

DIRECT PAYMENTS AND EMPLOYER LIABILITY.

This fact sheet:

- **Explains how local authorities can minimise liability.**
- **Provides an overview of good employment practice.**
- **Provides an overview of health & safety issues.**
- **Gives a summary of employer and public liability insurance.**
- **Outlines how this affects direct payment recipients who employ their own staff.**
- **Gives an overview of liability relating to criminal record checks.**

1. Introduction.

This fact sheet is aimed at local authority staff and support organisations, potential and existing direct payments (dp) recipients. It outlines best practice on employer liability relating to direct payments. For local authority and support organisation staff it is essential that they also read the Scottish Executive's Direct Payments Policy and Practice Guidance (June 2003), together with their own local authority procedures. As employment law is a huge area, this fact sheet may not be exhaustive. DPS update fact sheets regularly and welcome suggestions on improvements that could be made.

It should be recognised that there is a risk in every service. Whether a service is directly provided, contracted out, or a direct payment, occasionally things will go wrong. It is not possible to design a risk-free service. (Source: Direct Routes to Independence, 1999).

When an individual chooses the option of a direct payment instead of directly provided social work services, they take on the responsibility of arranging the support they require to meet their assessed community care needs. These choices include employing a personal assistant (PA),

or using an agency or service provider. People choose to employ their own staff because this option gives them the greatest level of choice, control and flexibility over how their support is provided.

Directly employing their own staff gives a direct payment recipient the responsibility of being an employer, which includes complying with the Employment Rights Act 1996. This includes providing terms and conditions of employment, ensuring staff are paid, and ensuring they fulfill a duty of care towards their staff. Whilst legislation, such as the Employment Rights Act sets out minimum standards that employers must comply with to ensure good employment practice, it is in every employer's best interests to check that they apply standards that go well beyond the legal minimum. For example, providing an induction with training before an individual starts work, or offering regular job supervision to discuss any issues. (For more examples of good practice, see the publication: *The Rough Guide to Managing Personal Assistants*, NCIL). There are circumstances where a PA employer may be exempt from employment legislation. For example, there may be 'a genuine occupational reason' such as when, for reasons of decency, employing an individual of the same sex or cultural background to provide personal care may be necessary.

'Domestic servants' are not covered by the terms of the Health and Safety at Work Act 1974. This includes people who are employed in an individual's house to provide support with, for example, personal care, gardening, assisting with shopping or taking someone to a social occasion. (Source: Health and Safety Executive, 2004). However, under the Occupiers Liability (Scotland) 1960, an occupier of a premises has a 'common duty of care', to all their visitors, unless otherwise agreed. The common duty of care is a duty to take reasonable care in all circumstances to see that visitors will be reasonably safe for the purposes which they are invited or permitted by the occupier to be there. Therefore direct payment recipients must, as far as possible, take reasonable care to ensure the health, safety and welfare of their employees and others who work for them such as agency staff. This means that employers should follow good employment practice and try to consider all possible risks to their employees, including what could happen and what would be the potential consequence for the employee or others. For example, if a PA does the ironing, their employer should ask them to regularly check the cable, and if it is frayed or damaged replace the iron to prevent a possible accident.

2. Minimising liabilities (Smith v South Lanarkshire Council).

The outcomes of this case present clear lessons for local authorities when implementing direct payment schemes, yet negative perceptions surrounding the case linger.

Two men in South Lanarkshire, one of whom had a learning disability, received 24 hour support from a rota of personal assistants. This service was 95% funded by their local Social Work Department through an independent living service (indirect payment) and 5% funded by the Independent Living Fund. Neither man received a direct payment. The local forum on disability (Hamilton & East Kilbride Forum on Disability) provided support for the two men and the personal assistants. Glasgow Council for Voluntary Service (GCVS) provided a payroll service from a bank account in GCVS's name, not those of the two men.

One of their female personal assistants left complaining of sexual harassment, eventually taking them to an employment tribunal. In her claim she named four employers - each of the two men, South Lanarkshire Council, and Hamilton & East Kilbride Forum on Disability.

Before the employment tribunal could consider the woman's claim about sexual harassment it had to decide who her employer was. The tribunal's decision, published in June 1999, states that the woman's employer had in fact been South Lanarkshire Council. The Council appealed but the appeal failed in February 2000.

What Were the Effects?

Publicity surrounding the case caused a wave of confusion about direct payments. Much of this was ill informed. The tribunal's decision does not affect case law about direct payments. It also does not affect case law about capacity to consent, whether to direct payments, independent living or employment contracts.

