

THE CHURCH OF SCOTLAND LAW DEPARTMENT

THE A – Z OF EMPLOYMENT LAW FOR CONGREGATIONS

WARNING!

Employment law is complex and constantly changing. As a result, this Circular can only cover matters in broad terms but links are attached to useful information which can be found online. Such links can change from time to time. Please let us know if you find that any of them no longer work.

We are pleased to provide tailored advice to specific enquiries and can be contacted on 0131 225 5722.

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***NOTE:** ACAS have also produced a helpful “Guide for New Employers” which can be found on line at:

[http://www.acas.org.uk/media/pdf/m/i/A_Guide_For_New_Employers_\(Jan_12\)-accessible-version-Apr-2012.pdf](http://www.acas.org.uk/media/pdf/m/i/A_Guide_For_New_Employers_(Jan_12)-accessible-version-Apr-2012.pdf)

INTRODUCTION - EMPLOYMENT STATUS

The term "employment status" refers to the type of contract or arrangement that is in place for an individual when engaged for work. A person working for a congregation could be:

- an employee, hired directly by the Kirk Session or Congregational Board; or
- a self-employed contractor in business on their own account providing a service to the Kirk Session or Congregational Board.

Determining employment status is important because an individual's employment rights will depend on their status. Generally speaking, those who are self-employed do not come within the ambit of employment law protection. Employees, on the other hand, will have a full range of statutory employment rights. It is also important from a congregational treasurer's perspective for obligations in relation to tax and National Insurance.

Style contracts of employment for a Church Officer, Cleaner, Organist (choirmaster), Secretary & Youth Worker, which can be edited and tailored to your congregation's needs, are available through the Church of Scotland website:

http://www.churchofscotland.org.uk/resources/subjects/law_circulars

Both the Unitary and Model Deed of Constitution provide for the church officer, organist or equivalent post) and others such as youth workers, secretaries and cleaners to be employees. Given the nature of the work required, Church Officers, Secretaries and Youth Workers should only rarely be engaged other than as employees and therefore a contract of employment will be required. However, if you have a situation where you think the individual concerned should be treated as self-employed, please contact the Law Department for clarification.

Depending on the circumstances, Cleaners or Organists may at times be classified as self-employed. The test for employment status generally depends on the 'mutuality of obligation' that exists between the person instructing the work and the person carrying out the work. An individual will tend to be viewed as an employee if they work regularly, even on a part-time basis and have few or no indicators of being in business on their own account. For regular workers, the key question is therefore whether they are dependent on the employer for work and income or whether they operate their own business. The indicators of the latter would be where the individual Cleaner or Organist has a range of people or organisations that they provide the service to. Other indicators could also be the provision of their own equipment and tools, marketing, sending out invoices, provision of insurance and dealing with their own tax affairs etc. What happens when the worker is unavailable? Do they send a substitute or is the onus on the employer to obtain cover? Someone who is self-employed will not be entitled to sick pay, holiday pay or other benefits.

A style agreement to cover those who are self-employed is available from the law department.

This is a complex area and if there is any doubt about particular circumstances please contact the Law Department.

NOTE: The remainder of this A – Z guidance note assumes that an employer/employee relationship is in place.

THE A – Z OF EMPLOYMENT LAW FOR CONGREGATIONS

A

ABOLITION OF DEFAULT RETIREMENT AGE

The Default Retirement Age (DRA) was phased out in 2012. This change means that whether or not any contracts of employment issued by your Kirk Session or Congregational Board contain an age at which your employee has to retire, you will not be able to use the DRA to compulsorily retire employees. No employee can be forced to retire simply because they have reached the age of 65 (or other contractual retirement age). Compulsory retirement will be treated as a dismissal like any other and will be unlawful unless it can be objectively justified and is fair within the meaning of the legislation.

Depending on the nature of the duties which your employee has to perform, it may be possible to retire them on grounds of capability i.e. poor work performance. This requires a fair procedure to be carried out, on which further guidance is available from the Department.

It is not necessary to make a formal amendment to existing contracts of employment to remove references to retirement provisions but, if felt necessary, a letter could be sent to the employee advising them of this change and a copy kept on file with their contract.

Further information can be found in the Law Department Circular on this topic available on the Law Circulars section of the Church of Scotland website.

ABSENCE MANAGEMENT: Illness/Self Certification

Employees are able to ‘self-certify’ for absences of up to 7 days. Thereafter employees are required to attend their GP surgery to obtain a ‘fit note’. The purpose of a fit note is to allow a doctor to advise if an employee is not fit for work. However, a doctor will equally be able to highlight the aspects of jobs that an employee can still perform.

Someone assessed by their GP as ‘not fit for work’ should send the fit note to their employer as evidence that they cannot work because of ill-health. The employer will then use it to arrange sick pay. If the note says that the employee ‘may be fit for work’, he or she should discuss that advice with the employer to see if a return to work is possible, taking into account the effects of the illness or injury. If it is possible for the employee to return to work, the employer and employee should agree how this will happen, what support the employee will receive and how long that support will last.

The GP will also provide general details of the functional effect of the individual's condition. The employer is not obliged to act on the GP’s advice in a ‘may be fit for work’ statement but it is often advisable to do so.

More information can be found of the Department of Work and Pensions website: <http://www.dwp.gov.uk/fitnote/>

ABSENCE MANAGEMENT: Long-term absence

The Health and Safety Executive recommend six key elements in managing sickness absence and the return to work process. These are discussed below:

- **Recording sickness absence**

The reasons for workplace absence should be noted and recorded appropriately. That is particularly important when workplace adjustments may be needed and also provides a means for the employer to look at each absence case objectively and justify any decisions required further down the line.

- **Keeping in contact**

The most effective tool here is to conduct a ‘return to work interview’. This could take the form of an informal chat to welcome your employee back to work and to confirm whether the record of their absence is correct. It could however be a full discussion of remaining health issues that may affect work and what workplace adjustments will have to be made. There is the added consideration that if the employee is or becomes disabled, you will then be legally bound under the Equality Act 2010 to make reasonable adjustments that will enable the employee to continue working.

