A-Z Guide

Individual Employment Agreements

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Individual Employment Agreements

An individual employment agreement "IEA" is an employment agreement entered into by one employer and one employee who is not bound by a collective agreement. Where there is a collective agreement in force and the work the employee is to do is caught by the coverage clause and the employee is a union member they will be covered by the collective agreement. For employees who are not union members their terms and conditions of employment will comprise those of the collective for the first 30 days, see page 7 below. Also refer to the **A-Z Guide** on **Collective Employment Agreements.**

Good Faith Bargaining

Employers must comply with the duties of good faith when:

- Bargaining for an individual employment agreement;
- Bargaining for a variation of an individual employment agreement;
- Any matter arising under or in relation to an individual employment agreement while the agreement is in force.

The duty to act in good faith prohibits the parties from (directly or indirectly) misleading or deceiving each other or doing anything that is likely to mislead or deceive. For further details on the duty of good faith refer to the **A-Z Guide** on **Good Faith.**

Unfair Bargaining

The Employment Relations Act provides remedies for any party that the Employment Relations Authority agrees has been unfairly bargained with, including the ordering of compensation and the variation or cancellation of the agreement. A party to an employment agreement cannot challenge or question an agreement on the grounds that the agreement itself is unfair or unconscionable. Bargaining for an individual employment agreement is unfair if:

- the employer knows or ought to know that at the time of bargaining the employee
  - sickness; or
  - mental or educational disability; or
  - a disability relating to communication; or
  - emotional distress
- the employee reasonably relies on the skill, care or advice of the employer; or
- the employee is induced into entering the agreement by oppressive means, undue influence or duress; or
- the employee did not have the information or opportunity to seek independent legal advice under s63A.

Refer to the **A-Z Guide** on **Undue Influence and Duress** for more information on the meaning of these terms.

Individual Employment Agreements

When entering into an individual employment agreement (where no collective agreement is in force), an employer must:

- provide the employee with a copy of the intended agreement under discussion; and
- advise the employee that they are entitled to seek independent advice about the intended agreement; and
- give the employee a reasonable opportunity to seek that advice; and
- consider any issues that the employee raises and respond to them.
- where an employer fails to comply with this section the validity of the employment agreement will not be affected but the employer may be liable to a penalty.

Minimum Requirements of an IEA

List of Minimum Requirements (Section 65)

Section 65 sets out the minimum requirements of an Individual Employment Agreement. The agreement must be in writing and may contain such terms and conditions as the employee and employer think fit but must include:

- the names of the employee and employer; and
- a description of the work to be performed by the employee; and
- an indication of where the employee is to perform the work; and
- any agreed hours of work specified in accordance with section 67c or, if no hours of work are agreed, an indication of the arrangements relating to the times the employee is to work; and
- the wages or salary payable to the employee; and
- a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised; and

must not contain anything:

- contrary to law; or
- inconsistent with the Employment Relations Act.

A plain language explanation of the services available for the resolution of employment

Compliance with section 65 of the Act involves the provision of a plain language explanation of services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised. Such an explanatory clause may include any internal procedure that your organisation wishes to adopt so long as that procedure is not contrary to law and not inconsistent with the Act. Samples of plain language explanatory clauses may be found in the A-Z guide on Samples of Plain Language Employment Relationship Problem Resolution Clauses.

Copy of Agreement to be retained and available

Section 64 of the Act requires that employers have the obligation to retain and provide written copies of all employment agreements.

Retain copies of Individual Agreements

Employers must:

- Retain a signed copy of the individual employment agreement; or
- Retain a copy of the terms and conditions of employment that make up the employee's individual terms and conditions.

AND

- Retain a copy of the intended employment agreement even if the employee has not signed it or agreed to it.

Providing copies of Agreements

If an employee requests, the employer must as soon as reasonably practicable provide the employee with a copy of:

- The individual employment agreement or current terms and conditions; or
- The intended employment agreement

A Labour Inspector may issue a breach notice and the employer then has seven working days to provide copies of employment agreements as required.

Employees with no written individual employment agreements

Some employees may have been employed before the law required written individual employment agreements, or were given an employment agreement but never returned it and the employer didn't keep a copy of what was given to them.

Employers are required to write down the terms and conditions of employment that apply. That does not, however, mean an employee cannot dispute them.

Employee Protection Provision

Employment agreements must contain an employee protection provision. The purpose of such a provision is to provide protection for the employment of affected employees if their employer's business is restructured. It must include:

A process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees; and The matters relating to the affected employees' employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and

The process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer.

For more information on restructuring refer to the A-Z Guide on Redundancy. For sample clauses refer to the A-Z Guide on Employee Protection Provisions.

