



Employment Relationships

FROM BEGINNING TO END



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Department of Labour
TE TARI MAHI



⇒ About the Department of Labour

The Department of Labour provides information and investigates problems to do with employment and workplace health and safety. We can help employers and employees with:

- › employment conditions
- › minimum legal requirements
- › problem resolution
- › health and safety
- › ways to work better
- › labour market information

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Information, examples and answers to your questions about the topics covered here can be found on our website www.dol.govt.nz or by calling us free on 0800 20 90 20.

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ISBN 978-0-478-38086-8

March 2011



→ Introduction

Building successful employment relationships is important. It also makes good business sense: organisations with good employment relationships tend to be more successful.

This guide describes employment relationship basics and introduces fundamental concepts that underpin employment relations laws. Also in this series are booklets on:

- › Minimum employment rights
- › How to hire – a guide for employers
- › Holidays and leave
- › Pay and the minimum wage
- › Solving problems at work
- › Unions and collective bargaining





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→ The employment relationship

■ Who is an employee?

An employee is anyone who has agreed to be employed, under a contract of service, to work for some form of payment. This can include wages, salary, commission and piece rates.

This includes:

- › homeworkers
- › people who have been offered and have accepted a job
- › fixed-term employees
- › seasonal employees
- › casual and part-time employees
- › probationary and trial employees.

An employee is not:

- › a self-employed or independent contractor
- › a sharemilker
- › a real estate agent whose agreement says they are an independent contractor
- › a volunteer who does not receive a reward for working
- › in some cases, a person who is engaged in film production.

■ Fixed term employees

If an employer has a genuine reason based on reasonable grounds to offer a fixed term, this should be explained at the start and put in the written agreement. The employment agreement must set out how the employment will end and why.

For example, a job may be for a certain time (e.g. for six months) or until something happens (e.g. when the project ends) or until work is completed (e.g. until the fruit is picked). Such workers have the same rights as other employees, except that their jobs will finish at the end of the fixed-term.

■ Casual and part-time employees

The rights of full-time employees apply equally to part-time employees. These rights also apply to casual employees, but the way in which annual holidays, sick and bereavement leave are applied can vary for these employees.

■ Ensure the employee is entitled to work in New Zealand

People entitled to work in New Zealand are those who:

- › are New Zealand or Australian citizens (including people born in the Cook Islands, Niue and Tokelau), or
- › have a New Zealand residence visa, or
- › have a New Zealand work visa or a condition on their New Zealand temporary visa showing they are allowed to work here.

Work visa conditions should be checked. Some visas allow only certain types of work, or work for specified employers. An employee is not entitled to work here just because they have a tax number.

The Department's VisaView tool allows employers to confirm an employees' work entitlement. See www.immigration.govt.nz/visaview.

You can contact the Department of Labour's immigration service on **0508 55 88 55** (outside Auckland) or **914 4100** (from the Auckland area) for more details, or visit www.immigration.govt.nz.



■ Good faith

Establishing and maintaining good faith relationships is the basis of the employment relations system in New Zealand, for both collective and individual arrangements.

Good faith generally involves using practical common sense and treating others in the way you would like to be treated. This means dealing with each other honestly, openly and with mutual respect.

Acting in good faith reduces the risk of conflict and problems. It is also a requirement of the Employment Relations Act.

There isn't a single set of requirements, because every workplace is different. However, there are some key expectations of a good faith relationship:

- › Employers, employees and unions should be responsive and communicative with each other.
- › The employee's employment agreement should reflect genuine discussion and negotiation.
- › The employee should have access to appropriate information when the employer is making decisions that may affect his/her job.
- › Problems that arise should be dealt with in a manner that is consistent with what a reasonable person would do.

Employers should have good processes and procedures for dealing with issues and should make sure that employees are aware of them. Making sure that everyone in the workplace understands what to expect is a good start.

The employer and employee must bargain in a fair way and act in good faith with each other.



→ Getting off on the right foot

■ Employment Agreements

Good employment relationships begin with a good recruitment process that ensures everyone has clear expectations about the role, working conditions and employment rights.

A clearly written employment agreement can help reduce the risk of misunderstandings.

Every employee must have a written employment agreement. This can be either an individual agreement or a collective agreement. Collective employment agreements are negotiated in good faith between an employer and a registered union on behalf of their members. Employers must not unduly influence employees to join or not join a union.

As of 1 July 2011, employers are required to retain a signed copy of the employment agreement or the current signed terms and conditions of employment. The employer must retain the “intended agreement” even if the employee has not signed it. Employees are entitled to a copy on request.

There are some provisions that must be included in employment agreements by law, and there are also a number of minimum conditions that must be met regardless of whether they are included in agreements. Employment law also provides a framework for negotiating additional entitlements.

The Employment Agreement Builder

The Department’s Employment Agreement Builder can help you draft an employment agreement. It clearly shows which clauses are compulsory, which clauses reflect minimum conditions that an employee is entitled to regardless of their inclusion in their employment agreement, and which clauses can be included voluntarily to meet the needs of the business or the employee. See www.dol.govt.nz/agreementbuilder.