- **Planning and undertaking workplace adjustments**

What is reasonable will depend on the financial and other impact of adjustments on your congregation, how effective adjustments are likely to be, and the particular needs of the individual employee.

The following are examples of possible adjustments to working arrangements:

- ❖ Allow a phased return to normal working hours or workloads to build up strength and confidence;
- ❖ Allow flexible working to ease work/life balance;
- ❖ Provide help with transport to and from work;
- ❖ Arrange for home working (providing a safe working environment can be maintained);
- ❖ Allow the employee to be absent during working hours for rehabilitation, assessment or treatment;
- ❖ Consider adjustments to ergonomic factors, e.g. working posture, the equipment used and the spacing of rest breaks;
- ❖ Move tasks to more accessible areas and closer to washing and toilet facilities;
- ❖ Make alterations to premises, e.g. provide a ramp if steps will be difficult.

- **Making use of professional and other advice**

Adjustments need not be difficult and solutions can often be found by working together with your employee. Advice from the employee's GP should be sought, if appropriate.

The employee's consent will be required for you to meet/contact the GP. The Law Department has a number of style letters available in this regard. Please contact us for further information.

- **Health and Safety**

Health and Safety law requires you to undertake risk assessments of your activities to prevent people being harmed. It is likely that you may need to review your risk assessment process and possibly amend it if the impact of illness, injury, disability or the effects of medication makes your employee vulnerable to additional risk; or if you are introducing adjustments that could affect the work and health of others.

- **Return to work plan**

Generally, the best time to prepare a plan is three to four weeks into an absence. In cases of injury or post-operative procedures there may be clear physical milestones in the healing process that will influence the plan. As mentioned above, in the case of serious injury it is important to involve some sort of medical advice specialist, such as a GP.

Depending on the specific needs of the employee, the plan can take the form of a simple chart or written statement. It could be useful to include the following:

- ✓ The approximate date of your employee's return to work;
- ✓ The goal for return to work plan;
- ✓ The time period for information about alternative working arrangements;
- ✓ Information about any impact on terms and conditions;
- ✓ What checks will be made to make sure the plan is put into practice;
- ✓ Dates on which the plan will be reviewed and by whom.

What if the employee cannot return to their original job?

Unfortunately there will be times when there is no reasonable adjustment or control measure that will enable an employee to return to their original job. One solution may be to offer the employee an alternative job, and any necessary re-training, if such a job is available. The key issue for you and your employee regarding alternative work includes checking that the alternative is suitable, the impact on contract terms, whether any training or other support is required and what the employee will do if all alternatives are pursued. Sometimes, however, continued employment will simply not be possible, but it is important not to jump to conclusions before you have explored the alternatives. If you think that you have reached the end of the road with an employee, please contact the Law Department for further advice.

ADVERTISING VACANCIES

See below under the heading “Recruitment”.

B

BRIBERY ACT

The Bribery Act 2010 came into force in the UK on 1 July 2011. There are four recognised offences under the Act:

- Bribing another person;
- Being bribed;
- Bribing a foreign public official; and
- Failure to prevent bribery.

Bribery runs contrary to Christian principles and has always been illegal in the UK. The Law Department has produced separate guidance on this topic, including a draft policy for Congregations:

http://www.churchofscotland.org.uk/resources/subjects/law_circulars

C

CONTRACTS OF EMPLOYMENT

All employees should have a written contract of employment. The Law Department has a number of style draft contracts:

http://www.churchofscotland.org.uk/resources/subjects/law_circulars

In cases where there is no existing written contract, it is advisable that a contract is entered into. The written contract should reflect the existing terms and conditions that will have been established during the period of employment. New and material conditions cannot be imposed unilaterally and, failing agreement with the employee, it may be necessary to adapt the styles accordingly.

D

DATA PROTECTION

The Data Protection Act 1998 applies to all organisations that handle information relating to their employees or others. The law requires that the ‘data processor’ is included on the register of Data Controllers (unless exempt). The established practice has been for Presbyteries to notify on behalf of themselves and the Congregations within their bounds. As

a result, Congregations do not have to notify (but may do so, if felt appropriate). The same will apply if your Congregation wishes to start processing data of an unusual nature. Regular dialogue should be in operation with Presbytery on the issue of Data Protection as notification to the Information Commissioner is to be made annually.

The Act sets out the 8 Data Protection Principles which should be followed at all times. Under this regime, personal data must be processed fairly and lawfully and special rules exist in relation to 'sensitive personal data' which includes information about religious beliefs.

The Law Department has produced separate guidance on this matter in the form of the Data Protection Pack for Congregations, available on the Law Circulars section of the Church of Scotland website. A webinar training session for office bearers is also available. A password is required to access this. Please contact the Law Department to obtain the password. It is strongly suggested that office bearers set aside one hour, as a group, to participate in this vital training session.

DISABILITY DISCRIMINATION

It is unlawful to discriminate against workers because of a physical or mental disability, or to fail to make reasonable adjustments to accommodate a worker with a disability. Under the Equality Act 2010 a person is classified as disabled if they have a physical or mental impairment which has a substantial and long-term effect on their ability to carry out normal day-to-day activities.

This means that employers:

- must not directly discriminate against a person because of their actual or perceived disability, or because of their association with a disabled person (for example a parent with caring responsibilities for a disabled child)
- must not treat a disabled person less favourably for a reason related to his or her impairment, unless that treatment can be justified e.g. an employer may reject someone who has a severe back problem where the job entails heavy lifting.
- unless these can be justified, must not have procedures, policy or practices which, although applicable to all workers, disproportionately disadvantage those who share a particular disability
- must make reasonable adjustments in the recruitment and employment of disabled people. This can include, for example, adjustments to recruitment and selection procedures, to terms and conditions of employment, to working arrangements and physical changes to the premises or equipment
- must not treat an employee unfairly who has made or supported a complaint about discrimination because of disability.

