

Company Law Newsletter



Company Law Reform

In this issue we are focusing on the new Companies Bill which was passed on 8 November 2006 and which represents the biggest 'shake-up' of company law for 150 years. These reforms have been made with the aim of putting the needs and interests of small companies first in recognition of the importance of small companies to the UK economy.

The main objectives of the reforms are to:

- make the law clearer and easier to understand,
- make the law more flexible,
- keep the regulatory burden to a minimum,
- promote shareholder engagement and a long-term investment culture.

Some of the changes have already taken effect (see our article 'Enough on Display?') but most will be coming into force during the course of this year. We will be keeping you informed of the main changes as they take effect, in the meantime, if you have any specific queries about the new regulations, please contact us.

Do your Terms & Conditions need an update?

The law is changing and your terms of business may be out of date. We would be happy to review your terms and conditions for the fixed fee of £250 + VAT.

This fee includes:

- A 30 minute consultation with a solicitor in our team;
- A full review of your standard terms and conditions;
- A report identifying any areas of risk in your terms and conditions; and
- An estimate of the likely costs involved to change your terms to reduce your risk.

This offer applies only to existing clients and ends on 30 November 2007.

If you are interested in taking advantage of this offer please contact Sarah Hopcroft at sarah.hopcroft@ellisjones.co.uk. Tel: 01202 414003

HIGHLIGHTS IN THIS ISSUE:



P2

CONSIDERING
OUTSOURCING



P3

EMPLOYING
BULGARIAN
OR ROMANIAN
NATIONALS



P4

GETTING A
FAIR SHARE

Considering Outsourcing?



Enough on display?

As from the 1st January 2007, Companies and Limited Liability Partnerships must now display on all websites of the business and in any emails, the information that is currently required to be included in all business stationery, correspondence and order forms.

This includes:

- the company name (as it appears on the memorandum of association);
- the company's registered number;
- the address of the registered office; and
- the place of registration (i.e. England, Wales or Scotland),

Failure to comply with the new provisions can result in a fine for the company or for any officer, or person acting on its behalf, who causes or authorises the appearance of a website of the company or LLP which does not comply with the provisions.

In addition, these changes now accept a "document" as being capable of taking an electronic form. As such a document will include, for example, a PDF or Adobe document.

These changes have been implemented by the first set of regulations brought in under the Companies Bill 2006, and attempt to go some way to cater for the increasing involvement of electronic documents in today's businesses.

These days more and more processes are being outsourced (run by external contractors under a service agreement) by more and more businesses. It is particularly common to outsource IT functions and telephone call management.

Outsourcing can offer many advantages - for example, cost reductions, access to better technology and the ability to prevent management attention being diverted by "non-core" activities within the business.

However, unless the contractual side of an outsourcing arrangement is right, the results can be a disappointment, or worse.

The steps to take in order to make sure your outsourcing is successful are:

1. Make sure your objectives are clear. You should know precisely what benefits you are expecting the outsourcing to bring to your business;
2. Before you start the outsourcing process, look at your own working methods and make them efficient. Having done this, you may even find you no longer want to outsource! Never outsource a mess;
3. Carry out a thorough costs analysis. Know exactly what your system costs to operate;
4. Create an invitation to tender. Specify precisely what needs to be done and what your necessary performance criteria are. This will form the basis of your contract with the supplier, so take care. Generally, it is better to express the requirements in terms of outputs (things that must be done) rather than in technical terms. Let the supplier deal with the technical side,

but make sure the contract is clear on what you will get out of the process;

5. Shortlist suppliers. It is important that the proposed supplier understands your business and its needs - both now and in the future. Contact existing customers of the supplier to find out what they think of the service they receive. Look at the supplier's finances to ensure they have sufficient financial strength to see the contract through;
6. Negotiate your contract very carefully. Make sure every critical part of the process is properly documented and dealt with in the contract;
7. Develop a transition plan to ensure your service standards continue to be met while the new system is being implemented. This is an important part of the "who does what and when";
8. Develop a service level agreement, which makes the outsourced service provider specifically responsible for delivering the agreed goals;
9. Make sure you have a disaster plan and an exit strategy. Plan for the worst. If it happens, you will be glad you did. Set up a system which allows a clear mechanism for dealing with any disputes or service failures.



Have you received job applications from Bulgarian or Romanian nationals? Do they need a work permit? Can they get one? What are the procedures?

If you want your business to benefit from recruiting from this labour source, it is important that you are aware of Government policy on such employment.

Following the accession of Bulgaria and Romania to the European Union, nationals of Bulgaria and Romania and their family members can now move and reside freely in the UK.

However, the UK Government has stated that Bulgarians and Romanians will only be allowed gradual access to the UK labour market and they must normally obtain authorisation for their employment if they wish to work in the UK - by applying for an accession worker card.

If the employment you are offering does not fall into a list of particular categories of employment where an accession worker card will be granted, or does not fall under certain exemptions and exceptions, including:

- highly skilled workers (who must meet the criteria of the existing highly skilled migrant programme)
- students holding a registration certificate confirming that they are a student who can then work for up to 20 hours per week

- self-employed workers (who, if challenged, must be able to demonstrate that they are genuinely self-employed)
- other persons who are exempt under the Immigration Act 1971 and particular exemptions relating to some family members

then you must obtain approval of the employment through the existing work permit arrangements before the potential employee can apply for an accession worker card and begin working for you.

