassment:

- Equality for Men and Women Act – the employer is deemed to have discriminated against a person if – the obligation to suppress sexual harassment is neglected;
- How can the employer suppress sexual harassment at the workplace? – by taking such steps as are reasonably practicable to prevent sexual harassment.



What is harassment?

- a) to subject other persons to an act of physical intimacy; or
- (b) to request sexual favours from other persons; or
- (c) to subject other persons to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of any written words, pictures or other material, where the act, words or conduct is unwelcome to the persons to whom they are directed and could reasonably be regarded as offensive, humiliating or intimidating to the persons to whom they are directed; or
- (d) the persons so subjected or requested are treated less favourably by reason of such persons' rejection of or submission to such subjection or request, it could reasonably be anticipated that such persons would be so treated.

Equal Treatment in Employment Regulations

- Same principles in the Equal Treatment in Employment Regulations S.L. 452.95;
- Discriminatory treatment includes also harassment and less favourable treatment based on a person's rejection to such conduct;
- Employer – deemed to discriminate if they neglect their obligation to suppress harassment + duty to take effective measures to prevent harassment;

Legal Procedures in Harassment

- 10 working days from receiving a request of a person claiming to have been sexually harassed or request by the Commissioner to provide such person or the Commissioner with a report on the allegations made/ procedures used by the employer in the matter (Equality between Men and Women Act);
- Same obligation to o supply a written report within 10 days – respondent’s version of events; grounds for disputing the allegations; explanation of procedures adopted to prevent discrimination (Equal Treatment in Employment Regulations).

John Bonavia v
Casa Francesco Ltd
– 15th September
2023



3. Grievance Policy



Not a legal requirement.



What should it contain?



Procedure / time-lines / contact persons / right to appeal/
protection for victimisation.

4. Disciplinary Proceedings



Not a legal requirement but recommended.



What should it include?



Types of offences / types of penalties / composition of board / right to be represented / right to appeal/ witnesses.

5. Use of Social Media



Not a legal requirement but recommended.

Permissible use or otherwise during work / public comments on posts / speaking on behalf of the company / avoidance of discrimination and hate speech.

6. Use of I.T. policies

- Useful to provide instructions to employees on how to correctly use their email, laptops, mobiles and other similar devices;
- IT policies should include instructions on correct usage of IT devices (e.g. do not leave unattended laptops unlocked, use strong complex 10+ character passwords, keep clear desks etc.);
- They can greatly enhance data security at the workplace - if they are properly adhered to – by warning and mitigating against vulnerabilities;
- They provide a certain degree of liability protection, if it can be shown that the employer had taken IT security seriously prior to an incident taking place;
- They should contain instructions for employees on how to tackle incidents, be they cyberattacks or data breaches or anything else;
- They can also serve to train your employees on how to use company software more effectively.

7. Other Policies

- Handbook or separate policies regulation – leave + additional benefits / use of company car/ office wear / alcohol and drug use / working from home (need for agreement) / unpaid leave.



Wage Considerations



Equal Pay:

- Article 27 - principle of equal pay:
- *“27. Employees in the same class of employment are entitled to the same rate of remuneration for work of equal value.”*
- Extended the principle of equal pay for equal work between men and women.
- What is meant by ‘same class’ and ‘work of equal value’?
- Importance of ‘role evaluation’.

What is 'class'?

- What is a class? when used in the context of a group or a category of employees shall refer to the groups or categories listed in a collective agreement”
- Where there is no collective agreement or where the collective agreement does not stipulate groups or categories of employees, it shall refer to the work performed or expected to be performed independently of the title or name given to the post
- Victoria Spiteri vs St Catherine’s High School → Class should not be given too strict an interpretation – consider also ‘interchangeability’ of employee

Equal Pay:

- *Roberta Spiteri vs St Microelectronics (Malta) Limited (30/09/2015) Court of Appeal* – performance of the work done does not change the value of the work done.
- Cannot justify difference in wage solely on performance – this can be done by a performance bonus.

New Pay Transparency Directive

- Companies with more than 250 employees will be required to **report annually** on the gender pay gap in their organisation to the relevant national authority.
- For smaller organisations (initially those with over 150 employees), the reporting obligation will take place every three years. Number of employees to reduce to 100 after 5 years from date of coming into force.

New Pay Transparency Directive

- Where the report exposes a gender pay gap of 5% or more without any objective justifications, the employer must actively work to rectify the issue within a reasonable time.
- Failure to do so results in the employer needing to carry out a 'joint pay assessment' together with the workers' representatives.
- Employers must also make available to workers an account of the requirements which are employed to determine their individual and average pay as well as their pay progression.