If an employee has a disability that is making it difficult for them to work, employers should speak to the employee to discuss what can be done to support them, and consider what reasonable adjustments they can make in the workplace to help. This could be as simple as supplying an adequate, ergonomic chair.

There are particular provisions in the Equality Act dealing with pre-employment questions about health and further reference to this is made under the heading “Recruitment” below.

DISCIPLINE AND GRIEVANCE

It is usual for a disciplinary procedure to contain a number of stages at which a verbal or written warning will be given, before dismissal is considered or instituted. Disciplinary rules should make it clear to all employees what types and stages of misconduct will be regarded as gross misconduct, justifying summary dismissal. If an employer fails to follow a reasonable procedure in carrying out a dismissal, the dismissal will be unfair. The ACAS Code of Practice on Disciplinary and Grievance Procedures provides statutory guidance to employers about how they should correctly handle discipline, unsatisfactory performance and grievances. A failure to adhere to the Code's recommendations is highly likely, in practice, to make any dismissal unfair.

All stages of the disciplinary process should be recorded in writing in order that there is a proper record or audit trail of proceedings.

To download the ACAS Code of Practice on Disciplinary and Grievance Procedures:

<http://www.acas.org.uk/CHttpHandler.ashx?id=1041>

There is also a helpful ACAS Guide on Discipline and Grievances at Work which includes sample procedures and style letters:

<http://www.acas.org.uk/CHttpHandler.ashx?id=1043>

The current employment contract styles issued by the Law Department contain disciplinary and grievance procedures which comply with the ACAS Code.

In the case of existing employees whose contracts do not contain such provisions, Congregations are advised to agree with their employees an amendment of their contract to import such procedures. Provided the employee agrees and signs a copy this could be done by a letter which is attached to the contract.

Right to be Accompanied at Hearings

Where an employee is required or invited by their employer to attend a disciplinary or grievance hearing and reasonably requests to be accompanied at the hearing, the employer must permit the employee to be accompanied by a single companion. The right is restricted to persons who are either officials or employees of a trade union or another of the employer's workers. Accordingly, there is no general right conferred allowing an employee to have anyone of their choice accompany them at a disciplinary or grievance hearing. It is, of course, in any employer's discretion to allow an employee to be accompanied by someone else and an appropriate form of wording is included in the disciplinary procedure incorporated into the style contracts.

DISMISSAL

A procedure similar to that for disciplinary matters should be followed in all cases where termination of employment is under consideration including redundancy, termination of a fixed term contract, or dismissal for incapacity. The style contracts also have a clause referring to the general procedural framework which should be followed in non-disciplinary cases, but this must be tailored to individual circumstances and particularly in potential redundancy and incapacity cases it may be necessary to hold more than one meeting with the employee. Such cases can be complex and it is essential that tailored legal advice is obtained before the procedure is initiated as otherwise there is a risk that the matter could end up at an Employment Tribunal (see 'Tribunals' below).

E

EQUALITY ACT 2010

This Act replaced the previous anti-discrimination laws in the UK by consolidating them and strengthening protection from discrimination in certain situations. The Act sets out a number of “protected characteristics” on grounds of which discrimination is unlawful. These are:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex and
- sexual orientation.

A question frequently asked by congregations is whether it is lawful to require a particular post to be filled by someone with a Christian faith. The default position is that it is illegal to discriminate against anyone, on the grounds of their religion or belief (or lack of it), in the employment field. This is then qualified in the case of an employer with an ethos based on religion or belief (e.g. a Church of Scotland congregation) if the employer can show that, having regard to that ethos and to the nature or context of the work, it is an occupational requirement that an employee should be of a particular religion and the application of this requirement is a proportionate means of achieving a legitimate aim. This of itself is a fairly opaque provision but the guidance which accompanies the Act makes it clear that it is anticipated that religious organisations will only be able to rely on this exception in a limited number of cases. The example that is given is that of a chief executive of a religious organisation or other posts which exist in order to promote or represent the religion. It is made explicit that “religious” employers should not have a blanket policy of applying an occupational requirement but should consider in every case whether all or any of the duties of the job need to be performed by a person of a particular faith. It is likely that a Youth Worker or similar post could legitimately have a “Christian commitment” requirement attached to it but that the post of Cleaner could not.

To come within this exception, being a Christian must be an occupational requirement either because of the nature of the work or the context of the work. The requirement must also be proportionate i.e. you must consider whether the impact on anyone discriminated against by the application of the requirement is disproportionate to the benefit to the employer.

There are also limited circumstances (which will usually be posts which exist to promote or represent the religion) in which, where an employment is for the purposes of an organised religion, an employer can require someone to be of a particular sex or sexual orientation. This may be possible where this requirement is applied to comply with the doctrines of the religion, or because of the nature or context of the employment the requirement is applied to avoid conflicting with the strongly-held religious convictions of a significant number of the religion's followers.

Further reference to other significant provisions of the Act is made under the headings of "Disability" and "Recruitment".

F

FOREIGN NATIONALS

Under the Immigration, Asylum and Nationality Act 2006, it is illegal to employ an individual who does not have the right to work in the UK. The responsibility lies with the employer to ensure that whoever is recruited has the legal right to work before he or she begins employment. Breaches of the legislation can result in significant civil and criminal penalties.

An employer will have a defence if reasonable steps have been taken to check that the appropriate documentation is available. Some documents (List A) indicate that the holder is entitled to live and work in the UK without restriction, whilst others (List B) indicate a time limit on the individual's right to work in the UK.

It is strongly recommended that documents are sought from all potential employees (this will also limit the possibility of discrimination claims) before any employment commences. You should ensure that you see the originals of the documents produced by the prospective employee and should retain copies throughout the individual's employment and for two years after termination of employment. Data Protection rules require that such copy documentation should be kept only for this purpose and be carefully destroyed when no longer required.

For UK nationals, usually all that will be required is for a copy to be taken of a passport or a document with the individual's National Insurance number.

