



A-Z OF EMPLOYING

Recruitment

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Business**Central** 

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Recruitment

Recruitment is the process whereby the employer attracts a group of people who wish to be employed in the role, and from which the employer selects the candidate that he or she believes is likely to be the most successful. Recruitment provides the foundation of the selection process, because good recruitment will result in a suitably sized group with the necessary knowledge, skills and abilities to succeed in the job. Poor recruitment may result in too small a group (which gives few options), too large a group (which may hide the excellent amongst the mediocre), or a group without the necessary competencies to perform the job. Poor recruitment may also result in the employer having poor options when selecting, and ideal candidates not being aware of the vacancy.

It is important to understand that recruitment and selection are processes, rather than singular events. Both involve a sequence of steps that lead towards the final outcome; the desired end of recruitment is to attract a suitably sized group of candidates who could potentially do the job, selecting the most appropriate and offering employment. Selecting the best person for the job is both cost and time effective. Getting it wrong may involve either wasting time and money and managing the employee so they can reach performance expectations, or the employment being terminated, thereby requiring the recruitment and selection process to start all over again.

As well as ensuring a good procedure is followed to obtain the best candidate for the position, employers must ensure they comply with legislative requirements. Employers need to consider their obligations under the Human Rights Act, Privacy Act, Fair Trading Act, Immigration Act, Criminal Convictions (Clean Slate) Act and the Employment Relations Act in relation to the recruitment process. The key steps in recruitment and selection are outlined in this guide with particular attention being paid to the obligations and constraints under the law that apply to employers during the recruitment process.

The process of recruitment

Finding the right person for a vacancy requires the two-step process of recruiting the best pool of candidates, then selecting the most appropriate for the job. Conducting an exit interview with the departing employee can be beneficial to this process, by potentially correcting the job description and person specification, and deciding how the vacancy should be advertised. The selection process begins with screening. Screened applicants progress to interviews and to pre-employment tests and checks. The selection ends when the prospective employee has been identified and the offer of employment has been accepted.

Reviewing the job description

Hiring a new employee may result from either an exiting employee (through resignation, or termination, but not redundancy), or a new position being created. When replacing an employee, the question should be asked as to whether a replacement is in fact necessary. Often, either through downturn or changes in operations, a replacement is unnecessary, therefore the opportunity should be taken to reduce the headcount without redundancy.

Should a replacement be necessary, it is important to review or consider what it is exactly you are looking for, and whether the current job description and person specification for the role reflects this. A job description is an agreed document outlining the key tasks and duties

an employee is to perform, and the expected levels to which they should be performed, including any requisite skills or qualifications. A person specification outlines the knowledge, skills and abilities considered necessary to perform the role. Often while an employee is in a role it alters or develops over time from its original form, and therefore it is necessary to consider whether any existing job description correctly reflects the role.

What is a job description?

A job description (or position description) should reflect a comprehensive analysis of what the employee will be required to do, how they will be required to do it, and what the required result will be in relation to the position. It may also include how an employee's performance will be monitored and assessed in relation to the result they were employed to achieve.

Where there are requisite skills or qualifications pertinent to the position then they should be included in the job description. Clearly if the job requires a certain professional or educational qualification then that must be included.

A job description may reflect reporting structures, time frames, areas of accountability and responsibility, and performance indicators and/or outcomes.

A job description should give an applicant (if it is available upon application) a good but not exhaustive understanding of what the role they are applying for entails, and should provide the successful candidate with a good understanding of what they would be employed to do.

An exit interview can provide some insightful information to assist an employer in the creation or revision of a job description, and the outgoing employee should be valued as a resource for this.

A job description is generally not included within an employment agreement, however it is usually annexed to it. This is because an employment agreement is just that – an agreement – and cannot be changed without further agreement. Conversely, a job description is rarely static; as the position evolves over time and the demands of the job change, it is appropriate that the job description is not fixed, but is rather capable of being treated as a fluid or living document and therefore reflective of reality. However, that does not mean that a job description is sufficiently fluid to enable radical change without consultation and agreement.