This information can be used as a starting point to establish conditions that best suit a particular employment relationship and employment agreement.

Types of employment agreements

The Employment Relations Act 2000 sets out most of the rules for forming an employment

relationship, through an employment agreement. The rules differ depending on whether there is a relevant collective agreement or not.

There will be a relevant collective agreement when:

- › an employer and a union have negotiated a collective agreement under the Employment Relations Act 2000, and
- › the agreement covers the work to be performed by that employer’s new employee.

When there is no relevant collective agreement

If there is no relevant collective agreement, the employer and the employee negotiate an individual employment agreement which sets out the employee’s terms and conditions of employment. This agreement must not have anything in it that is less than what is required by legislation, or is inconsistent with the law.

The agreement **must** be in writing and contain at least the required terms and conditions of employment. The prospective employee has a right to seek independent advice.

An employer must, when offering a person a job:

- › give the person a copy of the intended individual employment agreement
- › advise the person that he or she is entitled to seek independent advice about the intended agreement
- › give the person a reasonable opportunity to get that advice
- › consider any issues that the employee raises and respond to them.

The individual employment agreement must include:

- › the names of the employer and the employee (to make clear who are the parties to the agreement)
- › a description of the work to be performed (to make clear what the employee is expected to do)
- › an indication of the place and hours of work
- › the wage rate or salary payable
- › a plain explanation of services available to help resolve employment relationship problems
- › a provision confirming the right to at least



time-and-a-half payment for working on a public holiday

- › for most employees, an employment protection provision that will apply even if the employer's business is sold or transferred, or if the employee's work is contracted out
- › a reference to the fact that personal grievances must be lodged within 90 days of any incidents occurring
- › any other matters agreed upon, such as trial periods or probationary arrangements.

When there is a relevant collective agreement and the new employee is a member of the union that negotiated it

When there is a collective agreement negotiated by the employee's union covering their work, the employee's minimum terms and conditions of employment must be those set out in the collective agreement. The employer and the employee may agree to other terms that are additional to, or better than, the collective agreement, so long as those other terms can comfortably sit alongside those in the collective agreement.

When there is a relevant collective agreement and the new employee is not a union member

When the employee is not a union member but there is a collective agreement covering their work, the employer and the employee can have an individual employment agreement based on the collective agreement.

For the first 30 days, the employee's individual employment agreement consists of the terms and conditions of employment in the collective agreement. The employer and the employee may also agree to other terms that are additional to, or better than, the collective agreement so long as those other terms can comfortably sit alongside those in the collective agreement.

After the initial 30-day period, the employee's terms and conditions of employment can be varied by agreement (either upwards or downwards).

This gives the employee time to decide whether they want to join the union and the collective agreement or whether they would prefer to stay on an individual agreement. If, during the 30 days or later, the employee joins the union, they immediately join the collective agreement. If they don't join the union, they stay on an individual agreement.

Required process

When offering the employee the job, the employer must inform the employee:

- › if there is a collective agreement covering the employee's work
- › of the employee's right to join the union and how to contact the union
- › that, if the employee joins the union, the collective agreement will bind the employee
- › that if the employee does not join the union, the employee's terms and conditions are those in the collective agreement for the first 30 days along with any agreed additional or better terms.

The employer must also:

- › give the employee a copy of any collective agreement
- › if the employee agrees, promptly inform the union that the employee has commenced work.



Collective Bargaining

Where a union represents employees in a workplace they may negotiate a collective agreement. Bargaining for an employment agreement can cover a range of issues, but it will normally include the coverage of the agreement, either by the work performed or the workers involved, and the term of the agreement.

An employer is able to communicate directly with his or her employees – including communicating about the employer’s proposals for the collective agreement – while bargaining for a collective employment agreement. Such communications must be consistent with the duty of good faith.

More information on collective bargaining and a code of good faith in bargaining are available on the Department of Labour’s website at www.dol.govt.nz/er.

Trial periods

All employers can make an offer of employment to a prospective employee that includes a trial period of up to 90 days. Trial periods are voluntary, and must be agreed in writing and negotiated in good faith as part of the employment agreement. A trial period can’t be offered to an employee who has been previously employed by that employer.

An employee who is dismissed before the end of a trial period can’t raise a personal grievance on the grounds of unjustified dismissal. They can raise a personal grievance on other grounds, such as discrimination or harassment or unjustified action by the employer.

If any employment relationship problem arises, access to mediation is available at any point.

While an employer is not required to provide written reasons for an employee’s dismissal, there is an expectation that an employer, acting in good faith, would inform the employee as to why he or she has been dismissed. Any provisions about giving notice in the employment agreement will need to be adhered to.

Employees on trial periods are entitled to all other minimum employment rights, for example in relation to health and safety, employment agreements, minimum pay, annual holidays, public holidays, leave and equal pay.

Probation periods

An employer also has the option to an initial probationary period. **If the first part of the employment relationship is a probation period** this must be recorded in writing in the employment agreement **including its duration**.