New Pay Transparency Directive

- New right to receive information on individual and average pay levels, disaggregated based on gender and worker categories.
- This right is applicable to all workers and is not dependent on the workforce's size.
- Upon a worker's request, employers must grant this information within a reasonable period of time and in any case within 2 months from when the request was made.

Recruitment Processes



Interview/ Advertising Stage

- Art. 10 of the Equality for Men and Women Act –

“unlawful for persons to publish or display or cause to be published or displayed any advertisement, or, otherwise to advertise a vacancy for employment which discriminates between job seekers or to request from job seekers information concerning their private life or family plans”

Exception – where the work can only be performed by a person of a specific sex.

In practice...

- When advertising for employment –
 - List the job duties, responsibilities and any required qualifications in an objective manner;
 - No reference to the prohibited grounds;
 - Ex. – Recent graduates (age discrimination);
 - Female secretary (gender discrimination)
 - 20 years experience (age discrimination)
 - ‘waitress’ ‘bus boy’ ‘housewife’ ...

In practice...

- What is the test for an advert?
- Would an ordinary, reasonable person with no special knowledge conclude from the advert that the advertiser intends to discriminate?

During an interview...

- Prohibition from discrimination extends also to interview stage;
- Avoid asking questions about the 'protected characteristics' or whether they are married, intend to have children etc;
- Ask about health or disability only because of job requirements;

New Pay Transparency Directive

- Employers are not allowed to ask job candidates how much they currently earn or how much they earned in previous employment.
- Employers will need to reveal in job announcements or prior to a job interview, the starting salary level or range for the particular position.
- Job announcements and job titles need to be worded using gender neutral words with the recruitment process being carried out in a non-discriminatory manner.

Non-Disclosure / Confidentiality



Confidentiality

- How is the company protecting its confidential information?
- Are trade secrets involved – need for an Non-Disclosure Agreement?



Persons with Disability



Specific obligations – Persons with Disability

- Persons with Disability (Employment) Act – Chapter 210;
- *‘A person who...by reason of injury, disease, congenital deformity or other physical or mental incapacity, is substantially handicapped in obtaining or keeping employment or in undertaking work on his own account, of a kind which apart from that injury, disease, deformity or incapacity would be suited to his age, experience and qualifications’*

Employment of Persons with a Disability:

- The Act provides for a register of persons with a disability;
- Application and process for a person to be listed on the register;
- Obligation on employer to give employment to such number of registered persons as per an established quota;
- Obligation to comply when vacancies occur.

Employment of Persons with a Disability:

- Obligation applies to – any person who for the time being has, or would in accordance with his normal practice have, in his employment not less than 20 persons;
- In computation of the number of persons – no account is to be taken of employees who are related to the employer by consanguinity or affinity up to the 3rd degree.

Employment of Persons with a Disability:

- Failure to meet quota – asked by the Jobsplus to make an annual contribution of €2,400 for every person with disability that should be in his employment – max. €10,000.
- Obligation to keep a register – number and names of employees and of registered persons
- Employer may apply for an exemption from the Minister-consideration being the nature of the work.

Quota:

- Percentage of persons with disability which must be employed is currently 2% - i.e. one for every 50 employees (S.L. 210.02).

Termination of Employment



Termination Considerations:

- Rules on Redundancy.
- Collective Redundancies.
- Settlement Agreements – methods of compensation payments / principle of non-discrimination.
- Procedure for termination in case of a good and sufficient cause.

Occupational Health and Safety



General Duties

- The employer has a general duty to ensure the health and safety at all times of all persons who may be affected by the work being carried out for the employer.

Preventive Measures

- Avoid risks
- Identify hazards
- Evaluate risks which can't be avoided
- Control risks which can't be avoided
- Take necessary measures to reduce risks
- Give priority to collective protective measures (rather than individual protective measures)
- Adapt the work to the worker
- Adapt to technical progress in the interest of occupational health and safety
- Develop a coherent overall prevention policy

General Provisions for Health and Safety at the Work Places Regulations (S.L 424.18)

- Employer – carry out suitable, sufficient and systematic assessment of occupational health and safety hazards and risks
- 5 or more workers – keep copies of assessments and update them regularly
- Review of assessments – whenever there is a major change in working conditions or, employer has reason to suspect they are no longer valid
- Employer – inform workers on risks identified by the assessment, the preventive and protective measures required to identify the risks & the procedures to be followed