Exit Interview

As previously mentioned, one of the most effective means of evaluating a job is conducting an exit interview. This is an interview with the outgoing employee in which a number of issues are discussed, including the current tasks and responsibilities the role involves. Put simply, to find out what the job involves, ask the person doing it. An exit interview is not a disciplinary meeting. It is the formal conclusion to an employment relationship that enables you to address, with an outgoing employee, any issues that have remained outstanding. An exit interview may be one of the few situations where an employee feels comfortable giving an honest and frank opinion to their employer, which may be the key reason why some employers do not conduct them. Serious issues within the organisation can first come to the attention of the employer during such meetings.

Exit interviews may also prevent personal grievances. If an employee raises matters that indicate that their employment was materially affected by negative elements in the workplace or workforce, then their concerns or complaints can be heard and investigated by you in an effort to correct them before they leave. In this sense, the exit interview can be a risk management initiative.

Finding the Applicant

Once the type of applicant has been established, those people must be found. They can either be found internally or externally.

Internal Recruitment

There are advantages to hiring internally. The individual is already familiar with, and is a known quantity to the organisation, and this may constitute an opportunity to develop the individual or provide them with a more suitable or interesting job, thereby retaining key talent. Disadvantages include the fact that transfers or promotions create another vacancy to fill, may result in people being promoted beyond their ability, and the opportunity to bring in new talent is lost. Informing your existing staff of a vacancy may yield little or no response, but may result in an unexpected and ultimately successful application.

External Recruitment

Seeking external candidates can be done through a number of methods, and often multiple are used. Common methods include:

- Advertising – traditionally in the newspaper, but also can include radio, television and professional journals.
- Websites – posting vacancies online with website based recruitment services is a cheaper alternative, but it pays to remember that they are only visited by those with the means and ability to use the internet and who are actively looking.
- Recruitment agencies – listing vacancies with agencies is common practice and there are large numbers of agencies offering a variety of services, often specific to certain industries. It is important to make sure they are aware of your specific wants, and it is advisable to seek recommendations from other businesses in your industry.

Job Advertisements

When advertising a vacancy, employers need to be aware of the legislative restraints imposed on them.

Human Rights Act

The Human Rights Act is designed to ensure that selection of future employees and the promotion of existing employees occurs without discrimination on the grounds prohibited by the Act. The Act makes it clear that both the employer and anyone acting on the employer's behalf are jointly liable for any discriminatory actions. No-one may refuse employment to a job applicant, nor offer different terms and conditions from those available to others similarly employed, nor dismiss or subject an employee to detriment on any of the grounds set out in the Act. Section 67 of the Human Rights Act stipulates that advertisements for employment should not indicate an intention to commit a breach of the Act by discrimination against a person or people. For example, an advertisement should not specify that a person of a certain age or gender is preferred (unless an exception applies under the Act). The grounds for discrimination under the Human Rights Act are:

- sex, which includes pregnancy and childbirth;
- marital status;
- religious belief;
- ethical belief (which includes the lack of a religious belief, whether in respect of a particular religion or religions, or all religions);
- colour;
- race;
- ethnic or national origins, which includes nationality or citizenship;
- disability;
- age;
- political opinion;
- employment status (eg being unemployed);
- family status (eg being related to a particular person or having the full time care of dependants);
- sexual orientation.

If an applicant suspects that he or she has been discriminated against on any of these grounds while seeking employment, he or she may lodge a complaint to the Human Rights Commission. Personal information about a job applicant should therefore be kept for at least 12 months in case a complaint of this nature should arise.

The Human Rights Commission has published pre-employment guidelines called Getting A Job: An A-Z for employers and employees. Employers may access this and other guides on the following website: www.hrc.co.nz

Fair Trading Act

Section 12 of the Fair Trading Act requires all advertisements to fairly reflect the job vacancy, and the job should not be made to sound more attractive than it really is so as to attract better applicants. Not only is this a legal requirement, but it also makes sense in terms of retaining the person recruited for the position. If unrealistic expectations are created by the employer for a particular role, the employee is not likely to stay long in the company when they realise the true nature of the position.

Screening Applicants

Screening is the process of matching letters of introduction and CVs to the job description and the person specification, and removing those clearly not suited. An important consideration during this process should be whether the applicant has the right to work in New Zealand. CVs should state on what basis a person has a right to work in New Zealand so that an employer can ascertain whether to progress with their application.

Immigration Act

The Immigration Act makes it an offence for an employer to allow or to continue to allow any person to undertake employment knowing that the person is not entitled to undertake that employment. An employer must therefore decline to employ anyone who is not legally entitled to work in New Zealand.