However, the case raised issues about the clarity of authority, responsibility and control around services. Who controlled the service and the money which paid for it was at the heart of the case. There were many disabled people in South Lanarkshire who received an indirect payment, and used the personal assistant services from the independent living service. The service appeared to be an arms length organisation, funded and run by the Social Work Department. The independent living service supported the two men to have more control over who provided

their support, but it did not enable them to directly control the money attached to the service. The case demonstrates the dangers of not clarifying with service recipients or service staff about who actually controls, and is responsible for a service.

In theory, this case should not affect progress on direct payments. It does not indicate that people with learning difficulties cannot consent to a direct payment, manage a direct payment or be effective employers. It does indicate that what is needed is effective communication and access to effective advice and training for PA employers.

Possible Solutions.

To try to prevent situations such as the South Lanarkshire case, local authorities should ensure that they clearly explain to each potential direct payment recipient what responsibilities they will be taking on if they decide to employ staff.

It is imperative that local authorities arrange for people to have access to a local user-led direct payments support organisation. This means there is less involvement from the local authority, and takes them a step away from liability.

An independent user-led support organisation can offer direct payments recipients, including those who choose to be PA employers, a range of impartial advice, training and support. This includes expert advice on employment issues, training on how to be an effective employer, a payroll service which will assist them with tax and National Insurance, health and safety training, and a peer support. All of these will help to ensure the person can meet their responsibilities as an employer. Peer support in the initial stages is especially important. The prospect of becoming an employer can, for many people, be a daunting prospect. Hearing about the experiences of others who have gone through the same process is important for people who are deciding whether or not to become employers. (See Fact sheet 2: 'The role of the direct payments support organisation' for more information about what training and support a support organisation can provide).

Michael Mandelstam, in his publication 'Using the law to develop and improve equipment and adaptation provision' (2003), found that it may be possible for a court to look at the individual circumstances of a PA employer and decide that their employer responsibilities are a pretence. This could occur where, contrary to the guidance on direct payments, a

local authority had got excessively involved (for example assisting with a job description or contract) and it could not be said that the recipient was in any way managing (or being supported to manage) or controlling the payment. In such a situation, the local authority might be viewed as the employer as with the South Lanarkshire Council Employment Tribunal Case.

Mandelstam advises local authorities must, “find a balance between reasonable and unreasonable interference with the way in which a person is using their direct payment”.

3. Employee responsibilities.

As with employers, employees have a duty of care to their employers, and should:

- Take care of their own health and safety, and that of other persons.
- Co-operate with their employers.
- Must not interfere with anything provided in the interest of health and safety.

For a PA this means that they should use common sense when carrying out their duties, for example, use step ladders to reach a high object rather than standing on a chair.

It is important that PAs are employed rather than self-employed. They work stipulated hours, and can be told at any time what to do or when and how to do it. Direct Payments Scotland is aware that there are self-employed people working as PAs, and in these instances the self-employed have responsibilities towards themselves under various health and safety at work legislation. Also if a person working under the control and direction of an individual is treated as self-employed for tax and national insurance purposes, they may nevertheless be treated as an employee for health and safety purposes. (Source: Health and Safety Executive, 2004). For the PA employer contracting with self-employed people potentially reduces the level of control they have over arrangements. In either circumstance the dp recipient has a duty of care towards the PA, as they would have for anyone entering the home.

The Inland Revenue provides rules for who can and cannot be self employed, and have a checklist on their website:
www.inlandrevenue.gov.uk/selfemployed/

4. Health and safety.

PA employers must try to consider all possible risks to their employees while they are acting on their behalf as they have a common law duty to take reasonable care. This includes thinking about what accidents could happen and what would be the potential consequence for the employee or others.

Before an individual can get a direct payment they require a community care assessment carried out by a worker allocated by the social work department. This includes a risk assessment and will look at whether an individual is 'able to manage' a direct payment. It also assesses other potential risks such as health and safety, and looks at how these risks can be reduced or prevented. It may also be necessary, depending on the circumstances, for a specialist risk assessment to be carried out by a specialist worker e.g. for equipment or moving and assisting. If a PA employer does not follow the health and safety recommendations provided in this risk assessment then they could render their employers' liability insurance null and void. For example, when a community care risk assessment recommends two members of staff for the task of moving and assisting, but the individual prefers one member of staff then they must check with their insurance provider as to whether they would be covered by their policy.

