

International Labour and Employment Compliance Handbook www.kluwerlawonline.com



the global voice of
the legal profession

Edited by Salvador del Rey and Robert J. Mignin

Labour and Employment Compliance in England

Third Edition

Tony Hyams-Parish

 Wolters Kluwer

International Bar Association

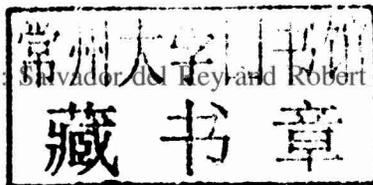
Labour and Employment Compliance in England

Third Edition

Tony Hyams-Parish

This publication is part of the International Labour
and Employment Compliance Handbook,
available on www.kluwerlawonline.com

Editors: Salvador de Tey and Robert J. Mignin



the global voice of
the legal profession



Wolters Kluwer

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-6249-6

© 2015 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA.
Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

All listed titles are also available on www.wklawbusiness.com

1. Argentina: Julio César Stefanoni Zani & Enrique Alfredo Betemps, *Labour and Employment Compliance in Argentina, 3rd edition*, 2015 (ISBN 978-90-411-6182-6)
2. Australia: Stephen Price, Rosemary Roach, Jack de Flamingh, Heidi Roberts, Nicholas Ellery & Nick Le Mare, *Labour and Employment Compliance in Australia*, 2015 (ISBN 978-90-411-6248-9)
3. Brazil: Sólton de Almeida Cunha, Jorge Gonzaga Matsumoto & Murilo Caldeira Germiniani, *Labour and Employment Compliance in Brazil, 2nd edition*, 2015 (ISBN 978-90-411-6174-1)
4. Canada: Kevin Coon & Adrian Ishak, *Labour and Employment Compliance in Canada, 2nd edition*, 2015 (ISBN 978-90-411-5637-2)
5. Chile: Gerardo Otero A., María Dolores Echeverría F., Macarena Lopez M., Juan Pablo Cabezón O. & María de los Ángeles Fernández S., *Labour and Employment Compliance in Chile, 3rd edition*, 2015 (ISBN 978-90-411-6233-5)
6. China: King & Wood Mallesons, *Labour and Employment Compliance in China, 2nd edition*, 2015 (ISBN 978-90-411-5631-0)
7. England: Tony Hyams-Parish, *Labour and Employment Compliance in England, 3rd edition*, 2015 (ISBN 978-90-411-6249-6)
8. France: Pascale Lagesse, *Labour and Employment Compliance in France, 3rd edition*, 2015 (ISBN 978-90-411-6181-9)
9. Germany: Gerlind Wisskirchen & Martin Lützel, *Labour and Employment Compliance in Germany, 3rd edition*, 2015 (ISBN 978-90-411-6180-2)
10. India: Vijay B Ravi, *Labour and Employment Compliance in India, 3rd edition*, 2015 (ISBN 978-90-411-6250-2)
11. Ireland: Duncan Inverarity & Sinead Grace, *Labour and Employment Compliance in Ireland, 2nd edition*, 2015 (ISBN 978-90-411-6179-6)
12. Israel: Yaron Horovitz, Pnina Broder-Manor & Helen Raziell, *Labour and Employment Compliance in Israel, 2nd edition* 2015 (ISBN 978-90-411-6251-9)
13. Italy: Angelo Zambelli, *Labour and Employment Compliance in Italy, 3rd edition*, 2015 (ISBN 978-90-411-6178-9)
14. Japan: Yoshikazu Sugino, *Labour and Employment Compliance in Japan, 3rd edition*, 2015 (ISBN 978-90-411-6177-2)
15. The Republic of Korea: Sang Wook Cho, Brendon Carr, Soojung Lee & Christopher Mandel *Labour and Employment Compliance in the Republic of Korea*, 2015 (ISBN 978-90-411-6149-9)
16. Mexico: Oscar De La Vega Gómez & Monica Schiaffino, *Labour and Employment Compliance in Mexico, 3rd edition*, 2015 (ISBN 978-90-411-6252-6)
17. The Netherlands: Els de Wind, *Labour and Employment Compliance in the Netherlands*, 2013 (ISBN 978-90-411-4928-2)
18. Poland: Barbara Józwick, *Labour and Employment Compliance in Poland, 3rd edition*, 2015 (ISBN 978-90-411-6176-5)
19. Russia: Anna-Stefaniya Chepik, *Labour and Employment Compliance in Russia*, 2013 (ISBN 978-90-411-4925-1).