Under the Immigration Act, the following people can undertake employment in New Zealand:

- New Zealand Citizens (including people born in the Cook Islands, Niue and Tokelau);
- Holders of New Zealand residence permits;
- Australian Citizens;
- Australian residents who hold New Zealand residence permits;
- Visitor or student permit holders whose conditions have been varied to authorise work;
- People who are exempt, e.g. Australian Citizens.
- There are heavy penalties ranging from \$10,000 - \$100,000 and possible imprisonment for employers who are convicted of an offence under the Immigration Act.
- It would however be acceptable to have the following in all application forms:
 - If you are not a New Zealand Citizen:
 - Do you have the right of permanent residency in New Zealand? or
 - Do you have a permit to work in New Zealand?

Employers should require successful applicants to provide evidence of their New Zealand citizenship, residency or work permit. This could be in the form of a passport, birth certificate or work permit. An IRD number is not evidence of an employee's right to work in New Zealand.

The Immigration department has launched a new website for employers called 'VisaView', which enables employers to check whether a person is entitled to work in New Zealand. For more information or to register, go to <http://www.immigration.govt.nz/employers/resources/visaview/>

Employers should note that under the Immigration Act an immigration officer can enter the employer's premises at any reasonable time to inspect wage and time records, if they believe on reasonable grounds that there may be an entry relating to a person who is in New Zealand unlawfully or who is not entitled to undertake employment.

Privacy Act

The Privacy Act establishes rules for dealing with any personal information collected from an employee or job applicant and limits an employer's ability to ask a previous employer about a prospective employee. The Act's principles bind employers seeking to employ a person. Principles 1-4 stipulate that employers should only ask questions that are relevant and have a lawful purpose; should ask for the information only from that person or seek their consent to ask that information from someone else; should indicate to the person why the information is requested and who will hold it, for how long, who will have access to it, and that the applicant has the right to access and correct the information; and should not collect information by means that are unlawful, unfair or are unnecessarily intrusive.

This is because, primarily, the Act requires personal information to be collected for a lawful and necessary purpose directly from the person to whom it relates and released only with the person's consent. Employers must, therefore, ask permission from a job applicant before approaching a former employer for a reference, while a job applicant or employee is entitled to see any reference provided in the knowledge or expectation that it would be given to the employee concerned. There is, however, no obligation to disclose the contents of a reference if the person giving it asked that this remain confidential, or where confidentiality is implied. With the agreement of an unsuccessful job applicant, his or her CV may be retained in case another job vacancy should occur.

The Employment Relations Amendment Act 2014 effective from the 6 March 2015 recognises that the disclosure of private information such as interview notes prevent individuals to take part or provide their free and frank opinions in interviews or participation in selection panels because of concerns about their comments becoming public. *Vice-Chancellor of Massey University v Wrigley* [2010] NZEmpC 37.

This hinders an employer's ability to make good decisions in employing staff and to manage its business in the most efficient way. The Act clarifies which type of information an employer is required to provide in order to comply with the duty of good faith in these circumstances. The main changes to the current law in regards to the disclosure of information and the duty of good faith is to amend the duty of good faith so that in the situation described above the employer is not required to provide an affected employee with access to confidential information if that information is

- About an identifiable individual other than the affected employee
- Evaluative or opinion material compiled for the purpose of making a decision that may affect an employee's continued employment
- About the identity of the person who supplied the evaluative or opinion material

Application for Employment Forms

An application form completed prior to the interview is a valuable tool for verifying the information a person supplies in their CV. Application forms should only ask for information that is relevant to the position being applied for, and to whether the applicant fits the organisation's culture. Application forms that reveal a "fishing expedition" for irrelevant information may antagonise applicants, and may contravene the Human Rights Act and Privacy Act. Application forms should be tailor-made for each undertaking of recruitment. An application form should not be relied on at face-value. Generally applicants are putting "their best foot forward" and while they may not make false claims, they will certainly be selective with their information. Employers should treat all information provided with caution, and make efforts to establish the truth of the important information. An application form is also a means of asking the applicant for permission to make reasonable invasions of their privacy to assist you in measuring their suitability for the job. A sample application form can be accessed on our website. It is strongly recommended that this form be used as a guide only. Having a blanket "one size fits all" employment application form for your organisation may be problematic if it seeks information from applicants that is relevant to one position, but irrelevant to another. You should therefore review your organisation's application forms regularly, to ensure they comply with the legal requirements and are relevant to the job in question.