A probation period allows the new employee to demonstrate their skills. Such arrangements may be permissible where the duration and tasks are limited and designed to give the employer a fair opportunity to assess the skills.

Employers may not use such an arrangement to get work done without having to pay for it. A probation period does not limit the legal rights and obligations of the employer or the employee, and both parties must deal with each other in good faith.

■ Induction

Good induction processes and ongoing training are critical to help employees to understand the job and perform well. Both set the tone and expectations for the relationship.

During induction employers should:

- › provide a full health and safety briefing covering:
 - hazards within the workplace
 - how to be safe from hazards
 - the workplace evacuation plan
 - an introduction to the health and safety representative
- › provide any safety or other equipment required for the job and ensure the employee is adequately trained in its use before working unsupervised
- › inform the employee of any reporting requirements, such as who to contact in case of absence or in an emergency in the workplace
- › clarify expectations on attendance and breaks
- › outline (preferably in writing) any on- or off-the-job training that the employee can expect to receive and is expected to participate in
- › go over again the terms of any probation or trial period that are in the employment agreement, including the support and guidance the employee will receive during the period



- › outline the expected performance standards, and when and how reviews and feedback will take place
- › introduce the employee to supervisors and co-workers, and the union delegate where there is one
- › make available to the employee information on any relevant policies (for example, policies on internet and email, sexual harassment, codes of conduct, reimbursement of business expenses)
- › explain and, where appropriate, sign the employee up to any benefit schemes (such as medical insurance or superannuation).
- › the employee's current entitlement to annual holidays
- › the employee's current entitlement to sick leave
- › the dates any annual holiday, sick or bereavement leave was taken
- › the amount of payment for any annual holidays, sick leave and bereavement leave taken
- › the portion of any annual holidays that have been paid out in each entitlement year
- › the date and amount of payment, in each entitlement year, for any annual holidays paid out
- › the dates of and payment for any public holiday worked
- › the number of hours worked on any public holiday
- › the day or part of any public holiday agreed to be transferred, and the calendar day or period of 24 hours to which it has been transferred
- › the date on which the employee became entitled to any alternative holiday for any public holiday worked
- › the dates and payment of any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to payment
- › the cash value of board and lodgings provided
- › the date of termination
- › the amount of pay for holidays on termination

Employers and employees should follow-up any issues and confirm mutual expectations and how they will deal with each other.

■ Wages and records

There are legal requirements for paying wages and keeping wage, time, holiday and leave records. Legally, wages have to be paid in cash. Other methods need an employee's written agreement.

Wages and time records must include:

- › the employee's name
- › the employee's age, if under 20 years
- › the employee's postal address
- › the type of work the employee undertakes
- › the type of employment agreement – individual or collective
- › the title, expiry date and employee classification in any applicable collective agreement
- › the hours worked each day, including start time, finish time and any non-paid breaks taken, and days of employment in each pay period
- › the wages paid each pay day and the method of calculation
- › details of employment relations education leave taken.

Holiday and leave records must include:

- › the name of the employee
- › the date employment commenced
- › the days on which an employee works, if the information is relevant to entitlement or payment under the Holidays Act 2003
- › the date the employee last became entitled to annual holidays

Holiday and leave records or the employee's file should also include:

- › any agreements to transfer holidays
- › any requests to cash up annual holidays
- › the anniversaries when the employee becomes entitled to conditions under either minimum legal entitlements or additional provisions in the employment agreement.

An employee's file should also include:

- › a signed copy of the employment agreement with the employee or details of the collective agreement under which he or she has been employed
- › a letter offering appointment
- › evidence that the employee is entitled to work in New Zealand



- › details of citizenship or work permits held
- › a tax code declaration (IR330) completed by the employee
- › a job description
- › a personal profile
- › an application form
- › the employee's personal information such as home contact details
- › details of who to contact in case of an emergency
- › details of the bank account to be credited with wages (if this is the agreed method of payment).

It is advisable to keep record files up to date. Employees have the right to know everything recorded on the file and they should be given the opportunity to review it.

An employer needs to get an employee's written consent to make deductions from pay, or to pay wages in a form other than cash. This consent can be included in a written employment agreement but should be specific enough to identify a particular deduction made. However consent can be withdrawn by the employee to any deduction by giving the employer 2 weeks notice in writing. Some deductions – for example, PAYE personal tax, student loan and child support – are required by law and do not need written consent.

■ **Establishing a performance management system**

Performance management involves a lot more than simply dealing with problems after they have arisen. Positive performance management should be built into every employment relationship and is equally important for setting expectations and rewarding success as it is for dealing with problems.

Performance management is an ongoing cycle (usually annual) with three basic steps:

- › **Establishing agreed expectations for the job.** Apart from the employment agreement and documenting routine duties, employers and employees may also want to agree on matters like:
 - particular milestones the employee is to achieve and whether there will be extra reward for achieving them

- any training or skill development the employee needs and how that will be accomplished
- the employee's longer-term aspirations and how the employer might help the employee achieve them.