20. South Africa: Susan Stelzner, Stuart Harrison, Brian Patterson & Zahida Ebrahim, *Labour and Employment Compliance in South Africa, 3rd edition*, 2015 (ISBN 978-90-411-6253-3)
21. Spain: Salvador del Rey & Ana Campos, *Labour and Employment Compliance in Spain, 3rd edition*, 2015 (ISBN 978-90-411-6231-1)
22. Turkey: Nuri Bodur, Elif Nur Çakir & Ozan Kesim, *Labour and Employment Compliance in Turkey*, 2015 (ISBN 978-90-411-6150-5)
23. United Arab Emirates: Sara Kohja, *Labour and Employment Compliance in the United Arab Emirates, 2nd edition*, 2015 (ISBN 978-90-411-6175-8)
24. United States: Baker & McKenzie LLP, *Labour and Employment Compliance in the United States, 3rd edition*, 2015 (ISBN 978-90-411-6256-4)

England

AUTHOR

Tony Hyams-Parish

Tony Hyams-Parish is a Partner and Head of the Employment Department at leading southeast UK law firm Rawlison Butler LLP where he leads a team of specialist lawyers advising clients. Ranging from large multinationals to small owner-managed businesses, on all aspects of employment law. Having qualified into the legal profession as a barrister, Tony has rights of audience in all courts, including Higher Courts, and regularly represents his clients at Employment Tribunals. Tony is continually rated as a leading employment lawyer in Chambers Guide to the Legal Profession and Legal 500 where his expertise in complex employment litigation is widely acknowledged.

ADDRESS

Rawlison Butler LLP
(Gatwick Office)
Griffin House
135 High Street
Crawley
West Sussex

RH10 1DQ

Tel: +44(0)1293 527744

Fax: +44(0)1293 520202

E-mail: ahyamsparish@rawlisonbutler.com

Web: www.rawlisonbutler.com

Table of Contents

1.	Legal Framework: Employment Laws	1
2.	Contracts of Employment	1
2.1.	Overview	1
2.2.	Written Employment Contracts	2
2.3.	Oral Contracts	3
2.4.	Employee Handbooks	4
2.5.	Job Description	4
2.6.	Offer Letters	4
2.7.	Checklist of Do's and Don'ts	5
3.	Recruiting, interviewing, Screening and Hiring Employees	6
3.1.	Overview	6
3.2.	Recruiting	6
3.3.	Employment Applications	6
3.4.	Pre-employment Enquiries	7
3.5.	Pre-employment Tests and Examinations	7
3.6.	Background, Reference and Credit Checks	8
3.7.	Interviewing	9
3.8.	Hiring Procedures	9
3.9.	Fines and Penalties	10
3.10.	Checklist of Do's and Don'ts	10
4.	Managing Performance/Conduct	10
4.1.	Overview	10
4.2.	Coaching and Counselling	11
4.3.	Written Evaluations	11
4.4.	Warnings and Suspensions	11
4.5.	Checklist of Do's and Don'ts	12

TABLE OF CONTENTS

5.	Termination of Employees For Performance or Disciplinary Reasons	12
5.1.	Overview	12
5.2.	Separation/Severance Pay	14
5.3.	Fines and Penalties	15
5.4.	Checklist of Do's and Don'ts	15
6.	Layoffs, Reductions in Force, and/Or Redundancies as a Result of Job Eliminations or Other Restructuring	16
6.1.	Overview	16
6.2.	Reductions in Force/Layoffs/Job Eliminations	16
6.3.	Fines and Penalties	19
6.4.	Checklist of Do's and Don'ts	20
7.	Labour and Employment Law Ramifications Upon the acquisition or Sale of a Business	21
7.1.	Overview	21
7.2.	Acquisition of a Business	21
7.3.	Acquisition Checklist	25
7.4.	Sale of a Business	26
7.5.	Sale Checklist	28
8.	Use of alternative Workforces: independent Contractors, Contract Employees, and Temporary or Leased Workers	28
8.1.	Overview	28
8.2.	Independent Contractors	29
8.2.1.	Definition	29
8.2.2.	Creating the Relationship	31
8.2.3.	Compensation	31
8.2.4.	Other Terms and Conditions	32
8.3.	Contract Workers	32
8.4.	Leased Workers	33
8.5.	Checklist of Do's and Don'ts	33
9.	Obligation to Bargain Collectively with Trade Unions: Employees' Right to Strike and a Company's Right to Continue Business Operations	34
9.1.	Overview of Unions' Rights to Organize	34
9.2.	Right of Employees to Join Unions	37
9.3.	How Employees Select Unions	37
9.4.	Pre-election Campaigning	38
9.5.	Unfair Labour Practices	42