An application form should be accompanied by a covering letter from your organisation to the applicant explaining why the information is sought (to assist the company in considering the applicant's suitability for the position for which they are applying), and what will happen to the information they provide in the event they are successful and in the event they are unsuccessful. The letter should also state that the applicant is entitled to access the information through your organisation's Privacy Officer and should provide the contact details of that officer.

A sample application for employment form can be downloaded from the Guides and Templates section of our website www.businesscentral.org.nz

Interviews

An interview follows up on the information disclosed in the application form and CV and is an opportunity to further assess suitability. It is also the time that you may give the applicant more information about the role and the work environment. Interviews are often an evaluation process, where both the potential employer and potential employee 'size up' each other, determining whether the other is offering what they are looking for. Generally, conditions of employment are commonly discussed at this stage, but it is not considered an appropriate time to negotiate terms and conditions of employment. This should occur after an offer of employment has been made. It is important to avoid asking questions that might indicate intent to discriminate on any of the 13 prohibited grounds of discrimination under the Human Rights Act and to focus on the skills and attributes that are required and/or desired for the fulfilment of the position. Open questions are a useful way of avoiding potentially discriminating questions and generally illicit more information from the applicant.

There are many different styles of interviews that employers can adopt. It is not desirable to have a standard set of questions to use for all vacancies. Employers should tailor the

interview to the particular position, and depending on what style best suits the culture of the organisation, e.g. casual or structured. Questions should be developed to ascertain that the applicant has the required skills and attributes required for the position and that they are the 'right fit' for the organisation.

Pre-employment Checks

These are checks made to confirm that the applicant is capable of fulfilling the requirements of the position on offer. It is important to consider the relevance of these checks before developing your application for employment form. Some checks that are not directly relevant may be indirectly relevant. For example, a criminal record check may not seem important for the job because it does not involve money, children or being in other people's homes, but it may involve overseas travel, and the applicant's ability to enter certain countries may be inhibited by a criminal record.

Checks of information should be conducted before the next stage in the selection process occurs. Checks of information made after an offer of employment has been made may be problematic. Even so it may be helpful to include on your application form a declaration by the applicant that the information they have provided is accurate and true, that the employer is reliant on the information being true, and that they may have their employment terminated if the information is found later to be false.

Pre-employment Tests

Pre-employment tests may be carried out before an offer of employment is made to a person. These tests are designed to ascertain whether or not the applicant has the skills required to do the job. It can be a very valuable way of assessing suitability and proficiency. Before conducting pre-employment tests, you should be confident that the skill you are testing is an important element of the vacant position, and that the test is not discriminatory – either directly or indirectly. It is inappropriate to seek consent for tests that are irrelevant to the job the applicant is applying for. Examples of pre-employment tests include:

- Personality testing;
- Word processing ability;
- Driving tests;
- Tests designed to evaluate numeracy and literacy skills.

Pre-employment Medical Examinations

Before proceeding to request, demand or schedule a medical examination, you should have a comprehensive understanding of how the medical examination will (or will not) assist in any decision making process. There are some legal constraints that you should be aware of, particularly if you are not clear on how a medical examination will assist your situation and how it does, or does not, relate to the person's ability to perform the role that he or she is expected to fulfil.

Whilst an employer cannot discriminate against an applicant based on a disability under the Human Rights Act, there are exceptions to this. An employer can treat applicants differently based on a disability where:

- The position is such that a person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or
- The environment in which the duties of the position are to be performed or the nature of those duties, or some of them, is such that the person could perform those duties only with a risk of harm to that person or others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.

As a rule, there are not many pre-employment situations where it is necessary to conduct a medical examination. Generally pre-employment medical examinations are appropriate and lawful where international regulations require a prescribed level of fitness (for example, airline pilots) or international standards have normalised a fitness level (for example, police officers). In New Zealand, the Police Force, the Armed Forces and the Fire Service represent the type of employers who can, and do, conduct pre-employment medical examinations.