General Provisions for Health and Safety at the Work Places Regulations (S.L 424.18)

- Workers – right to request health surveillance at regular intervals
- Employer – carry out health surveillance whenever risk assessments required to be carried out reveal:
 - An identifiable disease or adverse health condition related to the work involved
 - The likelihood that the disease or condition may occur under particular conditions of work

Health and Safety Representatives

- Sufficient number of workers – appoint health and safety representatives
- Role of health and safety representatives – consulted on matters which may affect occupational health and safety
- In addition – employer shall designate 1 or more competent persons (can also be external if no worker is competent) to assist them in undertaking measures for protection of occupational health and safety risks and prevention and control of risks

General Duties Resulting from Case Law



Providing a safe system of work;



Providing adequate training;



Providing adequate supervision;



Providing and maintaining adequate equipment

Notification of Accidents at the Workplace

- Notify Director of Labour if there's an accident occurs which results in:
 - Death or major injury to any person – quickest means and then within 7 days, send a written notice
 - An employee being unable to come to work for more than 3 consecutive days – within 7 days, send a written notice
- Keep a register of accidents – available for inspection for at least 2 years.

Protection of Maternity at Work Places Regulations (S.L 424.11)

- Under no circumstance shall an employer require a worker who is pregnant, breastfeeding or a mother, perform duties which the assessment reveals is a risk
- 'mother' – a worker who has recently given birth to a live or stillborn child and who informs her employer of such an event by means of a medical certificate (by a doctor or midwife) and, in the case of a worker who gives birth to a live child, this shall extend for a period of 6 months from the birth of the child

03. First Aid & Fire Detection



Work Place (First Aid) Regulations (S.L 424.13)

- Employer must ensure rapid access to first aid (including a first aid box, appropriately marked & First aiders)
- First aid – treatment to preserve life and minimize consequences of injury and illness until help is obtained from a medical practitioner or nurse and, treatment of minor injuries

Work Place (First Aid) Regulations (S.L 424.13)

- 1 first aid box per 50 employees which shall (at least) contain the items specified in the law
- 1 first aider per 100 employees (except in case of workplaces with a greater degree of hazard ex. Factories, in which case 1 first aider per 50 employees is required)
- In the case of 200 or more employees (or if type of activity or frequency of accidents dictates) – first aid room

Work Place (First Aid) Regulations (S.L 424.13)

- Employer must ensure first-aid even to workers sent to work outside the employer's place of work (where appropriate, provide them with a first aid box)
- Employer must inform employees of arrangements made for first aid, including the location of the first aid box and other equipment

Work Place Minimum Health and Safety Requirements (S.L 424.15)

- Employer – necessary measures for first aid, fire-fighting and evacuation of workers
- Employer – designate workers to implement fire-fighting measures and evacuation of workers (names kept in a register & updated)
- Number of fire patrol officers – depends on the size of the workplace and the hazards
- Fire drills – every 6 months (keep record)

Fire Fighting Equipment

- Employer must take necessary measures to –
 - Prevent risk of accidents from fire or explosion from anything at the workplace
 - Ensure the workplace is equipped with fire-fighting equipment and fire detectors and alarm systems as necessary
- Fire equipment – depends on the workplace risks, substances kept etc.
- Fire Equipment – easily accessible, simple to use, appropriately indicated & adequately maintained

Dimensions of an Office

- Volume when empty and divided by persons working in it – 11 cubic meters (except where space is limited, ex. Kiosks)
- If room is more than 3m high – still considered to be 3m

Washing Stations

Minimum number of sanitary conveniences and washing stations which should be provided by an employer.

The number of people at work shown in column 1 refers to the maximum number of workers likely to be in the workplace at any one time.

Column 1	Column 2	Column 3
Number of people at work	Number of sanitary conveniences	Number of washing stations
1 to 5	1	1
6 to 25	2	2
26 to 50	3	3
51 to 75	4	4
76 to 100	5	5

Provided that an additional water closet and an additional washing facility shall be provided for every twenty-five persons above one hundred.