The Home Office Border and Immigration Agency website has a lot of useful information:

<http://www.ukba.homeoffice.gov.uk/>

A number of guides have been updated:

Non EEA citizens

A 'points-based' system, including the requirement that employers hold a Sponsoring Licence issued by the UK Borders Agency, was introduced in November 2008.

<http://www.bia.homeoffice.gov.uk/employers/>

Any congregation wishing to employ someone who is not a citizen or national from the European Economic Area ("EEA")* or Switzerland should contact the Law Department for further advice.

* The EEA comprises: Austria, Belgium, Bulgaria, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

FAMILY FRIENDLY PROVISIONS

There are a range of entitlements available to employees designed mainly to assist with the upbringing of children. Basic details of these entitlements are given in the following sections:

Maternity Leave

A pregnant employee is required to notify her employer of the intention to take maternity leave by the end of the 15th week before the expected week of childbirth, which starts on the Sunday prior to the expected date of birth. Once notified, the employer is required to respond within 28 days.

There are three types of Maternity Leave:

- Ordinary Maternity Leave;
- Compulsory Maternity Leave; and
- Additional Maternity Leave.

The basic provisions are as follows:

Ordinary Maternity Leave ("OML") may last for up to 26 weeks and there is no minimum qualifying period of service. OML must commence no later than the start of the eleventh week before the expected week of childbirth.

There is a period of two weeks compulsory maternity leave which commences with the date of birth of the child (i.e. this must be taken by the employee even should she waive the right to take any other part of OML). You should note the following:

- A period of additional maternity leave ("AML") of up to 26 weeks from the end of the OML period may be taken;

- Employees on maternity leave retain their entitlement to accrue statutory annual leave throughout ordinary and additional maternity leave and annual leave cannot be taken during maternity leave;
- Provided a woman has completed one year's service, she may, with the agreement of her employer, add a period of parental leave to the end of it;

Employers are required by law to protect the health and safety of employees who are pregnant, have recently given birth or who are breastfeeding;

Care should be taken when handling difficult situations (such as business change and redundancy) that affect a pregnant employee;

It is unlawful to refuse to offer employment to a woman because she is pregnant;

All pregnant employees, regardless of their length of service, are entitled to paid time off to attend antenatal care but there is also a new right, which is:

Time off to accompany a pregnant woman to ante-natal appointments

This new right is available to employees and qualifying agency workers. It applies to the pregnant woman's husband, civil partner or partner (including same-sex partner), the father or parent of a pregnant woman's child, and intended parents in a surrogacy situation who meet specified conditions. The entitlement is to unpaid leave for up to two appointments, capped at 6.5 hours per appointment.

Employees will have the right to bring claims in the Employment Tribunal if their employer unreasonably refuses to let them take time off for this purpose. Employers can offer provision more generous than the statutory entitlement and also decide to make the leave paid, if they wish to do so. The Government has issued guidance for employers on the new right:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351413/bis-14-1063-time-off-to-accompany-a-pregnant-woman-to-ante-natal-appointments-employer-guide.pdf

There is a similar right for adopters.

An employer who fails to carry out an adequate maternity risk assessment risks a successful sex discrimination claim.

A woman is only eligible for Statutory Maternity Pay ("SMP") if she has completed 26 weeks' continuous service with her employer by the beginning of the qualifying week - which is the end of the 15th week before the expected week of childbirth.

SMP (and maternity allowance if appropriate) is payable for 39 weeks. Maternity allowance is a weekly benefit paid to pregnant women who cannot get SMP.

Parental Leave

Parental leave was introduced by the Maternity and Parental Leave Regulations 1999, which set out the minimum rights for employees. Employers can however offer enhanced rights, but they should not fall short of the minimum stipulated below.

Employees who fulfil the qualifying conditions are currently entitled to 18 weeks' leave for the purposes of caring for a child. The qualifying provisions are as follows:

- The employee must have 1 year's continuous service; and
- The employee must have, or expect to have, responsibility for a child (both birth parents are eligible) and the child must be:
 - under five years old; or
 - under 18 years, if disabled; or
 - have been placed for adoption with the employee within the last five years and is under 18.

The leave is unpaid, and has to be for the purpose of caring for the child. Unless the employer is prepared to agree otherwise, the leave must be taken in blocks of one week upwards at a time. In the case of a disabled child, the right will extend up to that child's 18th birthday and the parent will be entitled to take the leave in single days, if required.

The legislation envisages that employees and employers may agree to more generous provisions in respect of parental leave but in the absence of such provisions the following will apply:

- A father can take leave after a child is born if he gives his employer 3 months' notice before the expected week of childbirth;
- An employer has the right to postpone leave for up to six months from the date that the employee wishes to take the leave where "the operation of the employer's business would be unduly disrupted";
- The amount of parental leave which may be taken in any one year may be limited to 4 weeks; and
- 21 days' notice must be given before the leave is taken.

The employer has the right to request appropriate evidence relating to the exercise of the right (proof of date of birth etc.).

Adoption leave

Male and female employees have the right to claim Ordinary Adoption Leave ("OAL" - 26 weeks) and Additional Adoption Leave ("AAL" - a further period of 26 weeks) much on the same basis as Ordinary Maternity Leave and Additional Maternity Leave. The entitlement to a period of OAL only applies to employees who have 26 weeks continuous service ending

with the week on which they are matched with a child. The right applies to adoptive children up to the age of eighteen, but the child must be newly placed.

The employee must provide the employer with notification of their intention to take adoption leave not more than seven days after the date on which he/she is notified of having been matched with the child, or if this is not possible, as soon as reasonably practicable.

The employee is usually entitled to Statutory Adoption Pay (for a period of up to 39 weeks) from the start of OAL, currently paid at £135.45 per week.

There are further provisions which apply to Adoption Leave and it is recommended that Congregations contact the Law Department for detailed advice at the point when they become aware that an employee is seeking to exercise the right.