An employer should only consider requiring an employee to undergo a medical examination because:

- The nature of the work is physically and/or mentally and/or emotionally demanding; and/or
- An applicant has indicated that he or she has a health issue which could impact on their ability to perform the tasks associated with the position; and/or
- A medical examination may identify a justified barrier to the employment which may, or may not, be able to be overcome.

If a medical examination reveals that an applicant may not be suitable for employment, you should consider:

- The extent to which the applicant's health issue impacts, or does not impact, on the person's ability to fulfil the role; and
- The extent to which the way the role is performed is, or is not, subject to adjustment; and
- Whether it is reasonable, or not, in all the circumstances, to make alterations in order to accommodate the applicant concerned.

The withdrawal of an offer should be based on the finding either that it is unreasonable in the circumstances to provide special services or facilities to assist the person in the satisfactory performance of the employment, or that the employment of that person would involve an unreasonable risk of harm to that person or others, and there are no reasonable measures that the employer could take without unreasonable disruption to reduce that risk to a normal level.

Criminal Record (Clean Slate) Act

The Act's purpose is to establish a clean slate scheme to limit the effect of an individual's convictions, in most circumstances (subject to exceptions, e.g. in situations of national

security or the care and protection of young children), if the individual satisfies the eligibility criteria. If an individual satisfies the criteria, then he or she is deemed to have no criminal record for the purposes of any question asked of him or her about his or her criminal record; and he or she has the right to have the criminal record concealed by government departments and law enforcement agencies that hold or have access to that record.

In order to qualify, an individual must have:

- No convictions within the last seven years; and
- Never been sentenced to a custodial sentence (eg imprisonment; corrective training or borstal); and
- Never been detained in a hospital due to a mental condition instead of being sentenced; and
- Not been convicted of a specified offence (largely crimes of a sexual nature); and
- Paid in full any fines or reparation costs ordered by the court in a criminal case; and
- Never been indefinitely disqualified from driving.

The Act entitles job applicants whose convictions are concealed to state unequivocally that they do not have any previous convictions, even though they do. An employer asking candidates if they have any convictions will not, by asking, be in breach of the Act, but will be in breach should the candidate be required to disregard the effect of the clean slate scheme when answering a question about his or her criminal record; or disregard the effect of the clean slate scheme and disclose, or give consent to the disclosure of, his or her criminal record.

Any application form, or interview question that asks candidates about convictions should use clear and unambiguous language – e.g. “Do you have any criminal convictions, not including those concealed under the Criminal Records (Clean Slate) Act?”

A copy of the form to request a copy of criminal conviction records held on the Wanganui computer system can be downloaded at: www.justice.govt.nz

Credit Checks

Credit checks may be obtained if they are relevant to the position being applied for through providers like Baycorp who have online facilities designed for human resource personnel at: www.baycorp.co.nz

Driver's Licence Checks

Since the Police can impound any vehicle being driven by someone who has been disqualified or suspended from driving, or who has been forbidden to drive, companies need to be able to check the validity of their employees' driver licences before allowing them to drive a company vehicle. Driver Check – a service of the LTSA offers a secure internet site that allows you to check a driver's licence class and status details quickly and easily. You can make enquiries about the licence status of a driver in your firm – what licence classes and endorsements he/she holds, whether there are any conditions on the licence, and the status of the licence. You can also maintain and view your own company list of drivers – adding new drivers and removing any that are no longer associated with your firm. To establish your company as a registered user of Driver Check, apply for a registration pack by phoning 06 953 7027, or send an e-mail to drivercheck@nzta.govt.nz

Reference Checking

Reference checking is an extremely important step in the selection process. You are looking for confirmation that the applicant is capable of the position for which he/she applied and has a track record of success in the same or similar positions, and that he/she has been a valuable and reliable employee. This is the one step that you should not delegate or contract out. You need to ascertain for yourself, as the prospective employer, that the referee was satisfied with the applicant's performance, that the performance was recent and relevant, and that the applicant has been honest about the information provided in relation to that former employment.