Some risk assessments stipulate use of a hoist for moving and assisting. Some disabled people regard use of a hoist as inappropriate and in some cases it may cause them personal discomfort or injury. A disabled person might wish to challenge the local authority assessment so that it actually reflects their preferences as well as their needs. In doing so a balance needs to be struck between meeting the needs of the disabled person and avoiding injury to PAs. Social work, health departments and PA employers should take a flexible approach on this issue.

PA employers should follow good employment practices, and take reasonable care to assess the risk to the welfare of their employees and anyone else that may be affected by their work. This is often referred to as an employer health and safety risk assessment, which the PA employer should carry out, or arrange for an experienced risk assessor

to perform. It is advisable for the PA employer to have a written record of this. Arrangements should be made to manage any identified risks. For example, make sure that any cleaning materials or medicines are stored in a safe place; decide on what will be the designated fire escape, and always ensure that the area is kept clear.

It is good practice for employers to give their employees information about health and safety, make sure that their employees have adequate health and safety training and are capable enough at their jobs to avoid risk. Health and safety training may be provided by an experienced PA employer, a local support organisation, or a national organisation such as SPAEN. Further information is also available from organisations such as the Health and Safety Executive Helpline, telephone: 08701 545 500. The Royal Society for Prevention of Accidents offer a wide range of health and safety training courses some of which offer professional qualifications, telephone: 0870 777 2228 for courses in Scotland.

Michael Mandelstam provides a summary of other potential legal liabilities in a direct payments situation. These include:

- There is a view, probably correct, that a personal assistant in case of accident and injury could not use health and safety work legislation such as the Manual Handling Operations Regulations 1992 to sue the recipient of a direct payment – because of a general exclusion in s.51 of the Health and Safety at Work Act 1974 relating to ‘domestic servants’. However, the assistant could try to sue the recipient [and possibly the local authority] for negligence, or possibly the recipient for breach of the contract of employment.
- If the assistant is employed by an agency, then the agency would have responsibilities for their health and safety. The agency also has obligations under the Management of Health and Safety at Work Regulations 1999 to the direct payment recipient, and must ensure an assessment of the risks to their health and safety arising out of, or in connection with, the conduct by the agency or their staff.
- If an agency introduces a PA to a dp recipient who then employs the PA, the agency would still have obligations to both recipient and assistant. For example, an agency may check that it is a safe working environment for the potential PA, or check that the PA has suitable experience and training for the position.

(Source: Using the law to develop and improve equipment and adaptation provision, Michael Mandelstam).

5. Insurance.

All employers are required by law to insure against liability or disease to their employees arising out of their employment, though some large public bodies are exempt. For PA employers the cost of the employers' liability insurance should be provided annually by their local authority for them to arrange their own policy.

A PA employer has a duty of care towards their employee while they are carrying out their duties. If they are injured as a result of an accident at work, or become ill as a result of their work, and believe their employer is responsible, they may seek compensation from them.

Employers' Liability Insurance

Employers' liability insurance is a mandatory employment cost, which should be included by a local authority in an individual's direct payment package. This is available at around £84 per year (April 2004), from insurance companies, some of which provide policies specifically aimed at personal assistant employers (see contacts listed). However, similar and adequate cover may be available through an individual's own household policy – PA employers should seek advice from their insurance company or broker (a local support organisation can also advise). It is the PA employer's responsibility to arrange their own insurance policy.

Employers' liability insurance will provide compensation for injuries or illness caused on or off site (where an individual's employment is usually based). Any injuries or illness relating to motor accidents which occur as a result of an individual's employment may be covered by employers' liability insurance rather than through their motor insurance. Again it is best to check the policy.

PA employers must comply with the agreement (policy) they make with their insurance company, or their insurer may not pay compensation on a claim, or could cancel the policy. For example, if a piece of equipment had an apparent defect which was not repaired or precautions were not taken to avoid injury, and a PA was injured, then a policy may not pay out.

Employer liability insurance would not cover instances where an employee felt they were unfairly treated in the workplace or dismissed and took their employer to an employment tribunal. In this instance the PA employer may have to cover all the costs.

Employer responsibilities include obtaining employers' liability insurance, along with operating Pay as You Earn (PAYE) on the pay of employees, paying National Insurance contributions for employees, Statutory Sick Pay, etc (See Factsheet 6: Calculating a Direct Payment). A PA employer can receive assistance with payroll from local user led support organisations or the Inland Revenue (the cost of which should also be included in their direct payment). They could also seek assistance from accounting firms, bookkeepers etc.