Time off for dependents

Employees are to be permitted by the employer to take a “a reasonable amount” of time off to take action necessary in connection with various domestic demands. No definition of what is ‘reasonable’ is given but the right will arise in connection with the following circumstances:

- Where a dependant falls ill, gives birth, is injured or assaulted;
- Where arrangements require to be made for the care of a dependant who is ill or injured;
- The death of a dependant;
- The unexpected disruption or termination of arrangements for the care of the dependant; or
- An unexpected incident which involves an employee’s child at school.

It should be noted that dependants are not restricted to family members. A dependant may be a person living with an employee in the same household (who is not an employee, tenant, lodger or boarder) or a person who relies on an employee when they are ill, infirm or giving birth.

Whilst each incident will need to be looked at in isolation, it is suggested that one or two days should be sufficient in most cases to deal with the problem and ought, for example, to be enough to help a parent deal with the immediate crisis if a child falls ill. This gives enough time to deal with the immediate care of the child, doctors' visits and to make longer-term care arrangements. An employee will not normally be entitled to two weeks off to care for a sick child.

Paternity leave

Fathers have the right, subject to meeting certain criteria, to take a period of either one week or two consecutive weeks leave following the birth (or adoption) of a child for which they are responsible. The right must be exercised within 56 days of the birth or adoption and is in addition to any parental leave entitlement. The leave is unpaid but the employee is entitled to

claim Statutory Paternity Pay. It should be borne in mind that if it is the male partner who is adopting, the female partner may be eligible for paternity leave. The qualifying criteria are:

Birth

An employee is entitled to be absent from work for the purpose of caring for a child or supporting the child's mother if:

- he has been continuously employed for not less than 26 weeks ending with the fifteenth week before the expected week of childbirth;
- he is either the father of the child or married to the child's mother or married to the partner of the child's mother; and
- he has or expects to have if he is the child's father responsibility for the upbringing of the child or, if he is the mother's husband or partner, but not the child's father, the main responsibility (apart from the responsibility of the mother) for the upbringing of the child.

Adoption

An employee is entitled to be absent from work for the purpose of caring for a child or supporting the child's adopter if:

- he or she has been continuously employed for not less than 26 weeks ending with the week in which the child's adopter is notified of having been matched with the child;
- he or she is either married to or the partner of the child's adopter; and
- he or she has or expects to have the main responsibility (apart from the responsibility of the child's adopter) for the upbringing of the child.

Additional Paternity leave gives employed fathers a right to up to six months' extra leave which can be taken once the mother has returned to work after 20 weeks. Some of the leave may be paid if taken during the mother's maternity pay period. This is paid at 90 per cent of earnings up to the same standard rate as Statutory Maternity Pay.

In all of these cases it should be remembered that the employee has the right to return to the same job he or she had prior to the start of the leave without suffering any detriment. The statutory right is slightly different in the case of Additional Maternity Leave or Additional Adoption Leave or a period of Parental Leave of more than four weeks, or where a further statutory leave entitlement is taken directly after one of those periods. Again, there are statutory rights where a potential redundancy may have arisen during any such period. Where such factors may apply, the Law Department would be pleased to give advice as with any other aspect of these entitlements.

Families can also share leave for the purposes of caring as fathers or partners of mothers or adopters have the right to take up to six months' additional leave to care for a child, if the child's mother or the primary adopter returns to work before the end of their full maternity or adoption leave entitlement.

Shared Parental Leave

With shared parental leave now available, Congregations may be receiving enquiries about this from employees. What follows is a brief overview of the key changes and what issues will need to be addressed, however if you do receive such requests please do not hesitate to contact the Law Department for further advice as necessary.

Outline of New Regime

- The new system of shared parental leave and pay applies for parents of babies expected from 5th April 2015 onwards and for parents of children placed for adoption from that date.
- Ordinary and additional maternity leave will stay in place but the mother will be entitled to stop her leave and any associated statutory maternity pay and put the balance of her entitlement into a shared pot which can then be distributed between both parents as shared parental leave and pay.
- Mothers who do not have partners who qualify will also be able to opt into shared parental leave to give them more flexibility, as well as the ten optional keeping in touch days currently allocated to maternity leave a further 20 days will be attached to the period of shared parental leave ('split' days).
- Additional paternity leave and pay is to be abolished. Fathers and the partner of mothers are to continue to be entitled to take two weeks' ordinary paternity leave and pay which cannot be added into the shared leave pot. There are similar changes applicable to adoptive parents.
- From 1st October 2014 mothers partners have a right to take unpaid time off to attend up to two antenatal appointments with the mother and adopters have the right to paid time off to attend adoption appointments. Partners have the right to take unpaid time off to go with them.

Shared parental leave is to be available for a maximum of 50 weeks (due to the compulsory 2 week period immediately following the birth that the mother must take). Leave can be shared between qualifying parents but must be taken in four weeks. Each employee will be entitled to take up to three separate lots of leave.

Entitlement to statutory pay remains the same as is currently in place (i.e. a total of 39 weeks) but mothers entitled to statutory maternity pay are able to curtail their entitlement allowing both working parents to take the balance as statutory shared parental pay.

If and when this has happened both parents will then need to notify the respective employers of how they intend to divide the period of shared parental leave. In both cases supporting information is required.

Broadly speaking each parent is to give the employer at least 8 weeks' notice of the actual dates they will be taking shared parental leave. Notice provisions are fairly complicated, and should you receive such a request please contact the Law Department for assistance.

Flexible working

From 30th June 2014 all employees have a right to request flexible working, not just parents and carers. This is known as making a statutory application. Employees must have worked for the same employer for at least 26 weeks to be eligible. You can ask your employee to use a standard form to make the application and a standard application is available online:

<https://www.gov.uk/government/publications/the-right-to-request-flexible-working-form>

- The application must include the date
- A statement that this is a statutory request
- Details of how the employee wants to work flexibly and when they wish to start
- An explanation of how flexible working could affect the Congregation and how this could be dealt with
- A statement advising as and when a previous application has been made.