Employers must ask permission from a job applicant before approaching a former employer for a reference, while a job applicant or employee is entitled to see any reference provided in the knowledge or expectation that it would be given to the employee concerned. There is, however, no obligation to disclose the contents of a reference if the person giving it asked that these remain confidential, or where confidentiality is implied. It is best practice to ensure that confidentiality is expressly agreed with both the job applicant and the referees, if confidentiality is preferred. With the agreement of an unsuccessful job applicant, his or her CV may be retained in case another job vacancy should occur. Authorisation to contact and check an applicant's referees/references should be written and signed. It should be as precise as it needs to be in order to comply with the principles of the Privacy Act – that is in terms of who is collecting the information, from whom, and for what purpose. If the authorisation is completed on letterhead, it clearly identifies the party from whom a reference is sought, and is on a separate page, then it is capable of being faxed or reproduced for posting to that person. Both you as the collector of personal information, and the person from whom the reference is being sought as the discloser of personal information, require the applicant's consent to that information exchange.

Written References

If you are looking to employ an individual who has provided you with written references, either from previous employers or people who know the individual, you should confirm the integrity of the document. The primary reason for doing so is to ensure that it was actually written by the person alleged to have written it, they were writing regarding the individual applying for your position, and that the referee was in a suitable position to make such

statements, i.e. they were responsible for the management of the individual, and not a co-worker or manager of another department.

It is advisable to discuss the individual with the referee, but while you are entitled to confirm the document's integrity, to discuss the individual in question you need the authority of the individual. Questions you may wish to ask include:

- Would the author employ the individual again?
- When did the author work with, or employ the individual?
- Was there a reporting relationship between the author and the individual?
- If there were any performance issues, how did the individual respond to the management of those?
- How diligent was the individual in his or her employment?
- Does the author still endorse the view expressed in the written reference?

The secondary reason for corroborating a written reference is to confirm the validity of its contents against the employment on offer. It is very easy for reference writers to make broad statements that lack any sort of detail about an individual's performance. If you are looking to employ an individual who must demonstrate a specified level of competency or a specified range of skills, then any general statement referring to an individual's skills set or competency level should not be considered valid.

You should ask the author to qualify his or her statements with examples. If it is clear that the author himself or herself has little or no grasp of the competency level or range of skills you are seeking in the individual, or cannot provide you with clear examples from the individual's employment with the author, then the author is unable to provide you with a valid reference.

Verbal References

Most application for employment forms ask for (and most CVs offer) the contact details of people who can provide the prospective employer with a verbal reference about the individual applying for the position. When an individual provides you with these details they are authorising you to contact the people nominated as referees.

You should only seek information about the individual from those you are authorised to collect it from. If you seek a verbal reference from anyone other than the nominated referee, even if that person is employed by the same organisation, then you may be in breach of the Privacy Act. You should therefore seek permission from the applicant to make that reference. If any person from whom you seek personal information about an individual supplies you with information on the basis that it is supplied in confidence, then you should record that on any notes you take of the comments that person makes.

Providing a Reference

You may be asked to provide a verbal or written reference for a former employee, or someone you know in another capacity, to that individual's prospective employer. You should refrain from providing any reference unless you have written authorisation from the individual concerned. If the individual has named you in an application for employment form

or in a CV for the purpose of obtaining a verbal reference and you have a sighted and signed copy of that form or the CV, then you may disclose personal information about that individual.

Before making any disclosures you may want to ensure that the person seeking the verbal reference is who they say they are; by re-contacting that person through their organisation you can be confident that you are actually talking to the person you believe they are.

Employers who have not agreed otherwise in employment agreements are under no obligation to supply employees with character or professional references. However, employers who do agree should be careful about making statements that are both damaging and incorrect. Common law provides for remedies for defamation and injurious falsehood, two actions which a former employee may pursue in the District Court or High Court. Alternatively, a former employee may pursue an action for breach of employment agreement based on the implied term of trust, confidence and fair dealing, and now, in breach of good faith as defined by the Employment Relations Act. Employers who are not keen on providing a character or professional reference could provide a certificate of service (i.e. stating the date of commencement and cessation of employment and the job title).

Offers of employment

Now the person who best fits the job description and person specification has been interviewed, tested and selected and the unsuccessful people have been notified. An offer of employment is most often made by letter (posted or emailed) offering employment accompanied by a proposed employment agreement.

Individual Employment Agreements

If an employee is to be bound by an individual employment agreement (because there is no collective agreement between you and a union) the Act stipulates that you must:

- provide the employee with a copy of the intended agreement or part 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.