- › **Reviewing progress regularly and routinely.** It is important that employers and employees review progress at an agreed interval (every quarter is typical) and discuss both successes and problems. The credibility of the process can be undermined if performance reviews are only held sporadically or when there is a problem.
- › **Each review should deal with any problems, recognise success, and revise the objectives for the coming period.** This is the opportunity for employers and employees to agree on the state of the existing relationship and to work together on what the future should be. Over time, dealing with problems and seizing opportunities should become part of the fabric of the relationship.

The level of formality should reflect the circumstances of the workplace but having regular discussions on performance enables issues to be raised early on, creating an atmosphere of trust and understanding that should avoid problems.



→ Employment rights

Two types of employment rights apply by law to all employees:

- › the minimum pay and entitlements received
- › the way they must be treated at work.

Minimum employment rights must be met regardless of whether they are included in agreements but some provisions must be included in employment agreements by law. Employment law also provides a framework for the process of negotiating additional entitlements that are better than the minimum.

Employees can't be asked to agree to less than the minimum rights.

■ Health and safety

Employers must provide a safe workplace, with proper training, supervision and equipment. This duty includes identifying, assessing and managing hazards, and investigating health and safety incidents.

Employees must take reasonable care to keep themselves safe, and to avoid causing harm to other people by the way they do their work. Employees may refuse work likely to cause them serious harm and employees have the right to participate in improving health and safety.

■ Minimum pay

The adult minimum wage must be paid to employees aged 16 years and over, who are not new entrants or trainees. New entrants are 16 and 17-year-olds who have been employed for less than 200 hours or three months; who are not supervising or training other workers; and who are not trainees. Trainees are employees aged 16 or over who are required by their employment agreements to undertake at least 60 credits a year in a registered training programme.

Employees must be paid at least the minimum wage for the hours they work for either salary or wages if they are:

- › a full-time employee
- › a part-time or casual employee
- › a home-worker; or
- › paid totally or partly by commission or on a piece rate.

A small number of people 16 years and over may hold a time limited exemption from the minimum wage. Labour Inspectors issue a minimum wage exemption only if there are good reasons to do so because the employee's disability stops them from earning the minimum wage

Minimum pay rates are usually reviewed each year by the Government. The current level of minimum wages can be seen on the Department of Labour's website: www.dol.govt.nz/er/pay.

■ Break Entitlements

Employees are entitled to:

- › one 10-minute paid rest break if their work period is two hours or more but not more than four hours
- › one 10-minute paid rest break and one unpaid 30-minute meal break if their work period is more than four hours but not more than six hours
- › two 10-minute paid rest breaks and one unpaid 30-minute meal break if their work period is more than six hours but not more than eight hours

These requirements begin over again if an employee's work period is more than eight hours.

Employees and employers can agree to the timing of rest and meal breaks. If they cannot agree on the timing, the rest and meal breaks must be evenly spread throughout the work period where reasonable and practicable. Employers and employees can agree to more and/or longer breaks.

Employers must provide appropriate breaks and facilities for employees who wish to breastfeed or express breast milk while at work or during work time, where this is reasonable and practicable. In determining what is reasonable and practicable, employers can take into account their operating environment and resources. These breaks are to be paid only if the employer and employee agree they will be. Employers and employees can agree to use a rest or meal break for the purposes of infant feeding.

■ Annual Holidays

At the end of each year of employment with an employer, an employee becomes entitled to four



weeks' paid annual holiday. Employers can agree to give employees more than four weeks' paid holiday.

What constitutes a week's holiday is determined by the employer and the employee together. For example, if an employee works three days per week, a week's holiday will usually be three days. So the employee is entitled to take 12 of their working days as paid holidays per year.

Payment for annual holidays is the greater of an employee's ordinary weekly pay (what they are normally paid each week) when they go on holiday or their average weekly earnings over the 12-month period before their holiday.

If an employee leaves before completing a full year of employment, holiday pay owing would be 8% of gross earnings, less any holiday pay already received.

For employees with jobs of a fixed-term of less than 12 months, or casual jobs worked so irregularly that it isn't practical to work out four weeks' annual holiday, it can be agreed for holiday pay to be paid on a "pay as you go" basis. In such cases, employment agreements have to say clearly that this is how the employee will be paid and the amount paid. Holiday pay must be at least 8% of gross earnings and recorded separately in wage and time record, holiday and leave record or on a pay slip if this is provided.

If agreement cannot be reached on when an employee should take their holidays, the employer can direct the employee on when to take their annual holidays, giving at least 14 days' notice.

An employer can refuse to allow an employee to take holidays on the basis of good business reasons however the employer must allow for annual holidays to be taken if requested by the employee for at least a continuous two week stretch.

Employers can require employees to take annual holidays during a close-down period (as can happen over Christmas/New Year), providing they give at least 14 days' notice.

Cashing up holidays

As of 1 April 2011, employees are able to ask in writing for their employer to pay out a maximum of one week of their annual holidays in each entitlement year. This can only be at the employee's request and an employer cannot pressure an

employee into cashing in holidays. Any request must be considered within a reasonable time and may be declined.

However, employers can put in place a "no cash up" policy, in which case employees will not be able to request to cash up annual holidays.