PAs will only be protected by employer's liability insurance if they are an employee. Self employed people will need to organise their own cover.

Details of companies that offer employers' liability insurance are listed at the end of the document.

Public Liability Insurance

Public liability insurance covers employers for claims made against them by members of the public or other businesses, but not for claims by employees. For example, if a PA was assisting their employer to get out their car and they accidentally damaged a car parked next to them then the insurance policy should cover the incident.

Public liability insurance is generally voluntary, whereas Employers' Liability Insurance is compulsory. An employer could be fined if they do not hold an up to date employers' liability insurance policy.

PA employers may require public liability insurance if their PA's work involves interaction with the general public. It also covers legal fees, costs and expenses such as a court hearing because of an accident. Some policies which are specifically aimed at personal assistant employers incorporate both employer liability insurance and public liability insurance – always check with an insurer as to what cover a policy includes.

Indemnity Schemes

Some organisations are considering providing a specifically designed indemnity scheme for PA employers. These schemes will be tailor made, and will ensure compliance with statutory legislation. Proposals

include the provision of an advice line on personnel and employment law, step by step advice on any personnel and employment issues, legal expenses in defending criminal prosecutions, legal representation and indemnity cover should you be taken to a tribunal, with tribunal award and compensation cover, a limit on claims £100,000 per insured event with a maximum of £1,000,000 for all claims in one year. More information on these schemes will be available from local support organisations when they are established.

6. Disciplinary and grievance procedures.

Good employers must provide staff with information on grievance procedures. These enable individual workers to raise grievances with their employer about their employment, either by themselves or with a representative. This provides an open and fair way for PAs to make known their problems and enable grievances to be resolved quickly before they become major problems.

Since 1 October 2004, employers have been required by law to have a grievance and disciplinary procedure, which should be given to employees along with their written statement of employment. The disciplinary procedure sets out in writing the type of disciplinary action and penalties which can result from unacceptable conduct or performance. A disciplinary procedure can help employers to deal fairly and consistently with disciplinary problems, including those that may involve dismissal. A tribunal will take account of whether a fair procedure was used when it decides a case. (Sample grievance and disciplinary procedures can be accessed from ACAS at website: www.acas.org.uk).

Employment Tribunals are judicial bodies established to resolve disputes over employment rights. They will listen to applications or complaints and appeals about matters to do with employment including unfair dismissal, redundancy payments, sex, race and disability discrimination together with certain issues relating to wages and terms and conditions of employment. They must deal with each case justly, which includes doing what they can to ensure both parties are on an equal footing, and dealing with each case as quickly as possible in a way which is proportionate to the complexity of the issues. Each person must assist the tribunal in achieving this objective. The tribunal will send a written decision, with its reason for the decision to the parties or to their representatives. There are limited rights to apply for a review of the decision, or to lodge an appeal against it to the Employment Appeal Tribunal within set time limits.

7. Criminal record checks.

Enhanced disclosure checks on PAs need to be signed by a body registered in advance with Disclosure Scotland. This could either be a support organisation or a local authority. Under Part V of the Police Act a registered body can sign a disclosure check on behalf of a PA employer without being viewed as the employer. If a local authority assesses an individual as being able to manage their own employees, the choice of who that individual employs should be theirs. If the local authority interferes in the recruitment process they again increase their chances of being liable as the employer.

Where a PA is being employed to look after children or more vulnerable adults the local authority may need to have more direct involvement in processing Enhanced Disclosures and in decisions made over who can and cannot be employed.

Again there is a need to find a balance between protecting local authorities from liability and giving people the freedom to choose the employee they think is best suited to the job. If a body registered to sign checks is concerned that a person decides to employ someone when a criminal conviction has come to light, they should put an audit trail in place detailing what advice was given and what decision was taken by the employer. In extreme cases the appropriateness of the direct payment may have to be reviewed.

It should be remembered that Enhanced Disclosures are only one element of safe recruitment. These should be accompanied by interviews, references, and a process of candidates voluntarily declaring convictions. PA employers should be supported in doing all of this by a support organisation. More information on the criminal record checks is available from Disclosure Scotland on 0870 609 6006, or from Scottish Personal Assistants Employers Network (SPAEN).

8. Further Reading.

- A Guide to Receiving Direct Payments in Scotland – Scottish Executive (October 2003).
- Code of Practice, Scottish Personal Assistant Employers Network.

