

# 'Back to Basics' Employment Law Series

Edition Two: Individual Employment Agreements



# Edition Two: Individual Employment Agreements

Welcome to the second edition of our 'Back to Basics' series. This edition is all about what happens once the recruitment process is complete, and an employer has found a candidate that they would like to offer employment to.

At this stage of the relationship, employers must prepare a letter of offer and an individual employment agreement to provide to the successful candidate. As part of this, employers must consider whether the offer will be subject to any conditions, what type of employment they will offer, and on what terms.



# Pre-employment conditions

Employers may choose to make offers of employment subject to one or more conditions being met. This means that an offer of employment is not confirmed until any specified conditions are completed to a satisfactory standard. The most common conditions that employment may be subject to include:



Criminal record check



Drug and/or alcohol tests



Medical assessment



Confirmation of qualifications



Credit check

However, there are some fish hooks to be aware of when making a conditional offer of employment.



Importantly, any pre-employment test or check that a candidate is asked to complete must be relevant to the role being applied for. If not, such a condition may be found to be an unreasonable and unfair intrusion into the candidate's privacy.

For example, if a person has applied for a safety sensitive role, such as a truck driver, then a pre-employment drug test may be an appropriate condition of employment. This is because a driver being affected by drugs can pose a serious risk to health and safety. On the flipside, if a person has applied for an office-based role and will spend the majority of his or her workday at a desk, a pre-employment drug test is unlikely to be appropriate. This is because the role is not one that is safety sensitive.

Similarly, the Office of the Privacy Commissioner has previously found that a pre-employment credit check where the role applied for posed no financial risk was an intrusion into the candidate's privacy.

Careful wording must also be used when preparing a conditional offer of employment to ensure its validity. For example, employers must clearly state in the letter of offer that the offer is conditional, and remains conditional, on the check or test being completed to the satisfaction of the employer. Employers must also ensure that they receive the candidate's permission before conducting any pre-employment check.

# Type of employee

Employers at this stage of the process must also consider what type of employee they are hiring so that the most appropriate form of employment agreement is used.

There are several types of employees: permanent, fixed term or casual. Each type of employee comes with a different set of obligations, rights, and responsibilities, so employers need to ensure that they get it right from the outset to save problems down the line.

## Permanent

Permanent employment is the most common type of employment and will continue indefinitely until terminated by either party in accordance with the terms of the agreement. Permanent employment can be full-time or part-time.

## Fixed-term

If an employer wishes to hire an employee on a fixed-term (temporary) basis, there must be a genuine reason based on reasonable grounds for the fixed-term, and the employer must record that reason in the agreement. Common reasons for a fixed-term include to cover a specific busy period, to complete a project, or to cover another employee on maternity leave.

Wanting to test someone's suitability for permanent employment is not a sufficient reason for putting them on a fixed-term agreement.

Again, fixed-term employment can be full-time or part-time.

## Casual

If an employer wishes to hire an employee on a casual (intermittent) basis, they must be certain that the employee will not work regular hours and/or a regular pattern of work. A casual agreement should generally only be used if the employee will work on an ad hoc basis, such as to cover an employee who is away sick or to call on occasionally during a peak period (such as Christmas).

There are serious risks associated with keeping long-standing employees on casual agreements, and it pays to seek advice if you are not certain whether an employee should be employed on a casual agreement or a permanent part-time agreement. Generally, if an employee will have set hours of work each week (even if a small amount) for a continuous period of time, then this is a clear indicator that they are not a casual employee.



# Terms of employment

The next step is to ensure that any terms of employment offered to a new employee are fit for purpose. There are three main things for employers to consider when preparing an employment agreement for a new employee:

1 The minimum entitlements set out in the Employment Relations Act 2000

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2 Clauses that must be included by law

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3 Any additional wording or clauses specific to the business and/or a role

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The minimum entitlements provided by law apply to employers and employees regardless of whether they are recorded in an employment agreement. However, we recommend that employers do include them to avoid any confusion. Examples include the minimum entitlement to sick leave, annual leave, bereavement leave, statutory holidays, and the requirement for both parties to act in good faith. In some cases, employers and employees may negotiate and agree to better terms and conditions than what is provided by law.

There are also clauses that legally must be recorded in every employment agreement. Examples include, the name of the employer and employee, the agreed hours of work, the agreed remuneration and an explanation of how to solve an employment relationship problem and raise a personal grievance. Employers risk a penalty being imposed if they do not note these key points in their employment agreements.

Employment law in New Zealand is constantly changing and it is important that employers regularly review their employment agreements to ensure that they are compliant with the law and remain fit for purpose.

In addition, employers should also consider whether there are any additional clauses that they would like to include. Optional clauses usually depend on the role, the person being hired and industry standards. Employers can essentially include any wording they wish, so long as it is reasonable, and the employee agrees to it. Some optional clauses that are good to include are ones dealing with:

- 90-day trials or probationary periods
- Drug and alcohol testing
- Bonus schemes
- Company vehicles
- Information technology and social media
- Post-employment obligations (restraints of trade and/or non-solicitation clauses)
- Industry standards and registration
- Tenancy agreements (most common in farming situations)
- Force majeure

# Summary

Finally, make sure that the employee is presented with the letter of offer and proposed employment agreement with plenty of time to review the agreement and seek advice before his or her intended start date. It is also important to understand that once an offer of employment is made and accepted, that person is considered an employee by law, so you cannot simply withdraw an offer (even if they have not yet started their employment).

In our next edition, we answer all your frequently asked questions about workplace policies and procedures. In the meantime, please let us know if you have any questions about this edition.



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