Other holidays and leave

For public holidays, alternative holidays, sick leave and bereavement leave an employee is entitled to be paid either their relevant daily pay or average daily pay.

Payment for other holidays and leave

For most employees relevant daily pay applies. Relevant daily pay is the amount the employee would otherwise have earned if they had worked on the day and includes bonuses and overtime that the employee would have received on that day.

If it is not possible or practical to calculate the relevant daily pay, or the employee's daily pay varies in the pay period in question, then an averaging formula may be used called average daily pay. This is calculated by dividing the employee's gross earnings from the past 52 weeks by the number of whole or part days the employee worked or was on paid holiday or leave during that period.

Public holidays

Employees are entitled to a paid day off on a public holiday if it would otherwise be a working day. These public holidays are separate from and additional to annual holidays.

The public holidays

There are two groups of holidays, with slightly differing entitlements applying to each:

- › Christmas and New Year: Christmas Day (25 December), Boxing Day (26 December), New Year's Day and the day after (1 and 2 January).
- › All other holidays: Waitangi Day (6 February), Good Friday and Easter Monday (dates variable), ANZAC Day (25 April), Queen's Birthday (first Monday in June), Labour Day (fourth Monday in October) and Provincial Anniversary Day (date determined locally).

The public holidays over the Christmas and New Year period have special arrangements:

- › If the holiday falls on a weekend, and the employee doesn't normally work on the



weekend, the holiday is transferred to the following Monday or Tuesday so that the employee still gets a paid day off if the employee would usually work on these days.

- › If the holiday falls on a Saturday or Sunday and the employee normally works on that day, the holiday remains at the traditional day and the employee is entitled to that day off on pay.

If the employee works on a public holiday instead of having a day off, they must be paid at least time-and-a-half for the actual time worked. If the public holiday falls on a day that an employee would normally work they are also entitled to an alternative holiday.

An employee's alternative paid day's holiday can be taken at any time agreed between the employer and employee.

If an employer and employee cannot agree when an alternative holiday is to be taken, the employer may determine on reasonable basis the day on which the alternative holiday will be taken on, giving at least 14 days' notice.

If they have not taken the alternative day off after 12 months, an agreement can be made to exchange the holiday for cash.

Employers and employees may agree to transfer the observance of public holidays to another working day to meet the needs of the business or the individual needs of the employee.

Any request must be considered in good faith and any agreement must meet the minimum requirements set out in the legislation. Such an agreement cannot reduce the number of public holidays to which the employee is entitled.

An employee is entitled to a paid day off on the day the public holiday is transferred to. The employee should be paid their relevant daily pay or average daily pay for the day.

Employers and employees can agree to transfer part of a public holiday, in cases where an employee is to start work on one day and finish on the following day.

Employers may also have a workplace policy that they will not transfer public holidays.

■ Sick leave

After six months' employment with an employer, employees are entitled to five days' paid sick leave

during the next 12 months and every a year after that. Employees can take sick leave for themselves or for them to care for anyone who is dependent on them for care, such as a spouse or partner, dependent child or parent. Unused sick leave can accumulate up to 20 days.

Employees must be paid what they would have earned had they actually worked on the day and were not sick. Sick days cannot be exchanged for payment and are not paid out at the end of the employment relationship.

Special eligibility tests apply for people with variable hours and in intermittent employment. See www.dol.govt.nz/er/holidaysandleave for more information.

■ Proof of sickness or injury

As of 1 April 2011, Employers are able to ask for proof of sickness or injury within the first three consecutive calendar days of an employee taking sick leave. The employer must inform the employee as early as possible that the proof is required and agree to meet any reasonable expenses in getting this proof. If an employee is still on sick leave after that time, and the employer requests proof of sickness or injury, the employee would meet the costs of getting the proof.

■ Bereavement leave

After six months' employment with an employer, employees are entitled to paid bereavement leave of:

- › three days on the death of a spouse or partner, parent, child, sibling, grandparent, grandchild, or a spouse's or partner's parent, and
- › one day if the employer accepts that the employee has suffered a bereavement on the death of a person not included above.

Employees do not have to take all of their bereavement leave entitlement at the same time. Special eligibility tests apply for people with variable hours and in intermittent employment. See www.dol.govt.nz/er/holidaysandleave for more information.

■ Parental leave

Employees may be eligible for paid and unpaid parental leave if they meet certain criteria. The paid leave is funded by Government.



Employees may be entitled to parental leave if they have worked for the same employer for an average of at least 10 hours per week, and at least one hour in every week or 40 hours in every month, for either six or 12 months before the expected due date of the baby or adoption.

Employees who meet the criteria are entitled to 14 weeks' paid parental leave, some or all of which can be transferred to an eligible spouse/partner if they also meet the criteria.

Employees who meet the 12-month eligibility criteria are also entitled to up to 52 weeks' extended parental leave (less any maternity leave taken). This can be shared with a spouse/partner if they also meet the 12-month eligibility criteria.