Employers must deal with request in a reasonable manner and an example of handling requests in a reasonable manner includes: _

- Assessing the advantages and disadvantages of the application
- Holding a meeting to discuss the request with the employee offering an appeal process

It is important to bear in mind that the right is only a right to request a contract change (and that the employee must make a written case for doing so): there is no automatic entitlement to have the request granted, but the employer may only reject the application after proper consideration and on genuine business grounds.

Flexible working requests should not be ignored and indeed it will be difficult for employers to justify that 'full-timer only' policy. Indeed, refusal of the flexible working request following maternity leave can be discriminatory and it should not be assumed that men never need to work flexibly. Following recent case law, it is important to bear in mind that flexible working is particularly important for parent with disabled children and carers of adults.

It is recommended that Congregations seek advice from the Law Department with regard to what requires to be done at the point when a request is made.

FIXED TERM CONTRACTS

Waivers of the right to claim unfair dismissal or the right to a redundancy payment contained in fixed term contracts are void and unenforceable. In addition, an employer is prevented from treating a fixed term employee less favourably than an equivalent permanent employee, unless there is objective justification for doing so. Fixed term contracts entered into after 1st October 2002 will be converted into permanent contracts after four years duration (including those initially for a shorter term which have been extended beyond four years).

Accordingly, fixed term employees should be treated no differently from permanent employees. If the need for a particular post is coming to an end, then a fixed term employee should be subject to the same redundancy procedures as would apply to a permanent employee. It is important to bear in mind that the end of any fixed term contract constitutes a dismissal for the purposes of the unfair dismissal legislation and, accordingly, must be fair. Redundancy (through the end of any need for the post or the cessation of funding) would be a legitimate reason for dismissal, but the procedures mentioned should be followed.

Legal advice should be sought where the creation of a fixed term appointment or the termination of a fixed term contract are being considered.

H

HEALTH AND SAFETY

It is the employer's responsibility to ensure that their employees observe health and safety legislation. An employer owes a duty of reasonable care to its employees and has a delegable duty to select proper and competent employees, to provide them with adequate materials and resources for the work, and to operate a safe system of working.

The Law Department has produced a number of guidance notes on this topic which can be found on the law circulars section of the Church of Scotland website: http://www.churchofscotland.org.uk/resources/subjects/law_circulars

HOLIDAY ENTITLEMENT

All employees must be allowed at least 5.6 weeks paid leave in any calendar year. This entitlement applies regardless of the number of hours worked.

A useful online calculator, particularly helpful for part-time employees, can be found at:

<http://www.businesslink.gov.uk/bdotg/action/layer?r.11=1073858787&topicId=1079427399&r.12=1073858926&furlname=annualleave&furlparam=annualleave&ref=&domain=www.businesslink.gov.uk>

If you are employing someone on an hourly basis, it is perhaps more appropriate (and less confusing) also to specify the time off in hours.

N

NATIONAL MINIMUM WAGE

All workers, depending on their age, are entitled to be paid a minimum hourly rate which is reviewed annually with a new rate applying from 1st October every year. Please note however the instruction of the General Assembly of 2012 to congregations “to implement the Living Wage with all possible speed and in all cases by 2015 or have a plan in place by then with an agreed deadline”.

Current Hourly Rates applying:

There are three levels of the National Minimum Wage. To find out more and to check the level of the current rates please go to:

<https://www.gov.uk/your-right-to-minimum-wage> and

<https://www.gov.uk/national-minimum-wage-rates>

Preparing for the National Living Wage

As part of preparing for the new National Living Wage, set to come into force on **1 April 2016**, HMRC has published a four-step guide for businesses on the [living wage website](#). From that date, workers in the UK aged over 25 earning the minimum hourly rate of £6.70 will see a 50p increase to £7.20 per hour.

The Government is asking firms to:

- Check you know who is eligible in your organisation.
- Take the appropriate payroll action.
- Let your staff know about their new pay rate.
- Check that your staff *under 25* are earning at least the right rate of National Minimum Wage.

HMRC will have responsibility for enforcing the new National Living Wage in addition to the National Minimum Wage from April 2016 and – if previous experience is any guide – will take firm action where an employer fails to pay the correct wage.

There are, however, certain specialties which may apply to Church employees and of which congregations should be aware:

Accommodation Offset

Many Church Officers or Beadles will be provided with accommodation and, indeed, it may form the most significant part of their remuneration. Payments in kind are generally not permitted to be taken into account when calculating the figure a worker is paid. The provision of accommodation is the single exception but allowance can only be made for part of the value of the accommodation provided. The limit is set quite low and it may therefore be the case that Congregations require to increase the salary actually paid.

Accordingly, in determining whether a salary needs to be increased to bring it within the limit, the allowance, calculated as above, should be added to the amount actually paid over the relevant period and that figure divided by the number of hours worked in the period. If, after this, the hourly rate is less than appropriate hourly minimum then the monetary element will require to be increased.

The maximum amount from 1st October 2011 which can be offset against NMW is £33.74 per week (£4.82 per day). Where accommodation is provided for less than a full week, the offset should be correspondingly reduced.

For the avoidance of doubt, the above is intended to emphasise the fact that the financial element in a Church Officer's remuneration might require to be increased so that a rate of at

least the hourly minimum rate is achieved. The pay statement should ~~not~~ refer to a ‘net’ figure from which the permitted accommodation allowance has been deducted, as this is treated by HMRC as a non-taxable benefit where living accommodation is necessary for the proper performance of the duties of the post or is provided so that these duties can be performed in a materially better way, and it is customary for accommodation to be provided in that type of employment. For the purposes of the minimum wage legislation, the critical factor is that any worker who has the benefit of tied accommodation should receive remuneration equivalent to at least the minimum statutory rate (after taking into account the accommodation offset, correctly calculated).

Expenses

As from 1 January 2011 travelling and subsistence expenses no longer count when calculating National Minimum Wage pay.

