

# Amending the contract of employment – for the purposes of GDPR

Not every provision contained within a contract of employment is truly contractual in nature and can be changed unilaterally (by the employer) with little if no risk.

Most provisions, such as a person's title, hours, salary, are key to the contract and are contractual in nature. Clauses that concern data protection, of this type, are contractual in nature.

To amend such a provision you should first look to see if there is a provision within the contract that allows the employer to simply make the change, without obtaining the employee's agreement. Ordinarily, however, where no such clause exists, a process needs to be followed.

## Amendments required to the contract under the GDPR

SGBs will need to review their contracts of employment and update the data protection clause to remove any reference to the employee consenting to the SGB's use of their personal data. This clause should be updated to refer to the SGB's new privacy notice for employees and detail where employees can find the privacy notice – for example, within a staff handbook.

SGBs should also ensure that contracts of employment contain a confidentiality obligation on the employee to ensure that personal data to which they have access is kept confidential.

## Steps where no flexibility clause exists

A letter can be issued to staff. It should contain initial information, which does the following:

1. explain the nature and timing of the proposed change(s);

2. the business reasons for the change(s);
3. emphasise any advantages to the employees (e.g. if one element of the change is an enhanced benefit arrangement);
4. give a clear message about the implications for the SGB if the changes are not implemented;
5. include and explain the proposed revised written variation to the existing contract;
6. explain that employees should consider the proposed change and that any questions or concerns should be raised within the next 14 days;

There is then a choice, to either have point 7, noted below, included in the letter, or to issue a further letter after the 14 day window noted at point 6 above.

7. explain that in the absence of any objections to the change being made, the change will take effect after 28 days.

Instead of point 7 it can be helpful and more certain to issue a second letter advising that the change has been made.

This can have a number of benefits, including that there is a clear administrative step taken to record that there are no objections and to close the process formally.

A style letter can read like this for the purposes of making a change necessary to reflect changes to the laws surrounding data protection:

*"Dear [employee]*

*You will have heard that there is new legislation called the General Data Protection Regulation (GDPR) coming into force across the EU. As a result we need to change the provision within your contract of employment dealing with data protection. The change needs to be made with effect from [insert date]. The change proposed is outlined below.*

*It is important that we ensure that our contracts of employment are up to date and that you know how we will deal with your personal and sensitive data further to the GDPR. Making this change helps support the work we are doing to be GDPR compliant and will ensure that you are properly informed.*

*As the old data protection regime under is being replaced by GDPR we need to make the change to ensure we continue to be a well governed SGB; should we not amend your contract of employment we would risk falling foul of the GDPR by having an invalid provision within our contract of employment and we would risk being criticised in future governance audits.*

*If you have any questions or concerns regarding the proposed new wording set out below, please make your points known to us in writing, within the next 14 days. We will consider your correspondence and respond accordingly. If you wish to meet to discuss any points, please ask and a meeting can be arranged.*

*[If there are no objections to the change then the change will take effect after 28 days from this letter].*

Yours sincerely,

Clause to be deleted:  
*[type it into the letter]*

Clause to be added:  
*[type it into the letter]"*

### **Note:**

- If an employee expresses concern to the proposal, you are best to have a short meeting with them and seek to establish – then pacify – their concerns. Explaining the changes in person, and talking through their concerns, will usually lead to a resolution.
- Then issue a further letter confirming the points discussed and advising that the changes will be made accordingly.
- Do not use this process to make a significant detrimental change to the employee's employment with you. You'd need a much more detailed process if you were seeking to change their role, title, salary, etc. In such circumstances you would need to obtain legal advice to deal with the risk arising.

### **Steps where a flexibility clause exists**

Where the contract contains an express provision entitling the SGB to make a change to the contract, it can be relied on to make the change. You always need to check if the clause outlines or suggests a process is followed (for example sometimes the provision may say that a certain amount of time has to pass before the change will take effect).

Usually, a consultative process like that outlined above is helpful, but it can be changed to ensure (a) the process does what the contractual provision requires and (b) instead of point 7 above, the letter issued to staff can explain that the variation is being made further to the flexibility clause within the contract.