- Direct Payments: Policy and Practice Guidance – Scottish Executive (June 2003).
- Direct Routes to Independence: A guide to local authority implementation and management of direct payments – National Centre for Independent Living, Policy Studies Institute (1999).
- Health and Safety at Work Act 1974 – Department of Health.
- The Management of Health and Safety at Work Regulations 1999 Department of Health.
- Too Little, Too Slowly – Values Into Action (VIA), (2000).
- The Rough Guide to Managing Personal Assistants, National Centre for Independent Living.
- Using the Law to Develop and Improve Equipment and Adaptation Provision, Michael Mandelstram (June 2003) – Scottish Executive

8. Further Information.

UPDATE, Scotland's National Disability Information Service.

27 Beaverhall Road
Edinburgh
EH7 4JE

Tel: 0131 558 5200
Fax: 0131 558 5201
Minicom: 0131 558 5202
Email: info@update.org.uk

Specialist employment advice can be accessed from:

Scottish Personal Assistant Employers Network (SPAEN) is a user-led membership organisation, whose members are all people who have made the transition from having their care needs organised by social work departments, to taking over the management and control of their own assistance. They can offer their members access to up to date employment law, peer support and training opportunities. They are also looking at offering an employer indemnity scheme.

Telephone: 01698 250 280
Fax: 01698 250 236
Email: info@spaen.co.uk
Website: www.spaen.co.uk

Advisory Conciliation and Arbitration Service (ACAS), offer advice on absence, contractual issues, discipline, dismissal, grievances, and employment tribunals. They also offer a range of free leaflets, and low cost publications on subjects such as holidays and holiday pay, and varying a contract of employment.

Telephone: 0141 248 1400

Helpline: 08457 47 47 47

Textphone: 08456 061 600

Website: www.acas.co.uk

Inland Revenue has a national telephone helpline for employers, telephone 08457 143 143. The service is open from 8.00am to 8.00pm Monday to Friday, and 8.00am to 5.00pm on Saturday and Sunday, to help with general enquiries about PAYE, National Insurance and VAT registration.

Department of Trade and Industry (DTI) produces a number of fact sheets aimed at small employers, which give a basic introduction to some aspects of employment law, including fair and unfair dismissal, maternity rights, itemised pay and written statements of employment terms. These can be ordered from DTI Publications, Admail 528, London SW1W 8YT or by telephone on 0870 150 5200 or textphone on 0870 150 2100 or fax on 0870 150 2500. DTI publications are also available from your local Employment Service Jobcentre.

National Centre for Independent Living is a national organisation providing information, training, expertise and policy development on all aspects of direct payments and independent living. Provides information on good employment practice, job descriptions, advertising, contracts of employment, and terms & conditions, and provides publications such as 'The Rough Guide to Managing Personal Assistants'.

Tel: 0207 587 1663

Fax: 0207 582 2469

Text: 0207 587 1177

Email: ncil@ncil.org.uk

Website: www.ncil.org.uk

Citizens Advice Scotland can provide contact details for your local Citizens Advice Bureau. Local bureaux offer an independent advice service on issues such as employment.

For details of your local citizens advice bureau look in the phone book or visit the website: www.cas.org.uk

Disability on the Agenda can provide publications relating to the Disability Discrimination Act 1995.

Telephone: 08457 622 633

Textphone: 08457 622 644

Or write to: Disability on the Agenda, Freepost, London SE99 7EQ.

For information on insurance products contact:

The Association of British Insurers (ABI) provides information on types of insurance, what to be aware of when buying, contacts, and what to do if things go wrong.

Employers Liability Enquiry Unit

Tel: 020 7216 7546

Fax: 020 7367 8612

Email: info@abi.org.uk

Website: www.abi.org.uk

Fish Administration Limited provides a specifically designed PA employment protection policy, which incorporates employers' liability insurance and public liability insurance.

Tel: 01772 724442

Fax: 01772 733773

Email: paemploymentprotection@fishinsurance.co.uk

Website: www.fishadministration.co.uk/

Morton Michel offers a wide range of childcare insurance products including insurance for childminders'.

Tel: 020 8768 6700

Fax: 020 8771 6387

Website: www.mortonmichel.com/

For Advice on Health and Safety.

Health and Safety Executive (HSE) Office

Local contact details will be listed in telephone directories under Health and Safety Executive or call the HSE Information Line on 08701 545 500.

Health and Safety Executive Books

Tel: 01787 881165

Fax: 01787 313 995

Website: www.hsebooks.co.uk

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