9.6.	Relocation of Work/Shutdown of Business	42
9.7.	Checklist of Do's and Don'ts	43
10.	Working Conditions: Hours of Work and Payment of Wages: By Statute or Collective Agreements	43
10.1.	Overview of Wage and Hour Laws	43
10.2.	Minimum Wage	43
10.3.	Overtime	44
10.4.	Meal and Rest Periods	45
10.5.	Deductions from Wages	46
10.6.	Garnishment	47
10.7.	Exemptions to Wage and Hour Laws	47
10.8.	Child Labour	48
10.9.	Recordkeeping Requirements	50
10.10.	Reductions in Compensation Caused by Economic Downturn	50
10.11.	Checklist of Do's and Don'ts	51
11.	Other Working Conditions and Benefits: By Statute, Collective agreements, or Company Policy	51
11.1.	Health and Other Insurance	51
11.2.	Pension and Retirement Benefits	51
11.3.	Vacation and Holiday Payments on Termination	52
11.4.	Leaves of Absence	52
a.	Personal Leave	52
b.	Medical or Sick Leave	52
c.	Bereavement Leave	53
d.	Family Leave	53
e.	Pregnancy Leave	53
f.	Maternity Leave	54
g.	Injury at Work	54
11.5.	Checklist of Do's and Don'ts	54
12.	Workers' Compensation	54
12.1.	Overview	54
12.2.	Checklist of Do's and Don'ts	55
13.	Company's Obligation to Provide Safe and Healthy Workplace	55
13.1.	Overview of Safety and Environmental Laws and Regulations	55
13.2.	Requirements	56
13.3.	Rights of Employees	56

TABLE OF CONTENTS

13.4.	Rights of Employer	56
13.5.	Specific Standards	57
13.6.	Injury or Accident at Work	57
13.7.	Workplace Violence	58
13.8.	Fines and Penalties	58
13.9.	Checklist of Do's and Don'ts	58
14.	Immigration, Secondment and Foreign Assignment	58
14.1.	Overview Laws Controlling Immigration	58
14.2.	Recruiting, Screening and Hiring Process	59
14.3.	Obligation of Employer to Enforce Immigration Laws	59
14.4.	Fines and Penalties	60
14.5.	Secondment/Foreign Assignment	61
14.6.	Checklist of Do's and Don'ts	62
15.	Restrictive Covenants and Protection of Trade Secrets and Confidential Information	63
15.1.	Overview	63
15.2.	The Law of Trade Secrets	63
15.3.	Restrictive Covenants and Non-compete Agreements	64
15.4.	Checklist of Do's and Don'ts	68
16.	Protection of Whistleblowing Claims	68
16.1.	Overview	68
16.2.	Checklist of Do's and Don'ts	69
17.	Prohibition of Discrimination in the Workplace	70
17.1.	Overview of Discrimination Laws in England	70
17.1.1.	Direct Discrimination	71
17.1.2.	Indirect Discrimination	72
17.1.3.	Victimization	73
17.1.4.	Harassment	74
17.2.	Age Discrimination	77
17.3.	Race Discrimination	78
17.4.	Sex Discrimination/Sexual Harassment	79
17.5.	Handicap and Disability Discrimination	80
17.6.	National Origin Discrimination	81
17.7.	Religious Discrimination	82
17.8.	Military Status Discrimination	83
17.9.	Pregnancy and Maternity Discrimination	83
17.10.	Marital Status Discrimination	83
17.11.	Sexual Orientation Discrimination	83
17.12.	Retaliation	84