A spouse/partner with six months' service may be entitled to an additional one week's unpaid paternity/partner's leave, and a spouse/partner with 12 months' service may be entitled to two weeks' unpaid paternity/partner's leave. To be eligible, the spouse/partner must meet the minimum hours test above.

Up to 10 days' unpaid special leave for pregnancy-related reasons is available for a pregnant mother before maternity leave begins.

It is illegal for an employer to either dismiss or discriminate against an employee on grounds of pregnancy or for taking parental leave.

■ Other leave rights

Employees may also be entitled to other rights in some situations. For example:

- › Employees injured in an accident at work or somewhere else may be eligible for accident compensation. Your nearest ACC office can give you information about this. Call ACC on 0800 101 996.
- › Employees doing full-time or part-time voluntary training in the armed forces may be able to get unpaid leave.

■ Flexible working arrangements

Employees with caring responsibilities have a right to request a variation to their hours of work, days of work, or place of work.

To be eligible, employees must be caring for someone and have been employed for at least six months prior to making the request. When making the request, they must explain how the variation

will help to provide better care for the person concerned. Employers must consider a request and can refuse it only on certain grounds.

■ Equal pay & equal rights

Employers can't pay employees differently if the only difference is whether they are male or female.

Employers can't discriminate in hiring or firing, pay, training or promotion because of race, colour, national or ethnic origin, sex or sexual orientation, marital or family status, employment status, age, religious belief or political opinion, disability, or participation in certain union activities.

■ Union membership rights

Employees have the right to decide whether they want to join a union and, if so, which union. It is illegal for an employer or anyone else to put unreasonable pressure on someone to join or to not join a union, or to discriminate against someone because they joined or didn't join a union.

Unions are legally allowed to enter a workplace for employment and union business. Both the employer and the union should deal with union visits in good faith.

Union members must be allowed to attend two union meetings (no longer than two hours each) each calendar year, on pay and during normal work hours. This is separate from and additional to discussions between union members and union representatives that take place in the workplace. Union members can also take paid education leave to attend employment relations courses approved by the Minister of Labour.

Employees can also require their employer to deduct union fees from their wages and pay them to a union.

■ Union access to workplaces

Union representatives intending to visit a workplace need to get permission from the employer first. This permission may not be unreasonably withheld. The employer must respond within one working day after the request is received. If the employer decides not to grant access, they must provide written reasons for this decision no later than one working day after the date of the decision. If the employer does not respond within two working days of the request, then that is taken as consent for the union representative to enter.



→ When problems arise

■ Recognising an employment relationship problem

A problem includes anything that harms or that may harm an employment relationship. While the most obvious relationship is between an employer and an employee, other examples are relationships among employees, between a union and its members, between a union and an employer, and among unions covering employees in the same workplace.

Examples of problems from an employer's perspective include:

- › poor performance or unacceptable behaviour
- › lateness and absenteeism
- › long-term illnesses
- › failure to comply with health and safety procedures
- › breaches of company policy or the law
- › misconduct
- › conflict between employees.

Problems from an employee's perspective include:

- › discrimination or harassment
- › disagreement about whether a warning should be issued
- › problems with health and safety
- › disagreement about the meaning of a term in an employment agreement
- › misunderstood or poorly managed discipline, dismissals, redundancies or restructuring
- › disputes over holidays or pay, including deductions from pay.

Some of these problems may be the basis of "personal grievances", which require specific treatment under the Employment Relations Act. The first step, after trying to resolve the problem directly, is to contact the Department for the help of a mediator. If mediation does not resolve the matter personal grievances can be heard at the Employment Relations Authority.

A number of staff in the same workplace may share a common view about a problem. If so, it can help to deal with the problems collectively and to look for a solution that works for everyone. Where the employees are union members, their union

can play an important part in representing their collective interests and agreeing on a sustainable solution.

Whether a problem involves an individual or a group, it is important for everyone to:

- › deal with the issue as soon as it arises
- › take the time to get the facts straight
- › listen to everyone's views
- › seek solutions
- › follow a fair process that everyone understands
- › record actions and expectations.

■ Preventing employment relationship problems

Problems are least likely to arise when everyone in an employment relationship acts in "good faith".

Some simple practices can help make relationships smoother and prevent problems:

- › Employees should be well informed about their employment rights and responsibilities.
- › Agreements (and changes to agreements) should be recorded in writing. This helps to prevent misunderstandings and resolve problems if they arise later.
- › It should be clear that the terms of employment being offered are only those recorded in the written agreement, and employers should avoid giving assurances that are inconsistent with the written agreement or that are not recorded in it.
- › Employees also have a responsibility to prevent and clear up confusion. For example, if an employee believes he or she is being paid more than the entitlements in their employment agreement, the employee should raise the error.
- › Before any significant change, the people affected should be consulted. Getting everyone's ideas and perspectives will often lead to better decisions. People also respond better to change when they have some warning and have been listened to.
- › Raising concerns when they first arise can help stop them becoming bigger and harder to



resolve. An effective performance management system is a good way of ensuring this.

- › Take time to communicate clearly. Poor communication often causes disputes and misunderstandings.

It is a good idea to record important communications in writing, especially where they relate to performance issues. These records do not need to be complex, but they should be dated, accurate and stored carefully.