Holidays Act

The Holidays Act 2003 requires that employment agreements include a provision that confirms the right of the employee to be paid in accordance with section 50 of the Act for working on a public holiday. Section 50 relates to the right to be paid at least time and a half for working on a public holiday. There is no obligation to include any other specific clauses in relation to employee's rights. under the Holidays Act however employers are required to inform employees of these rights.

Employees may be given an information sheet outlining their rights under the Holidays Act rather than including these as a contractual term which will need to be updated every time the legislation is amended.

In limited circumstances employers may pay an employee's annual holiday pay as they go. To do this the employee must agree in his or her employment agreement. For further information please refer to the **A-Z Guide** on **Annual leave.**

Enforcement

A failure to comply with these requirements can incur a penalty. An IEA need not contain an expiry date if the employment is permanent; at the time of an expiry date the terms and conditions will continue in force unless varied by agreement. No party can unilaterally vary any term or condition of employment contained in an IEA, any variations of an IEA should be expressed in writing and signed and annexed to the original document.

Union Fees

Although an employer is not expressly required to include a clause regarding union fees in their individual employment agreements, an individual employment agreement of an employee who is a member of a union is to be treated as if it contains a provision that requires the employee's employer to deduct with the consent of the employee, the employee's union fee from the employee's salary or wages on a regular basis during the year. An individual employment agreement may exclude or vary the requirement.

Employment subject to a trial period

Employers are able to include a trial period in an employment agreement. The trial period clause must be in writing in the IEA and signed by both parties. This trial period can only be for up to 90 days. This trial period will prevent the employee from raising a personal grievance for unjustified dismissal if a dismissal occurs during the trial period. There are specific restrictions on how. employers can use trial periods and from 6 May 2019 trial periods have been restricted to employers employing fewer than 20 employees. It is considered under sections 67A and 67B of the Employment Relations Act 2000.

Refer to the **A-Z Guide** on **Trial & Probationary Periods** for more information on how the trial period works.

Employment subject to a probationary period

Probationary periods are very separate and distinct from trial periods. Like the trial period if the IEA is to contain a probationary period then this will need to be stated in writing in the IEA and section 67 of the Employment Relations Act 2000 will apply. The probationary period clause is a different clause to the trial period clause. Unlike the trial period, the probationary period does not prevent a personal grievance for unjustified dismissal from occurring. Process must still be followed before any dismissal occurs during the probationary period.

Refer to the **A-Z Guide** on **Trial & Probationary Periods** for more information

Employment for a fixed term

If the IEA is to be for a fixed term then this will need to be stated in writing in the IEA and section 66 will apply. Refer to the **A-Z Guide** on **Fixed Term Employment** for more information.

IEA where work covered by a collective agreement – non-union member

The ’30-day rule’ has applied again since 6 May 2019. New individual employees who are not a member of the union that is a party to a collective that covers the work to be done by the employee, will be automatically covered by the terms of the collective that would bind the employee as if they were a union member for the first 30 days of employment.

Parties can agree on any additional terms that are no less favourable with the terms of the collective agreement in place. Additional terms can be agreed even during the 30-day period.

This applies to any new employees who start working, or sign an individual employment agreement, on or after commencement of the amendment.

Employers need to inform new employees that a collective agreement exists and covers the work, provide information about the union, a copy of the collective agreement, and inform them that they will be covered for the first 30 days by the terms of the collective agreement.

Please contact AdviceLine if you require a sample offer of employment letter.

Employers must meet these obligations for ‘prospective employees. This applies to an employer bargaining with an individual on or after commencement of the amendment, whether bargaining was initiated before, on, or after commencement.

There is also a requirement for employers to share information about a new employee with the union. However, this will be subject to any objection by the employee. Employees will be given a certain timeframe in which to object. The information will include the name of the employee and whether the employee has elected to join the union or not. The form to be provided to new employees is available from MBIE or AdviceLine.

Union member and Collective Agreement

If an employee joins the union they will be covered by the collective agreement.

An employee bound by applicable collective agreement may agree to additional terms and conditions of employment.

The terms must be:

- mutually agreed whether before, on, or after the date on which the employee became bound by the collective agreement; and
- not inconsistent with the terms and conditions in the collective agreement.

Employment subject to a trial or probationary period

A trial period or probationary period clause could also be included if it is not inconsistent with the provisions of the collective agreement in force. Refer to the **A-Z Guide** on **Trial & Probationary Periods** for more information.

Employment for a fixed term

For the employment to be for a fixed term then that type of employment must not be inconsistent with the provisions of the collective agreement that is in force. Refer to the **A-Z Guide** on **Fixed Term Employment** for more information.