17.13.	Constructive Discharge	85
17.14.	Checklist of Do's and Don'ts	85
18.	Smoking in the Workplace	85
18.1.	Overview	85
18.2.	Checklist of Do's and Don'ts	86
19.	Use of Drugs and Alcohol in the Workplace	86
19.1.	Overview of Laws and Regulations in England	86
19.2.	Checklist of Do's and Don'ts	89
20.	AIDS, HIV, SARS, Bloodborne Pathogens	89
20.1.	Overview	89
20.2.	Checklist of Do's and Don'ts	90
21.	Dress and Grooming Requirements	90
21.1.	Overview	90
21.2.	Checklist of Do's and Don'ts	92
22.	Privacy, Technology and Transfer of Personal Data	92
22.1.	Privacy Rights of Employees	91
22.2.	Checklist of Do's and Don'ts	94
23.	Workplace Investigations for Complaints of Discrimination, Harassment, Fraud, theft and Whistleblowing	94
23.1.	Overview	94
23.2.	Checklist of Do's and Don'ts	94
24.	Affirmative Action/Non-Discrimination Requirements	94
24.1.	Overview	94
24.2.	Checklist of Do's and Don'ts	97
25.	Resolution of Labour, Discrimination and Employment Disputes: Litigation, arbitration, Mediation and Conciliation	97
25.1.	Internal Dispute Resolution Processes	97
25.2.	Mediation and Conciliation	98
25.3.	Arbitration	98
25.4.	Litigation	99
25.5.	Fines, Penalties and Damages	99
25.6.	Checklist of Do's and Don'ts	99
26.	Employer Recordkeeping, Data Protection and Employee Access to Personnel Files and Records	100
26.1.	Overview	100
26.2.	Personnel Files	102

TABLE OF CONTENTS

26.3.	Confidentiality Rules	102
26.4.	Employee Access	104
27.	Required Notices and Postings	103
27.1.	Overview	103
27.2.	Checklist of Do's and Don'ts	103

Legal Compliance in England

1. LEGAL FRAMEWORK: EMPLOYMENT LAWS

Employment law in England has three main sources:

(a) *Contract:*

The relationship between the employer and the employee is governed at common law by the contract of employment.

(b) *Legislation:*

A range of statutes and statutory instruments confer a number of minimum statutory rights on employees, one of the most important of these being the Employment Rights Act 1996 (ERA) which provides, amongst many other rights, a right not to be unfairly dismissed. The Equality Act 2010 (EqA) deals with discrimination law and the Working Time Regulations 1998 (WTR) sets out minimum requirements in terms of maximum working hours, providing holiday, rest breaks, etc.

(c) *European law:*

Employees have acquired additional rights (and employers have acquired additional obligations) as a result of European law, particularly in the areas of discrimination, equal pay and 'family-friendly' rights.

2. CONTRACTS OF EMPLOYMENT

2.1. OVERVIEW

A contract of employment need not be in writing and may be partly written and partly oral. Although oral contracts are legally enforceable, it is always

better to have a written contract as evidence of the terms that have been agreed between the parties.

A contract of employment will generally consist of:

- (a) Express terms, which are those that have been specifically agreed between the parties, whether in writing or orally;
- (b) Implied terms, which are those that are taken to have been agreed, because:
 - they are too obvious to need recording;
 - they are part of the custom and practice of the business or industry;
 - they can be logically deduced from the conduct of the parties;
 - they are necessary to give ‘business efficacy’ to the agreement as a whole;
- (c) statutory terms those derived from employment legislation;
- (d) terms incorporated into individual contracts from other sources, such as collective agreements.

The terms of employment may be found in one document or a combination of documents, including a staff handbook.

2.2. WRITTEN EMPLOYMENT CONTRACTS

Employees who have been employed for one month or more are entitled by section 1 ERA to a written statement of particulars of employment. The written particulars must be provided to employees within two months of starting employment. This document should contain all of terms relating to the following:

- the scale or rate of pay;
- the intervals at which the employee is to be paid (i.e., weekly, monthly or other specified intervals);
- hours of work;
- entitlement to holidays and holiday pay;
- incapacity for work due to sickness or injury, including any provision for sick pay;
- pensions and pension schemes;
- the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment;
- the title of the job which the employee is employed to do or a brief description of the work for which he is employed;
- where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;

- either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer;
- any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made;
- where the employee is required to work outside the United Kingdom for a period of more than one month, the period for which he is to work outside the United Kingdom and the currency in which remuneration is to be paid while he is working outside the United Kingdom;
- any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom.

Subject to the above, there is no legal requirement for other contractual terms to be in writing – they may be either written or oral or even a mixture of the two.