Minimum Health and Safety Requirements for Work with Display Screen Equipment (S.L 424.14)

- Employer is to keep record of:
 - All display screen equipment and workstations
 - The names of persons using that equipment
 - The measures taken to safeguard occupational health and safety

Definitions

- Display screen equipment – any alphanumeric or graphic display screen
- Workstation – an assembly comprising of:
 - Display screen equipment
 - Any accessories to the display screen equipment
 - Any disk drive, telephone, modem, printer, document holder, work chair, work desk, work surface or other item peripheral to the display screen equipment and
 - The immediate work environment around the display screen equipment

Risk Assessment

- Each workstation – assessment on the health and safety risks which workers are exposed to from using display screen equipment
- Assessment reveals risk – take appropriate measures to remedy the risks
- Workstations/display screen equipment – must meet minimum requirements laid down in the schedule

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Risk Assessment

- Employer must provide training on safe use of workstations before commencing work and when the workstation is substantially modified
- Worker's activities – interrupted periodically (breaks, changes in activity)
- Workers entitled to eye-sight tests at regular intervals

Data Protection

For a brief overview of the General Data Protection Regulation (GDPR) and updates regarding its implementation, please visit:

www.gdprmalta.com





EU Regulation 2016/679
(GDPR)



Data Protection Act
(Chapter 586 of the Laws
of Malta)



Other
Subsidiary
Legislation

“Everyone has the right to
the protection of personal
data concerning them” Art 16
(TFEU)

The GDPR came into effect on 25 May 2018

GDPR Employment Audit – Things to Look Out For and Ask Yourself:

1. Data mapping and inventory – know what employee data you have, where it is stored, who is responsible for it and what the data flows are
2. Information provided to employees – at both onboarding and outboarding stages
3. Review any consent forms
4. Are you prepared for employee DSARs and other right requests?
5. Review contracts with third party data processors (eg. outsourced payroll)
6. Review internal policies on monitoring, IT, BYOD etc.
7. Ensure employee data is stored securely
8. Review retention policies – make sure you are not keeping past employee data for longer than is needed
9. Any data transfers to third countries?
10. Do you have a DPO? Check whether one should be appointed
11. Schedule employee training on GDPR compliance
12. Consider whether DPIAs are needed
13. Review documentation and reporting mechanisms
14. Set a date for the next audit

1. Data Mapping and Inventory

- Create a data map tracking the flow of all personal data through your organisation
- Identify all data processing activities related to employees
- You should know all points of data entry/collection + what data is collected + why + who has access to it
- Ensure that the correct legal basis has been determined for all processing activities (6 to pick from for non-sensitive personal data e.g. contractual necessity and legal obligations)
- Ensure you are not collecting any unnecessary personal data

2. Information to be Provided - Onboarding

- Identity & contact details of controller;
- Contact details of data protection officer (if applicable);
- Purpose and legal basis for processing;
- Legitimate interests pursued (if this is legal basis);
- Recipients or categories of recipients;
- Intention to transfer data to third country or international organisation (if applicable).
- Existence of the right to request access to data/ rectification or erasure of data/ restrict processing or object to processing;
- Data retention period or criteria used to determine the period;
- Right to lodge a complaint with supervisory authority;
- Whether providing personal data is a contractual or legal requirement or necessary to enter into a contract & consequences of failure to provide data;
- Existence of automated decision making (if any);
- Processing of any sensitive personal data (Biometric data, including fingerprint scans);
- Sources of data

2. Information to be Provided - Outboarding

- Inform employee of what will happen with their personal data and what the employee should do before leaving (e.g. employer will keep a copy of the entire work inbox and the employee should make sure to remove any personal emails they have in it before leaving)
- Review and/or implement policies that explain and provide such information beforehand (e.g. IT policy, BYOD policy)

3. Review any Consent Forms

- Consent is valid only if it is freely given, specific, informed and unambiguous.
- Keep in mind that consent is generally not an ideal legal basis in the context of employment – make sure employment contracts don't have wording along the lines of “the employee consents to the processing of their personal data by the employer” – this is incorrect
- Consent can be freely given by employees in some situations such as promo photos for website or to be used in magazine

4. Rights: Right of Access (Art. 15, GDPR)

- Ensure you are prepared to handle DSARs that may be submitted by employees – know what they are and train employees to recognise them
- Right of access: Right of data subjects (incl. employees) to obtain a copy of information the controller (employer) holds about them;
- Know what to provide and what not to (e.g. no need to provide ‘inferred’ or ‘internal notes’ data)
- Have a procedure in place on how to handle/escalate such requests where needed and how to respond

4. Rights: 'Right to be Forgotten' (Art. 17, GDPR)

- Right of erasure: Right of data subjects (incl. employees) to have personal data about them deleted, in certain instances only and subject to exceptions (i.e. not an absolute right)
- There will likely be many instances where a request of this kind can and should be refused
- Have a procedure in place on how to handle/escalate such requests where needed and how to respond