The sending of an agreement to a prospective employee with an offer of employment should be 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 reached an agreement on the terms and conditions of employment, which will be signalled by the signing of an employment agreement, you will not treat the offer of employment as being accepted. Employees should not commence employment without a signed employment agreement. The offer of employment should also have an expiry date, after which it is no longer an offer. The start date 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.

When negotiating the terms and conditions of an individual employment agreement the duty of good faith will apply. 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. The penalty for breaching the duty of good faith is \$10,000 for a corporate body and \$5,000 for an individual if the failure was deliberate, serious and sustained; or the failure was intended to undermine bargaining for an individual employment agreement or the employment relationship.

Employers should also be aware that there are provisions for the protection of employees in a situation where the bargaining for an individual employment agreement has been unfair. Bargaining for an individual employment agreement is unfair if:

- the employer knows or ought to know that at the time of bargaining the employee is unable to understand adequately the provisions or implications of the agreement due to:
 - 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.

A sample employment agreement and information on the minimum requirements of an individual employment agreement are available on our website.

Note: From 1 July 2011 employers are required to retain a signed copy of the individual employment, or retain a copy of the terms and conditions of employment that make up the employee's individual terms and conditions.

Collective Employment Agreements

If an employer has entered into a collective employment agreement with a union to which the employee is a member, then that employee will be covered by the collective agreement. If, a prospective employee is not a union member and the employer has an applicable collective agreement in place the employee would be under the terms of an individual employment agreement

However an employers should:

- Provide the prospective employee with a copy of the collective agreement; and
- Advise the employee:
 - That the collective agreement exists and covers work to be done by the employee; and
 - That the employee may join the union that is a party to the collective agreement;

- About how to contact the union; and
- That, if the employee joins the union, the employee will be bound by the collective agreement; and
- Give the employee a copy of the collective agreement; and
- If the employee agrees, inform the union as soon as practicable that the employee has entered into an individual employment agreement with the employer.

Probationary Periods

An initial probationary period enables an employer to monitor the employee's ability and performance. The fact that there is to be a probationary period must be specified in writing in the employment agreement. During this time shortcomings in the employee's work must be pointed out and assistance to improve provided. The employee must be told of possible consequences if the employer's expectations are not met.

A probationary period does not give an employer the right of automatic dismissal at the end of the period. The fact that there is to be a probationary period will not affect the employee's right to take a personal grievance in the event of dismissal when the period ends. So a probationary employee must be monitored, helped to improve, and warned that dismissal will follow if improvement does not occur. Employers must follow their normal performance management procedures but can specify a shorter procedure within the probationary period clause. The right to extend a probationary period should also be contained in the employee's agreement.

Trial Periods

Trial periods allow an employer and employee to agree to a period of up to 90 days whereby the employer has the right to give notice of termination within that time without the ability for an employee to raise a personal grievance for unjustified dismissal. All employers can include a trial period clause in employment agreements entered into on or after 1 April 2011. The employee must be someone who has not previously been an employee of the company. Trial periods must be agreed as a term within employment agreements. All employment agreements must be mutually agreed and there are obligations to negotiate terms and conditions in good faith. This means the use of a trial period is subject to good faith negotiations.

The trial period law provides that employment terminated by way of a trial period cannot give rise to a personal grievance claim for unjustified dismissal. The Courts have so far interpreted the trial period law very strictly and the cases have highlighted the importance of raising the issue with prospective employees and having a new employee sign the employment agreement before they start work. The Courts also interpreted the Employment Relations Act 2000 in a way which means a trial period clause needs to be very carefully drafted in order for employers to rely on it. Before including a trial period clause in a new employment agreement contact AdviceLine for our sample clause. It is also available on our website.

For more information about trial and probationary periods, please see Business Central's A-Z Guide to Trial & Probationary Periods:

Sample trial and probationary period clauses are also available in Business Central's Sample Clauses document.

Fixed Term Employment

Fixed term employment can be entered into for a limited time only with the employer and the employee agreeing that employment will end at the close of a specified date or period, when a specified event occurs, or at the conclusion of a specified project. A common reason for fixed term agreements is to cover for a period of maternity leave. Where the employer and the employee agree to fixed term employment, the employer must have genuine reasons based on reasonable grounds for specifying that employment will be for a fixed term only and must inform the employee in writing of the reasons for the fixed term and how his or her employment will end.