■ Procedures for resolving employment relationship problems

Problems can often happen in workplaces, and common sense is usually the best tool. If there's a problem, it's important to have a clear idea of the issues, check the facts and make sure that both sides have the time and opportunity to take advice and think through the issues.

Every collective and individual employment agreement must contain a clear explanation of the processes for resolving employment relationship problems. This explanation does not need to be complex or long. It should be written clearly, so employees know what processes they are required to follow, what their rights are and what happens when a problem is raised.

The sooner an issue is dealt with, and the better a process is followed, the less likely it is that outside assistance will be required. It is important that all parties, in good faith, try to resolve any problems directly. Some parties may be able to settle their differences quickly and with less cost using a mediator as a third party. The Department of Labour provides free mediation services which you can access by calling 0800 20 90 20.

■ Following a problem-solving procedure

Ignoring a problem and hoping it will go away, often only leads to bigger problems later. Delays can also create added frustration and avoidable distress, with consequences for the work place, and legal costs for all involved.

An explanation of the services available for problem-resolution must be outlined in an employment agreement. A clear procedure can help protect people's rights, and provide information to support decision-making. It can also help ensure that the problem doesn't get worse through inconsistencies or misunderstandings.

First steps in dealing with a problem

If either side believes that there is a problem, it should be raised as soon as possible. The first step is to check the facts and make sure there really is a problem and not simply a misunderstanding.

It is critical that no one jumps to conclusions when an issue is first raised. Employers must make any decisions fairly and consistently. This is usually not complicated – basically, employers should investigate, gather information and think before acting.

In all cases, employees should be treated with respect and consideration. Damages can be awarded against employers when they have caused distress to employees that could have been avoided.

Sensitive issues should be dealt with in a confidential manner – for example, by not conducting interviews in public or open-plan spaces. Both sides should try to set aside emotion and concentrate on identifying and addressing the underlying reasons for the problem.

It may be a good idea to have a third party present as a witness when a problem is discussed, to help prevent misunderstandings. An employee may wish to have a support person, union delegate or other representative present. Both sides should keep notes of any meetings and any agreements reached.

Further steps

Anyone can call the Department of Labour to clarify their rights or obligations.

If the problem is about minimum legal requirements, a labour inspector may help. See below for more information about the role of a labour inspector.

If a problem can't be resolved, parties can go to mediation, either through the Department of Labour's mediation services or through independent mediators. If this does not resolve the problem, employers or employees can go to the Employment Relations Authority for a determination.

If either party is dissatisfied with the determination of the Employment Relations Authority, the issue can be taken to the Employment Court.



Personal grievance cases

If a problem is a personal grievance, the employee must raise it with the employer within 90 days of the action complained of, or after they became aware of it – unless the employer consents to the personal grievance being raised after that time. If consent is not given, the employee can apply to the Employment Relations Authority. The employer and employee also have the option to try to resolve the grievance through mediation before applying to the Authority.

The Employment Relations Authority or Court must consider the test of justification which assesses the fairness of an employer's decision in relation to disciplinary action. From 1 April 2011, this means considering what a fair and reasonable employer could have done in the circumstances, for instance, before dismissing or taking action against an employee, did the employer:

- › having regard to the resources available, sufficiently investigate the allegations against the employee
- › raise his or her concerns with the employee
- › give the employee a reasonable opportunity to respond to those concerns
- › genuinely consider the employee's explanation (if any) in relation to the allegations.

An employer's action cannot be viewed as unjustified solely because of mistakes made in the prescribed process, if those were minor, and they did not result in the probability of the employee being treated unfairly.

As of 1 April 2011, the Employment Relations Authority may provide for reinstatement as a remedy where practicable and reasonable, but reinstatement is no longer the primary remedy.

For more detailed information about problem resolution check: www.dol.govt.nz/er/solvingproblems or visit the Employment Relation Authority's website: www.era.govt.nz

The role of Labour Inspectors

Labour inspectors work with employers and employees to make sure that employment laws are applied properly in workplaces.

Labour inspectors monitor and enforce minimum employment conditions set out in various Acts of Parliament. A labour inspector may investigate

complaints about possible breaches of minimum entitlements, such as rights to holidays, leave and pay, and enforce the law where there is non-compliance. Labour inspectors also provide employees and employers with information and education to enable them to become compliant with the law; and assist employers to implement systems and practices in the workplace that comply with the minimum standards.

A labour inspector may agree to an enforceable undertaking or issue an improvement notice. These approaches would require an employer to take steps to address breaches of the law and may include steps to address the underlying causes of those breaches.

A demand notice requires an employer to comply with legal obligations in relation to wages or other payments to individual employees.

As of 1 July 2011, labour inspectors will be able to seek a penalty against an employer who does not meet the requirements to put in place, and retain copies of individual employment agreements or terms and conditions of employment whether signed or unsigned.



→ Ending the employment relationship

There are several ways in which employment relationships may be ended, such as resignation, retirement, dismissal or redundancy. If an employee believes that an employer acted unjustifiably in ending the employment relationship, the employee can challenge the employer's decision.