4. Rights: Right to Rectification (Art. 16, GDPR)

- Right to rectification: Right of data subjects (incl. employees) to have incorrect personal data about them corrected and/or changed.
- Employer should try and verify accuracy of the data independently if possible
- Have a procedure in place on how to handle/escalate such requests where needed and how to respond

5. Reviewing contracts with third party data processors

- Consider whether you make employee personal data available to a third party (e.g. payroll service provider, cloud hosting service provider etc.)
- Those entities act as your data processor and a written Data Processing Agreement must be in place (Art. 28, GDPR)
- This is required by law for both parties

5. Contents of Data Processing Agreement

- (a) processes the personal data only **on documented instructions** from the controller, including with regard to transfers of personal data to a third country or an international organisation, unless required to do so by Union or Member State law to which the processor is subject; in such a case, the processor shall inform the controller of that legal requirement before processing, unless that law prohibits such information on important grounds of public interest;
- (b) ensures that persons authorised to process the personal data have committed themselves to **confidentiality** or are under an appropriate statutory obligation of confidentiality;
- (c) takes all measures required pursuant to **Article 32**;
- (d) respects the conditions referred to in paragraphs 2 and 4 for **engaging another processor**;
- (e) taking into account the nature of the processing, **assists the controller** by appropriate technical and organisational measures, insofar as this is possible, for the fulfilment of the controller's obligation to respond to requests for exercising the data subject's rights laid down in Chapter III;
- (f) assists the controller in ensuring compliance with the obligations pursuant to **Articles 32 to 36** taking into account the nature of processing and the information available to the processor;
- (g) at the choice of the controller, **deletes or returns all the personal data to the controller** after the end of the provision of services relating to processing, and deletes existing copies unless Union or Member State law requires storage of the personal data;
- (h) makes available to the controller **all information necessary to demonstrate compliance** with the obligations laid down in this Article and allow for and contribute to audits, including inspections, conducted by the controller or another audit mandated by the controller. The processor shall immediately inform the controller if, in its opinion, an instruction infringes this Regulation or other Union or Member State data protection provisions.

6. Review internal policies: monitoring, IT, BYOD

- Make sure these are kept up-to-date with the latest technology and software being used by the employer.
- Information can be grouped together in employee handbook;
- If any monitoring practices are in effect by the employer, it is imperative that the employees are told – these can be:
 - Monitoring at the workplace (CCTV + software)
 - Monitoring outside the workplace (tracking/keylogging/screen capture software on laptops, phones etc)
- Any and all CCTV monitoring must be properly signposted and with the relevant information provided

CCTV Notice – EDPB Template

(Note the legal basis being used)



Video surveillance!

Identity of the controller and where applicable, of the controller's representative:

Contact details of the Data Protection Officer (where applicable):

Purposes of the processing for which the personal data are intended as well as the legal basis for the processing:
Our legitimate interests to ensure adequate security on our premises, for crime-prevention purposes [and for monitoring of work-related activity].

Further information is available:

- Via the notice provided to you
- At our reception/customer information/HR manager
- On our website (URL/QR Code:)

Data subject rights: As a data subject you have several rights against the controller, in particular the right to request from the controller access to or erasure of your personal data.
For details on this video surveillance including your rights, see the full information provided by the controller through the options presented on the left.

7. Security Measures to Protect Data

- GDPR imposes obligation to implement appropriate technical and organisational measures to protect the (employee) personal data that is processed against accidental destruction or loss or unlawful forms of processing;
- Employer must provide an adequate level of security, taking into account relevant factors such as the sensitivity of the data, cost, technical means and risks;
- GDPR mentions encryption, on-going reviews of security measures, redundancy and back-up facilities, regular security testing etc.)
- Even more important now that employees may be working in a less secure environment at home.

8. Retention Policies

- Data by employer should only be retained for as long as necessary – up to employer to determine necessity
- This can be based on legal obligations or certain rights employer has
- Go through past employee records and see whether they are still necessary to keep

9. Transfers of Data Abroad

Transfer to a 'third country' (i.e. Non-EU/EEA) of personal data that is undergoing processing or intended processing, may only take place subject to the provisions of the GDPR or other *ad hoc* arrangements

- The 'third country' to which the data is transferred must ensure **an adequate level of protection**. This includes when employees are working remotely outside the EU and accessing personal data.
- Transfers to countries not offering such adequate level of protection may still take place without needing IDPC approval if '**appropriate safeguards**' are in place.
- These 'safeguards' include **EU Model Clauses**, **Binding Corporate Rules** (which will still require IDPC approval), an approved **Code of Conduct** and an approved **Certification Mechanism**.
- **UK** is whitelisted.
- **USA** remains an issue despite EU-US Data Privacy Framework.
- In absence of the above grounds, other grounds may still justify the transfer (for example, the **explicit consent of the data subject**).