Employers should be aware that it is now an offence to employ a Bulgarian or Romanian national who is subject to the requirement to hold an accession worker card and does not have one, or who is doing work other than as specified on their card.

Employers may face fines of up to £5,000 per worker, so make sure that your new employees from Romania or Bulgaria are correctly authorised to work for you.

If you need advice on this or other immigration issues, please contact Lyn Tucker on 01202 414000 or e-mail lyn.tucker@ellisjones.co.uk



Important News for Directors

Under the new Companies Act directors' duties are to be 'codified'. This legislation is not yet in force although the legislation has been 'passed'. (See Article 'Company Law Reform') This is a welcome change as under the existing law it is very difficult for directors to identify what their duties are as these are mainly to be found in case law.

Under the new laws, the government proposes to introduce a statutory statement of directors' general duties which consists of seven general duties as follows:

- to act within the company's powers
- to promote the success of the company
- to exercise independent judgement
- to exercise reasonable care and skill
- to avoid conflicts of interest

- not to accept benefits from third parties
- to declare an interest in any proposed transaction or arrangement with the company.

One of the other major changes impacting on directors is the new extended right for shareholders to bring a 'derivative action' to sue directors for a broader range of conduct than would have been possible under the present law. For example, under the new laws, actions can be brought for breach of duty by a director.

While an extension of rights to sue directors is clearly a concern for directors, comfort can be taken from the fact that this action can only be brought by the shareholder on behalf of the company or by the shareholder for his own benefit. Also, there is a stringent procedure to prevent 'frivolous' claims. In essence, the shareholder must seek the

court's permission to bring the claim and the court must refuse permission if the person seeking to promote the success of the company for the benefit of its members would not continue the claim or if the company has authorised the action in question.

The Law Commission have stated that due to this tight judicial control of the new procedure, they do not anticipate a large overall increase in litigation as a result of this change.

Conclusion

It will take some time before it becomes clear what these changes will mean in practice. If you would like any further information or advice about the changes for directors and/or the other changes to company law to be effected by the new legislation please contact us.

Getting a Fair Share

If you are a shareholder of a private limited company, you should be aware of the following facts:



The standard provisions contained in most company constitutions specify that when a shareholder decides to sell his/her shares the shareholder must first offer their shares to the other shareholders and that if the price for those shares cannot be agreed those shares should be sold for a 'fair value'. The big question is what is 'fair value'.

Recent case law has confirmed that in calculating the 'fair value' the following factors will usually be taken into account.

- a) The value of your shares is reduced by the fact that your shares cannot be made readily available to a public buyer;
- b) The value of your shares is discounted by up to 75% if you are a minority shareholder.

These factors become crucial when you decide to realise the value of your shares or leave the company and they apply regardless of whether the sale is to another shareholder or to an outsider.

There are two things you can do to ensure the value of your shares will not be diminished:

The Easy Way

The quickest and easiest way to ensure that you recover the true value of your shares is to specify in your company's articles or shareholders agreement the basis on which you want the fair value of your shares to be determined.

The Hard Way

A risky alternative is to do nothing other than to wait until you have a pressing reason to sell your shares and possibly leave the company. Discovering only then how your shares will be valued and what price can be agreed between you and those with the benefit of pre-emption rights, hoping that this will be sufficient to recoup your investment. By doing this you accept the risk of finding that the value of your shares is much less than anticipated and you will be left with only one option, to argue in the High Court that the company is in fact a quasi-partnership. An expensive option which is legally technical and boasts varying degrees of success.

If you are in any doubt where you stand we can review your documents and change them to ensure that the value of your shares is protected.

Company Commercial Team



Grant Esterhuizen

Partner
Head of Company Commercial
grant.esterhuizen@ellisjones.co.uk



Elizabeth Gilmour

Associate
elizabeth.gilmour@ellisjones.co.uk



Sarah Hopcroft

Solicitor
sarah.hopcroft@ellisjones.co.uk



Lyn Tucker

Legal Executive
lyn.tucker@ellisjones.co.uk



Amy O'Kelly

Trainee Solicitor
amy.o'kelly@ellisjones.co.uk



Danielle Cheal

Associate
Head of Employment
danielle.cheal@ellisjones.co.uk



Lesley Walford

Solicitor
lesley.walford@ellisjones.co.uk

www.ellisjones.co.uk

302 Charminster Road,
Bournemouth, BH8 9RU
Tel: 01202 525333
bournemouth@ellisjones.co.uk

99 Holdenhurst Road,
Bournemouth, BH8 8DY
Tel: 01202 414000
business@ellisjones.co.uk

14a Haven Road
Canford Cliffs, BH13 7LP
Tel: 01202 709898
canford@ellisjones.co.uk

4 Monmouth Court
Ringwood, BH24 1HE
Tel: 01425 484848
ringwood@ellisjones.co.uk

55 High Street
Swanage, BH19 2LT
Tel: 01929 422233
swanage@ellisjones.co.uk