A fixed term agreement should not be used to establish an employee's suitability for employment. This is not a genuine reason for a fixed term employment agreement. Therefore fixed term agreements cannot be used instead of a probationary or trial period.

Independent Contractors

In some circumstances an employer may wish to hire someone as an independent contractor under a contract for services, rather than as an employee under a contract of service. The difference between an employee and a contractor is increasingly difficult to ascertain and will involve an analysis of the particular circumstances of the situation. The Employment Relations Act makes it clear that, in the event of a complaint, the Authority or the Court may find an independent contractor to be an "employee" even though work is being performed under what the parties have described as a contract for services (the independent contractor arrangement) rather than under an employment agreement.

Making as certain as possible that entry into an independent contractor arrangement has been understood and agreed to, and that a contractor relationship is appropriate in the particular situation is important as if a complaint is subsequently made to the Employment Relations Authority or the Employment Court, those institutions are required to determine the "real" nature of the relationship between the parties and not just look at any words of agreement. To this end they:

- Must consider all relevant matters, including any that indicate intention; and
- Must not treat as determining the matter any statement by the parties that describes the nature of the relationship.

Custom and practice and subsequent conduct may be of assistance in determining the true nature of the relationship, and there are also a number of tests that the courts have developed to assist in the process. Some specific tests are:

- What degree of control has the employer over the work done, and the way in which it is done? (The more control an employer has the more likely it is to be an employee/employer relationship.)
- Is the person concerned able to make a profit from his or her labour, hire and fire his or her own employees, subcontract, and invoice the company for the work done? (If yes, this indicates a contractor relationship.)
- Is the work an integral part of the business operation? Under a contract for services the work is an accessory to the business, rather than an integral part of it.
- Is the person concerned in business on his or her own account? This involves assessing all practical factors – including the liability for the payment of taxes and

ACC levies and the behaviour of the parties before and after entering into the particular arrangement – to ascertain the parties' relationship.

Relevant factors indicating a contractor relationship are that the contractor:

- Pays his or her own tax and ACC levies;
- Provides his or her own equipment;
- Can hire his or her own employees;
- Has a degree of financial risk and responsibility for investment and management; and
- Has the opportunity to profit from sound management in the performance of the task.

If in any doubt it is recommended that employers wanting to enter into an independent contractor relationship first seek advice from Business Central.

Holidays Act

Employers also have an obligation to inform employees of their minimum entitlements under the Holidays Act. This can be achieved by providing them with a copy of the “Holidays Act – Information sheet for employees” available by contacting AdviceLine.

Induction

Induction is the process of integrating a new recruit into the organisation. A good induction programme can result in lower turnover in the initial stages of employment, greater commitment to the organisation's rules and custom, and fewer misunderstandings and potential grievances.

It is important that on arrival the new employee is met, welcomed and introduced. The new employee's immediate supervisor, or another nominated person, should be responsible for the induction process.

The following topics should be addressed during the induction process:

- Internal communications;
- Chain of command;
- Safety procedures, equipment and clothing;
- Pay, benefits, social club;
- Staff Handbook;
- Computer/email policies;
- Holiday entitlements;
- Timekeeping procedures, hours of work;
- Methods of work;
- Personal problems;
- House rules;
- Smoking policy;
- Reporting absences (providing medical certificates if relevant);
- Facilities, including phones, car parking etc;
- Tour of premises;
- Other company policies e.g. sexual harassment.

Putting this information into a company handbook along with the code of conduct or house rules means that employees can refer to it when in doubt.

Conclusion

If employers decide to undertake the process of recruitment themselves rather than outsourcing this task to a recruitment agency, they need to prepare and follow a procedure to ensure that they attract and retain the right candidate for the job. Extra effort from the employer at the selection stage could save the employer time and money in the future should the wrong person be selected for the role. A probationary period does not give an employer an automatic right to terminate an employee's employment at the end of that period and a fixed term agreement cannot be for the purpose of assessing an employee's suitability for on-going employment. Therefore the best method of reducing the risk of hiring an employee with performance issues is for employers to be diligent at the recruitment phase. As well as ensuring the best candidate is selected for the role an employer should ensure they are aware of the laws governing this area such as the Privacy Act, Human Rights Act, Employment Relations Act and Criminal Records (Clean Slate) Act

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