10. 'DATA PROTECTION OFFICERS' (DPOs)

- Consider whether your organisation should appoint a DPO. Under the GDPR, a Data Protection Officer (DPO) must be appointed in certain cases:
 - processing is carried out by a public authority or body, (except for courts);
 - core activities of the controller/processor consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of data subjects on a large scale; or
 - core activities of the controller/processor consist of processing on a large scale of special categories of data and personal data relating to criminal convictions and offences.

10. 'DATA PROTECTION OFFICERS' (DPOs)

- DPO Tasks include:
 - Informing Controller/Processor of GDPR obligations;
 - Monitoring Compliance;
 - Providing advice regarding Impact Assessments;
 - Cooperating with Supervisory Authority;
 - Assessing risks associated with processing operations.
- They can act as a point of reference for employees with queries on all matters related to data protection.
- Even if a DPO is not legally required, it is advisable to have at least one person in the organisation with a certain level of DP knowledge.
- If appointed, the DPO's details must be notified to the IDPC.

11. Employee Training

- Schedule regular training for employees
- It is vital that employees have, at least, basic knowledge of DP obligations. They should be able to:
 - Adopt good practices in data security
 - Recognise when a customer is attempting to exercise one of their data subject rights (right of access, right to be forgotten etc.) and how to handle such request effectively
 - Spot when a data breach may have taken place and know how to escalate the matter
 - Consider data protection implications when adopting any new practices (e.g. any third country transfers? Any sensitive data being processed?)
 - Adopt the 'Privacy by Design and by Default' principle – should be the default practice for any new products or processes

12. Data Protection Impact Assessments (DPIAs)

- For any new products and/or processes being rolled out, consider whether a DPIA is required
- This depends on multiple factors:
 - Will personal data will be processed due to such product/process?
 - Will large amounts of data be processed?
 - What risk is posed to the data subjects?
 - Will sensitive data be processed?
 - Will data be transferred to a third country?
 - What mitigating measures can be implemented as safeguards?
- If the answer to most of the above is 'Yes', a DPIA should definitely be carried out.

12. Data Protection Impact Assessments (DPIAs)

- The DPIA should:
 - Describe the nature and the purposes of the processing operations
 - Assess the necessity and proportionality of the measures being adopted
 - Identify any risks to individuals and any relevant mitigating measures
 - Consider likelihood and severity of impact on individuals (both high probability of some harm and a low possibility of serious harm should be taken into account)

13. Review documentation and reporting mechanisms

- Establish/review internal policies on matters such as data handling
- Establish/review escalation procedures which should reflect organisational hierarchy – these are vital for reporting data breaches (keep in mind 72 hours deadline for reporting to the IDPC)
- Establish/review templates for reporting data breaches to the IDPC – this speeds things up during an emergency
- Keep track of all internal data breaches (involving employees or otherwise)

14. Set a date for the next audit

- Ensure that such audits are carried out regularly – consider combining them with other similar audits such as a cybersecurity or IT audit
- GDPR compliance is ongoing – not just a matter of drafting and publishing a policy, there must be proper implementation and constant monitoring and enforcement of such policies
- Remember: i) people forget, so repetition is good and ii) new employees will join who may have never received such training before.

Some Practical Tips

- In the majority of instances, problems will arise from 3 sources:
 1. Disgruntled employees
 2. Disgruntled clients
 3. Competitors
- Carry out regular training for staff, if necessary, grouping it with training on other matters. GDPR compliance is not a one-time thing, it must be an ongoing practice – remember that: Employees should be able to flag any suspicious activity, be it a data breach, security incident etc. and report/escalate it immediately.
- Wherever possible, and depending on the size of your organisation, do not leave GDPR compliance up to one person – the topic is vast and can be overwhelming for one individual.
- Ensure that you actually *implement* any policies you have. Putting up a privacy policy on your website or rolling out an employee handbook is the easy part.

Thank you for your attention!

Employment Law Audit

Dr Christine Calleja

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01.11.23