If an employer fails to provide a section 1 ERA statement or provides an inaccurate or incomplete statement, an employee may make a claim to the employment tribunal for compensation of up to four weeks' pay.

Unless an employment contract specifically provides for a power to vary, an employer will only be able to change terms of employment with the consent of the employee. If the employee does not consent, an employer has two choices: vary it unlawfully and risk the employee suing for breach of contract; or terminate the old contract and replace it with a new contract on the new terms, with the risk that an employee may claim to have been unfairly dismissed.

2.3. ORAL CONTRACTS

Although technically in breach of section 1 ERA, which requires the main terms of a contract to be provided in writing to the employee, oral contracts are as binding as written contracts. However the inevitable problem with an oral contract is that it may be difficult to prove the exact terms and conditions of the employment. If there is only an oral contract, otherwise extraneous matters, such as job advertisements and representations made at an interview, will have increased significance. The courts have indicated their willingness to use the wording contained in advertisements to interpret ambiguous terms in an oral contract. For all these reasons, it is advisable for employment contracts to be in writing in case of a later dispute regarding the agreed terms.

2.4. EMPLOYEE HANDBOOKS

It is normal practice for employers to issue employees with a staff handbook. Commonly a staff handbook contains all the non-contractual policies and procedures that are applicable to the employment. The benefit of ensuring that the handbook is non-contractual is so that it can be amended and updated without obtaining the consent of the employees. Occasionally, however, some employers opt to have a contract of employment which is a combination of certain terms set out in a staff handbook together with those terms set out in the individual contract issued to the employee.

2.5. JOB DESCRIPTION

There is no obligation to provide an employee with a job description, but an employee's written statement of employment must include the title of the job that the employee is employed to do or a brief description of the work for which s/he is employed.

2.6. OFFER LETTERS

An employer needs to consider whether an offer letter will form part or all of the contractual terms (once accepted by the employee) or whether the employer intends to have a separate more detailed contract of employment that the employee will sign when they start work. If the offer letter is to comprise the entire contract then it is important to check that the offer letter contains all the relevant terms of employment and expressly incorporates any other documents that may contain contractual terms, for example, a staff handbook.

If the offer letter is to be superseded by a more detailed written contract of employment once the employee starts work, then the employer may wish to make the offer of employment conditional upon the signing of the full contract and acceptance of its terms (in other words mark the offer letter 'subject to contract'). This will prevent an employee from arguing that the employer is unilaterally trying to change the terms agreed in their offer letter.

A common problem occurs where the terms of the offer letter and the terms of the subsequent contract of employment are inconsistent. The contract should make it clear that in the event of any inconsistency, it is the contract terms that will prevail. It may also be useful to include an 'entire agreement' clause in the offer letter and/or contract which records that the document contains the entire agreement as to the employee's terms of employment (if this is the case) as this will prevent an employee

subsequently arguing that they are entitled to contractual terms other than those set out in the offer letter or contract. For the same reason, it may be advisable to include a provision in the offer letter or contract stating that the employee has not relied on any oral or written representations which are not contained in the offer letter or contract, to head off a misrepresentation claim that, for example, they were promised a particular promotion at interview and that was the reason they accepted the offer of employment.

The employer needs to consider whether the offer of employment should contain any conditions precedent. If these are required they must be clearly set out in the offer letter. Common conditions include:

- the need to obtain an appropriate work permit;
- immigration approval for an employee who does not have permission to work in the UK;
- receipt of references or background checks which are satisfactory to the employer;
- receipt of regulatory or other relevant professional body approval;
- obtaining any qualifications specifically required for the job.

2.7. CHECKLIST OF DO'S AND DON'TS

- Ensure that all employees sign a contract of employment, or at the very least, a basic written statement of terms and conditions that complies with section 1 ERA. Such document should ideally be issued at the start of employment but no later than two months after employment starts.
- Consider including specific terms in the contract of employment that provide some protection against the disclosure of confidential information, poaching clients after the employment has ended, etc.
- Include in an offer letter a number of conditions precedent relating to references, qualifications, right to work in the UK, etc.
- Even if there is no staff handbook in place, ensure that certain procedures, such as disciplinary, grievance and equal opportunities policies and procedures are drafted and made accessible to employees.
- When writing an offer letter, employers should consider what they want to achieve, whether it will form part of the contract of employment or whether a contract will follow, in which case special care will need to be taken to ensure that there are no inconsistencies between the contract and the offer letter.