Coverage

Your individual employment agreements may cover as many different topics as you wish so long as they comply with the law. You are encouraged to seek advice about the form and content of IEAs.

Your IEAs should cover the issues that are pertinent to your organisation and be capable of being shaped to fit each employee. IEAs should complement your policies and procedures and refer to them as appropriate. You will need to consider what terms will apply if an employee on an IEA later joins a union and there is an applicable collective agreement in place. EMA Consultants and Lawyers can review and draft employment agreements and are able to provide you with current and pragmatic advice about what your IEAs should cover. The EMA website also contains sample employment agreements and a list of sample clauses to consider including in your IEAs.

Best Practice

The provisions of the Employment Relations Act 2000 state that every employee must have a written employment agreement and is recommended that an agreement is signed before the employee starts work. Agreements containing a trial period must be signed before the employees starts work. The sending of an employment agreement to a prospective employee with an offer of employment is the start of a negotiation of the terms and conditions of the employment being offered. The letter offering employment should clearly state that until you and the prospective employee have agreed on the terms and conditions of employment, which will be signaled by the signing of an employment agreement, you will not treat the offer of employment as accepted. A start date for work should be a term and condition that is negotiated when the other terms and conditions of employment are negotiated; only once the agreement has been entered into should an employee actually start work.

Where a collective agreement is in place

As outlined earlier in this guide where there is an applicable collective agreement in force employers need to advise new employees of the existence of the collective agreement and if the employee joins the union they will be covered by the collective agreement. Refer to the **A-Z Guide** on **Recruitment and Selection** for more information.

Hours of work

The Act covers the requirements with respect to:

- Agreed hours of work
- Availability provisions
- Cancellation of shifts
- Secondary employment provisions

Where an employer requires an employee to be available to work when required then they will have to provide for guaranteed hours and include an availability provision. The law in relation to availability provisions does not interfere with the existing practice of true casual employment relationships where there are no guaranteed hours, but the employee is not required to be available if asked to work. But where an employer requires an employee to be available to work when required then the employer will have to include a provision for guaranteed hours.

Section 65 of the Act has been amended so that an individual employment agreement must include “any agreed hours of work specified in accordance with section 67C or, if no hours of work are agreed, and indication of the arrangements relating to the times the employee is to work.”

Section 67C – Agreed hours of work. Provides that hours of work agreed must be specified in a collective agreement, in additional terms to a collective agreement, and an individual agreement.

Hours of work includes any or all of

- The number of guaranteed hours of work
- The days of the week on which the work is to be performed
- The start and finish times of work
- Any flexibility in days of week, and/or start and finish times

Availability provisions

Section 67E – Availability provision – A provision in an employment agreement under which:

- The employee's ***performance of work is conditional*** on the employer making work available to the employee; and
- The employee is required to be available to accept any work that the employer makes available

An availability provision may only:

- Be included in ***an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work*** among those agreed hours; and
- Relate to a period for which an employee is required to be available that is in ***addition to those guaranteed hours of work.***

An employer can only include an availability provision if:

- The employer has genuine reasons ***based on reasonable grounds*** for its inclusion, and for the number of hours specified
- The availability provision provides for the payment of ***reasonable compensation*** for the employee being available

An availability provision outside of an employment agreement is not enforceable against the employee.

Cancellation of shifts

Section 67G – Cancellation of Shifts – An employer is not able to cancel a shift unless the employment agreement specifies a r***easonable period of notice that must be given***, and ***reasonable compensation*** that must be paid if the employer cancels a shift without giving the required notice in the employment agreement.

To avoid doubt, nothing in an employment agreement providing for notice of cancellation of a shift enables an employer to cancel an employee's shift if that cancellation would breach the employee's employment agreement.

Secondary employment

Section 67H - Secondary employment provisions – a provision in an employment agreement which prohibits or restricts the employee from performing work for another person, or prohibits or restricts the same without the employer's consent.

An employer may only include a secondary employment provision in an employment agreement if they have ***genuine reasons based on reasonable grounds***, and those reasons are stated in the employment agreement.

A full summary of the amendments is available from AdviceLine.

Conclusion

The Employment Relations Act 2000 sets out for employers and employees the obligations they have towards one another in bargaining for IEA's. Individual employment agreements are required by the Act to be in writing and to express a minimum of terms and conditions of employment. If you wish to discuss your particular circumstances contact the EMA AdviceLine for assistance.

Remember

- **Always call AdviceLine to check you have the latest guide**
- **Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.**
- **Use our AdviceLine employment advisors as a sounding board to test your views.**
- **Get one of our consultants to draft an agreement template that's tailor-made for your business.**

This guide is not comprehensive and should not be used as a substitute for professional advice.

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