Hours Worked

Essentially, at least, the minimum rate should be paid in respect of each hour worked. In most cases an employee will be employed for a set number of hours and the position will be straightforward. However, in other cases, including employees such as Church Officers, the employment may not entail working a set number of hours and the actual number of hours in respect of which the minimum wage requires to be paid may be open to debate. Although the legislation stipulates that time when a worker is ‘on call’ is to be included, this does not extend to time on call at home and simply because a Church Officer is required to live in the accommodation provided does not mean that he or she can claim that such time spent at home should be taken into account.

Church Officers who do not work set hours probably fall into the category of workers who perform what is called, in the legislation, ‘unmeasured work’ and the rules applicable to this category require to be followed. Where the Church Officer is required under his or her contract of employment to be at work at specific times and his or her duties can be performed within those hours there should be no difficulty. If additional duties are required then the Church Officer can simply be paid the appropriate hourly rate - effectively “overtime”. In fact, for the category of unmeasured work the employer must either (a) pay at least the minimum wage for every hour worked or (b) have entered into a “daily average” agreement. For new employees the figure for the daily average can be entered into the contract of employment. For existing employees, unless payment is made for actual hours worked, a figure for the daily average must be agreed: i.e. there must be a daily average agreement. It is important to understand that there must be agreement between the parties to an existing contract of employment: it is not open to an employer to seek to impose new terms and conditions as, if this is done, it may be open to the aggrieved employee to seek recourse through an Employment Tribunal. A form of daily average agreement is attached at the end of this document. The style contracts of employment referred to below also contain an appropriate clause.

Note that it is unlikely you will need to take account of the value of the accommodation for tax purposes if it is required for the proper performance of the job but it is worth checking with the relevant HMRC guidance:

<http://www.hmrc.gov.uk/manuals/eimanual/EIM11342.htm>

Voluntary Workers

Voluntary workers are specifically excluded from the legislation. Explicit mention is made of those who work for charities and in the vast majority of cases there should, therefore, be no difficulty. There may be certain “grey areas”, however, such as casual workers or those who are given honoraria. Someone who carries out a task or service, even regularly, is not entitled to the minimum payment if it is clear that there was no contractual relationship between the parties. If an honorarium is given where there is no obligation to make payment for the work or service then this does not create a relationship giving rise to any entitlement to receive remuneration equivalent to the minimum wage rate. Casual workers are different if there is an expectation of payment for work done regularly. If the task is just a ‘one off’ where no employment relationship is intended then it should be possible to agree a rate for the job equivalent to a figure less than the hourly minimum. However, where someone carries out a task regularly such that he or she should be classed as a part-time worker then the minimum hourly rate should be paid.

Record-keeping

The legislation requires employers to keep appropriate records. There is no statutory specification of what this entails. Obviously, it is of greater importance that the employer keeps more detailed records where the employee is paid at a rate close to the hourly minimum or where there is a complicating factor such as the provision of accommodation. It is recommended that where hours worked may vary appropriately detailed records should be kept and that Financial Boards should allocate this task to a particular office-bearer.

As a minimum it is suggested that records should involve the employee’s pay and time records, but may include more detailed records of the various elements that make up the total pay, any deductions for accommodation or absences, pay received during those periods, and details of time spent on business travel. In particular, employers must also keep:

- a copy of any agreement to undergo accredited training;
- a copy of any daily average agreement;
- copies of any written notices given to those doing output work; and
- copies of the information used to calculate any 'mean hourly output rate'.

Queries in connection with payment of the national minimum wage may arise as a result of the activities of the HM Revenue and Customs and legislation empowers Revenue Officers who obtain information in connection with tax and national insurance matters to pass on that information for the purposes of enforcing the national minimum wage.

A Government Guide in relation to the Minimum Wage can be downloaded at:

<http://www.direct.gov.uk/en/Employment/Employees/TheNationalMinimumWage/index.htm>

There is also a National Minimum Wage Helpline: 0800 917 2368

P

PART-TIME WORKERS

Part-time workers, no matter how few hours they work, should not be treated any differently from full-time workers.

PENSIONS

Since October 2012, employers have been required to enrol workers into a workplace pension. Employees will also require to contribute and may decide to opt out. Employers can choose the qualifying scheme they use, which could include NEST (the National Employment Savings Trust), a trust based defined contribution occupational pension scheme set up by the UK Government.

When this is to be implemented depends on the number of persons employed. The system will be phased in between October 2012 and April 2017, with the largest employers being brought in first. See the Law Department Circular for more information:

http://www.churchofscotland.org.uk/_data/assets/pdf_file/0003/9264/Pensions_Changes.pdf

PAYE AND REAL TIME REPORTING

See Taxation.

R

RECRUITMENT

As mentioned above, the Equality Act 2010 protects job applicants against all forms of race discrimination throughout the recruitment process. There is a Home Office Code of Practice covering discrimination concerns. It aims to provide employers with guidance on how to avoid a civil penalty for employing an illegal migrant worker in a way that does not result in unlawful race discrimination.

Advertising vacancies

You do not have to advertise a job vacancy in a particular way or at all, but if you don't advertise at all or you advertise in a way that won't reach people with a particular protected characteristic (see reference to the Equality Act above), this might in some situations lead to indirect discrimination, unless you can objectively justify your approach.

For example, if you recruit for a cleaner through word of mouth, or by an advert on a congregational notice board, it is possible that this could constitute indirect discrimination on

the grounds of the protected characteristic of religion or belief, as it is likely that individuals of no faith or of other faiths would by default not have the opportunity to apply for such a post.

If you advertise a post for which a Christian commitment is a legitimate requirement (as referred to above under “Equality Act”), you should specify this in the advertisement itself

Questions before offering employment

The Act also makes it unlawful, except in certain specific circumstances, to ask any job applicant about their disability or health until the applicant has been offered the job. This includes questions whether in an application form or an interview relating to previous sickness absence. The intention of this provision of the Act is to ensure that disabled applicants are assessed objectively for their ability to do the job in question.

