

UK Employment Law



In Practice

By Sinead Casey, Managing Associate

Employee secondments: Top 10 issues

A secondment arrangement is typically used when an employee (or group of employees) is temporarily assigned to work in a different office or department of their employer or for another organisation. Secondments that take place within an employer or group of employers are often relatively informal whereas third-party secondments, that is, secondments between different legal entities/employer groups, are usually more formally agreed and documented.

There are a number of different terms that are used for the three parties involved in a secondment arrangement.

- (a) The original (or seconding) employer is referred to as the "**employer**" or "**seconders**";
- (b) The seconded employee is referred to as the "**employee**" or "**seconded**"; and
- (c) The organisation to which the seconded is to provide their services is referred to as the "**host**".

Details of the secondment arrangement should be properly agreed and documented at the outset, to avoid uncertainty, which can result in either party incurring unanticipated liabilities and/or costs.

Top 10 key issues to consider in relation to secondments

1. Identity of the employer

- > Ensure that the secondment documents clearly state who will be the employer during the secondment. It is usually intended that the employee will remain employed by the seconders for the duration of the

Linklaters

secondment. If employment does in fact transfer to the host, this may have unintended consequences, with the host being liable for any employment claims and costs in respect of the secondee.

- > Check that the practical arrangements for the secondment (for example, management of the individual, reporting lines, integration etc) are set up in such a way as to minimise the risk of the secondee being deemed to be an employee or worker of the host. Ideally, these will continue to be carried out by the employer although, depending on the nature of the secondment, the host may in practice need to take on day-to-day supervision of the secondee.
- > *Fitton v City of Edinburgh Council UKEATS/0010/07* is an example of a case where the secondee was held to be employed by the host during the secondment.

2. The employment contract

- > Check whether the secondee's employment contract entitles the employer to second the secondee. If not, the employee's express consent to the secondment will be required. The secondee's express consent may also be needed in relation to any terms of the employment contract which will be changing due to the secondment (for example, duties, place of work).

3. The duration of the secondment

- > Consider whether the secondment will be for a fixed period or for an indefinite length of time, with termination on an agreed notice period.
- > Will the employer, host or the secondee have the opportunity to bring the secondment to an immediate end or to extend the secondment in any circumstances? Account should be taken of the likely impact on the business of these provisions being exercised. For example, if the host brings the agreement to an end earlier than anticipated, the employer may not have sufficient work for the employee. Equally, if the secondment is extended for longer than anticipated, the employer needs to have sufficient resource to meet its own workload. If there are concerns about the duration of the secondment, consider whether the parties should agree that it be for a minimum or maximum period, and/or that the agreement of both parties is required to extend the secondment or terminate it early.
- > Will the agreement provide for either the employer or host to make/require replacement of the secondee at any time and, if so, on what basis and on how much notice? Employers should consider whether this is desirable, and if there are available resources to meet such a request. If this right is agreed in principle, the host should stipulate any minimum requirements that a replacement should meet.

4. Management during the secondment

- > The responsibility for day-to-day supervision of the secondee, their performance appraisals and dealing with disciplinary and grievance

Linklaters

issues should be agreed in advance between the employer and the host. Ideally, the employer will retain responsibility for these matters, which are relevant to the underlying employment relationship, although in practice the host rather than the employer may need (and wish) to supervise the secondee.

- > How will annual leave and sickness absences be dealt with? It is common practice for the employee to continue to benefit from the same entitlements while with the host, as he did with the employer. Absences on annual leave may, additionally, need to be agreed with the host, and the host and the employer will need to make arrangements for the funding of these absences.

5. Payment

- > The employer and the host should agree who will pay the secondee during the secondment and, if this is the employer, whether the host will pay the employer a fee for the secondment. If so, consideration should be given to whether the employer can increase this fee during the secondment to reflect, for example, any increase in the secondee's salary.
- > The employer and the host will also need to decide who will fund additional payments made to the employee, for example overtime, bonuses and expenses. This is likely to depend on whether such payments reflect productivity, and whether or not they have already been factored into the overall payment structure.
- > Funding for payments owed to the secondee if he is absent for a substantial period (for example, maternity leave or long-term sickness absence should also be agreed). Note that the termination of a secondment arrangement in such circumstances is likely to be discriminatory.

6. Protection of confidential information, client relationships and intellectual property

- > During the secondment, the secondee will usually have access to the host's confidential information and intellectual property, and the host therefore should enter into confidentiality arrangements (and possibly also post-termination restrictive covenants) directly with the secondee to protect this information. The employer may also want to emphasise the need for the secondee to protect its own confidential information and intellectual property while on secondment and, depending on the secondee's existing obligations, new arrangements may need to be entered into.
- > It is usually the employer who will own inventions and discoveries made by an employee in the course of their employment. Where these are made during the course of a secondment, if the secondee intends to own the inventions/discoveries, express provision will need to be made in the secondment agreement.

Linklaters

7. Liability and insurance

- > Liability for the secondee's actions or omissions, if they cause loss or damage to the host, its employees, clients or suppliers, during the secondment, should be apportioned in the secondment agreement, to avoid later dispute and to allow the parties to take out appropriate insurance cover.

8. Regulatory issues

- > Consider whether there are any regulatory issues arising from the secondment. For example, for a secondment in the financial services sector, it may be necessary to inform and possibly consult with the FCA.

9. The end of the secondment

- > Consider what will happen to the secondee when the secondment ends. Will the secondee be entitled to return to the same role and duties at the employer that they had prior to the secondment? If not, the employer should agree with the employee the parameters of flexibility that will be applied at the end of the secondment. To minimise liability the employer must then apply these in a manner that preserves trust and confidence in the employment relationship.
- > Will the secondee be entitled to pay increases and other benefits that they would have received if they had not been on secondment?

10. International secondments

There will be additional issues to consider for an international secondment, including:

- > **Tax** – It will be necessary to seek specialist tax advice. Many employers will offer tax equalisation (where the employee is guaranteed the same net income as he would receive in the employing country) to ensure the secondee is no worse off when working in countries with higher tax charges.
- > **Immigration** – A work permit or visa may be required. If so, the secondment arrangement should be made conditional on the permit or visa being obtained and maintained throughout its duration.
- > **Local employment law** – Local employment laws may apply, regardless of the law the parties choose to apply to the secondment (for example, in relation to holiday entitlement and sickness pay, and possibly also on termination of employment if this takes place in the host country). The employer should therefore take local law advice to ensure that the secondment terms meet the minimum requirements.
- > **Practical matters** – Relocation, schooling, housing, flights and other expenses and benefits should all be considered at the outset.