■ Resignation

Employees may resign at any time, provided they give reasonable notice. The employment agreement should be checked to confirm notice periods and final pay should be calculated. If the employee gives the required notice, the employer must pay the employee to the end of the notice period, unless the employee is justifiably dismissed during that period. The employment relationship continues until that date.

The employee may be required to work for the full notice period or may be asked to stop coming to work before this date. In either case, the employee should be paid to the end of the notice period. If pay is stopped before the end of the notice period, the employee may be able to claim for wages owed.

If an employee leaves work without giving notice, the employer is not required to pay for time beyond the employee's last actual working day. The employer must not deduct pay in lieu of notice from any amount owed to the employee unless the employee agrees in writing or the employment agreement specifically allows it.

The employer must pay all holiday pay owing to the employee in their final pay.

Forced resignation

If an employer puts pressure (directly or indirectly) on an employee to resign, or makes the situation at work intolerable for the employee, it may be a forced resignation, often known as a "constructive dismissal".

A constructive dismissal may be where one or more of the following occurs:

- › the employer has followed a course of conduct deliberately aimed at coercing the employee to resign
- › the employee is told to choose between resigning or being dismissed

- › there has been a breach of duty by the employer (i.e. a breach of the employment agreement or the duty of fair and reasonable treatment) such that the employee feels he or she cannot remain in the job.

If an employee has been forced to resign, they may have a personal grievance case.

■ Retirement

In law, there is in general no set age to retire from work. Employers cannot require employees to retire just because of their age.

There is an exception to this rule if the parties have a written employment agreement that was in force on 1 April 1992 and remains in force. If this agreement specified a retirement age, and the employer and the employee agreed in writing on or after 1 April 1992 to confirm or change this retirement age, then the employee must retire at that age.

■ Dismissal

There must be a good reason for a dismissal and the dismissal must be carried out fairly. Otherwise, the employee may have a personal grievance claim against the employer.

What is fair depends on the circumstances. Any relevant provisions in the employment agreement must be followed. If an employment agreement does not have a notice period, then reasonable notice must be given.

Employees have the right to be told what the problem is and that dismissal or other disciplinary action is a possibility. Employees must then be given a genuine opportunity to tell their side of the story before the employer decides what to do.

The employer should investigate any allegations of misconduct thoroughly and without prejudice. Unless there has been misconduct so serious that it warrants instant dismissal, the employee should be given clear standards to aim for and a genuine opportunity to improve.

If an employee is dismissed, he or she has the right under the Employment Relations Act to ask the employer for a written statement of the reasons for dismissal. This request can be



made up to 60 days after they find out about the dismissal. The employer must provide the written statement within 14 days of such a request. If the employer fails to provide this written statement, the employee may consequently be able to raise a grievance after the required 90-day limitation period.

There are some different provisions applying to dismissal during a trial period. See the section on Trial Periods for more information on this.

■ Restructuring and redundancy

An employer must have a genuine work-related reason for a redundancy. Employers may need to make changes in the workplace for a variety of reasons, such as:

- › improved technology
- › more productive business processes
- › product changes
- › loss of suppliers or markets
- › a decision to contract out or sell some or all of the business.

The law requires employers to provide information to employees when they are considering changes that will affect their jobs and to give them an opportunity to contribute to any decisions.

The first step is to refer to the employment agreement, since that sets out the basis for the relationship and the procedures for changing its terms.

The more significant a proposed change is, the more likely it is that it cannot be imposed without the employee's agreement. Even where the employment agreement states that certain changes can be introduced in the future, they should be introduced with early advice and discussion. Employees should have an opportunity to comment before an employer makes a decision.

Generally, there is no right to redundancy compensation unless employers and employees and/or their union have agreed to it. This can be done before or after an actual redundancy is planned. It is also up to the parties to decide what any redundancy compensation should be.

Where employees agree to a change, the terms of the employment agreement must be updated, signed by both parties and kept on file.

Employees may be able to raise a personal grievance if they believe their employer has acted unjustifiably in the event of a redundancy. For instance, the employer cannot use redundancy as a way of dismissing someone for reasons relating to the employee personally (such as the employee's performance).

Remedies are available through the Employment Relations Authority or the Employment Court.

Employers do not have to disclose confidential information if there is good reason to maintain the confidentiality of that information. Good reason to maintain confidentiality includes:

- › complying with statutory requirements to maintain confidentiality
- › protecting the privacy of individuals
- › protecting the commercial position of an organisation from being unreasonably prejudiced.

Employers also have some specific legal obligations where a business is sold or transferred, or work is contracted out:

- › Most employers must take the steps outlined in the employment agreement to protect employees in such situations.
- › Employers who employ staff doing certain catering, cleaning, caretaking, laundry and orderly work have special obligations that provide continuity of employment protection to employees during restructuring. See more information on our website www.dol.govt.nz/er/solvingproblems.

■ More information

Information, examples and answers to your questions about the topics covered here can be found on our website www.dol.govt.nz or by calling us free on 0800 20 90 20.







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