There are some limited exceptions to the general rule prohibiting disability or health-related questions. So far as likely to be relevant for congregational purposes, these are:-

- questions relating to reasonable adjustments that would be needed for an assessment such as an interview or other process designed to assess a person’s suitability for a job;
- questions asked with the aim of implementing positive action measures in improving disabled people’s employment rates; or
- questions which relate to a person’s ability to carry out a function that is intrinsic to that job. Only functions that can be justified as necessary to a job should be included in a job description, and if a health-related question would determine whether a person can carry out this function, if necessary with reasonable adjustments in place, then such a question is permitted.

Questions after an offer of employment is made

Job offers can be made conditional on satisfactory responses to pre-employment health checks, but you must ensure that you do not discriminate against a disabled job applicant on the basis of any such response. It will, for example, be direct discrimination if an applicant is rejected solely because they have a disability. Where pre-employment health checks are carried out after someone has been conditionally offered a job subject to such enquiries, an employer must not use the outcome of the enquiries to discriminate against that person.

REDUNDANCY

See ‘Dismissal’ above. Please note, such situations are complex and it is therefore essential that tailored legal advice be sought.

T

TAXATION

It is often mistakenly thought that ‘casual’ or part-time employees (particularly if paid in cash) are outside the scope of the Pay As You Earn system. Similarly, it could be thought that for taxation of part-time staff that this should be dealt with by their ‘main’ employer. In fact, the obligation to operate PAYE arises on the making of any payment through earnings and this obligation applies to part-time and casual staff.

All Church of Scotland Treasurers are therefore required to communicate with HM Revenue and Customs on behalf of their congregation in relation to any employee and to use the appropriate taxation code when doing so.

When engaging a new employee, the first step should be to request Parts 2 and 3 of their P45 (leaving certificate) from their previous employer. If a P45 is produced this will enable PAYE to be operated on the previous tax code unless the employment is after 24 May in any year. In this instance, and in any other circumstance where a P45 cannot be produced, a P46 should be completed. HMRC have produced a useful Guide which may be of assistance. It can be found online at: <http://www.hmrc.gov.uk/helpsheets/e13.pdf>

If your congregation is paying PAYE, National Insurance contributions (NICs) will also be due on the earnings paid to employees. Note that ‘earnings’ will also include any benefits provided, such as a car or accommodation. Most workers (both employed and self-employed) pay NICs on their earnings, in addition to Income Tax.

The tax and NICs due on employees' earnings are calculated and deducted at the same time through the PAYE system NICs are therefore paid directly to HMRC. Note however that the NICs that apply to many employer-provided benefits are calculated separately after the end of the tax year.

From 6th April 2013 employers started reporting PAYE information to HMRC in Real Time, sometimes called Real Time Information or RTI. The Law Department has issued guidance on Real Time Information and when there is a requirement to report and a practical step by step guide of how to do so. Please refer to the Law Circulars page for further information.

TRIBUNALS

Employment Tribunals have jurisdiction to hear more than 80 types of statutory employment claims, including unfair dismissal and discrimination. In the majority of cases the time limit for starting proceedings in the Employment Tribunal (ET) is three months from the date of the act complained of or, where dismissal is involved, three months from the effective date of termination of the contract.

The procedure for bringing a claim to Tribunal requires the aggrieved person (the claimant) to lodge a complaint on the prescribed ET1 form, setting out particulars of the act(s) complained of. In almost all cases, to be eligible to raise an unfair dismissal claim, an employee must have been employed for at least one year (or two years if employed on or after 6 April 2012), but there is no prior service qualification needed to raise a discrimination claim.

If you receive such a form or threats of action from an employee please contact the Law Department immediately, as the procedure is regulated by strict time-limits and if a response is not submitted in time the claim will be successful by default.

Note: Employment Tribunals will be able to order employers to carry out equal pay audits where there has been an equal pay breach and so ensure you are not discriminating on grounds of sex. Equally, the other characteristics protected by the Equality Act are listed under the Equality Act section, which you should take cognisance of.

VOLUNTEERS

There is currently no legislation specifically covering volunteer workers, and equally there is no legal definition of what a voluntary worker is. There have been a number of recent cases in which volunteers have sought the protection of discrimination and/or unfair dismissal law and the Supreme Court last year issued its judgment on the pivotal question of whether or not volunteering activities could be defined as “an occupation” for the purposes of the EU Framework Directive which underlies the UK legislation. The Court held that the answer was No, and that volunteers were not as a matter of course entitled to the protection of employment law, but it is important to take certain steps to ensure that volunteers do not become employees in the eyes of the law. To avoid this, the following steps are suggested:-

- don't create volunteer “contracts”. Volunteer role descriptions can be helpful but there should be no expectations of obligation on either side. Instead, goals should be expressed as intentions or hopes rather than as obligations
- differentiate between paid staff and volunteers
- only make payments to volunteers which are in reimbursement of costs incurred
- don't pay “volunteer's expenses” if no expenses are actually incurred

W

WORKING TIME

Essentially, employees cannot be required to work more than forty eight hours per week averaged over a seventeen week period. This stipulation does not apply to office-holders or the self-employed and, accordingly, Parish Ministers are not affected but anyone working under a contract of employment will be.

All qualifying employees are entitled to at least one day off per week.

It is probable that very few congregational employees work more than the limit but it is possible under the legislation for the employee to agree to work longer hours. This cannot be imposed on the employee, however, and the terms of any agreement must be scrupulously adhered to. If a congregation is considering such an agreement then legal advice should be sought and the Law Department would be pleased to assist.

DAILY AVERAGE AGREEMENT

We the employer and, the employee under Contract of Employment between us dated do hereby agree that the daily average number of hours worked by the employee to perform the duties required of him/her in connection with the post of Church Officer [*or cleaner or other post as appropriate*] ishours and that this Agreement will come into force on[*state date which must be after the date of the Agreement*].

..... (employer) *

..... (employee)

* [*the Agreement should be signed by the same office-bearer(s) or their successors in office who signed the original Contract of Employment*].

March 2016