



hiring new employees

in the employment relations act environment

a guide for employers

where to start > pitfalls to avoid > practical examples





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infoline
0800 800 863
www.ers.dol.govt.nz

The Employment Relations Service can give further advice and assistance about issues in this brochure. Contact Employment Relations Infoline: Call free **0800 800 863** or visit our website at **www.ers.dol.govt.nz**

PURPOSE OF THE HANDBOOK

Recruiting and hiring new employees can be the biggest investment that a business makes. Done well, it can increase the effectiveness of the business. Done badly, it can be the beginning of problems that harm both the employer and the employee.

Employment relationships are more likely to work well if they start off on the right foot. The Employment Relations Act highlights the importance of mutual trust and confidence as the foundation of the employment relationship. This helps employers and employees to be clear about their rights and obligations from the outset of the relationship. Other legislation, such as the Human Rights and Privacy Acts, also needs to be considered during the hiring process.

The principles in this handbook may be applied differently across the variety of workplaces in New Zealand, but they are designed to provide all employers with a useful resource on good practice. In most cases, you do not need to read the whole handbook before getting started. The index will help you find the information you need in your situation. Taking the time now to consider these

suggestions may save you costs and avoid employment relationship problems later on.

If you don't follow all the suggestions in this handbook, that does not mean you are necessarily in breach of the Employment Relations Act or other relevant legislation. There is no "one way to hire", but the suggestions in this handbook can help to avoid some common problems.

This is one of a continuing series of handbooks produced by the Employment Relations Service of the Department of Labour to assist employers in managing workplace relationships. Other handbooks, including those listed at the back of this booklet, are available through the Employment Relations Infoline 0800 800 863 or can be accessed by visiting our website (www.ers.dol.govt.nz).



**Employment
Relations Service**
Te Ratonga Hononga Taimahi

Contents

| | | |
|----|--|----|
| 1 | What is good faith in an employment relationship? | 6 |
| 2 | How can good faith and the Employment Relations Act impact on hiring new employees? | 6 |
| 3 | What should I think about before seeking an employee for a new or vacant job? | 7 |
| 4 | Avoiding discrimination and unlawful preference during hiring | 8 |
| 5 | How do I attract suitable job applicants? | 10 |
| 6 | How should I deal with the applications that I receive? | 10 |
| 7 | What are the benefits of using an application form? | 11 |
| 8 | How do I prepare for and conduct an interview? | 12 |
| 9 | Using assessment tasks appropriately | 13 |
| 10 | Should I contact referees and make independent inquiries? | 13 |
| 11 | How do I make the selection decision? | 15 |
| 12 | What do I do with the applications of, and information collected about, applicants? | 16 |
| 13 | How do I make an offer of employment if there is already a relevant collective agreement in place? | 17 |
| 14 | How do I make an offer of employment if there is no relevant collective agreement in place? | 19 |
| 15 | What terms have to be contained in an individual employment agreement? | 20 |
| 16 | Employment agreements for part-time jobs | 21 |
| 17 | Employment agreements for casual jobs | 21 |
| 18 | Additional requirements in relation to fixed-term employment agreements | 22 |
| 19 | Recording probationary periods in the employment agreement | 23 |
| 20 | Avoiding a claim of unfair bargaining | 24 |
| 21 | The early days after hiring | 25 |
| 22 | Resolving problems that arise in relation to hiring | 27 |
| 23 | Information and guidance are available from the Department of Labour | 27 |

Appendix A

Sample letter - collective agreement and union member 31

Appendix B

Sample letter - collective agreement and non-member of union 32

Appendix C

Sample letter - individual agreement with no collective agreement 34

Appendix D

Sample problem-solving procedure in an employment agreement 35

Appendix E

Flow-chart of the hiring process 37

1. What is good faith in an employment relationship?

Employment relationships are most likely to succeed when everyone in the relationship acts in “good faith”. That means dealing with each other honestly, openly and with mutual respect. This includes not misleading or deceiving each other.

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

Treating people in good faith is important at all times during an employment relationship, and is particularly critical at times such as the hiring phase. Job applicants and employers need to communicate openly and honestly with each other to avoid disappointed expectations and other problems later on.

The Employment Relations Act also looks to promote good faith behaviour in the formation of employment relationships by providing protection against unfair bargaining, a topic that will be discussed in section 20 of this booklet.

2. How can good faith and the Employment Relations Act impact on hiring new employees?

The obligations of good faith and other requirements set out in the Employment Relations Act can impact on each stage of the hiring process:

- preparation
- attracting suitable applicants
- interviewing
- selection
- documenting and making the offer
- finalising the agreement
- commencing the relationship.

Common pitfalls can be reduced by following good practice:

- The genuine requirements and skills needed for the job should be identified in advance and communicated clearly to job applicants.

- The privacy and confidentiality of applicants and the process should be maintained throughout.
- Advertising, selection and hiring decisions should be made fairly, and not on unlawfully discriminatory grounds.
- Communications with applicants should be clear. If there are any areas of uncertainty they should be addressed and clarified.
- Offers of employment should be in writing and comply with the requirements of the Employment Relations Act 2000, the Holidays Act 2003 and other minimum employment legislation.
- The bargaining surrounding a job offer should be fair, and comply with the requirements of the Employment Relations Act 2000.

These principles will be discussed in greater detail in this booklet. Further advice can also be obtained from staff at the Employment Relations Service, the free Employment Relations Infoline (0800 800 863), employers' organisations and employment advisers.

3. What should I think about before seeking an employee for a new or vacant job?

The first step is to define the needs of the job. These needs fall into different categories:

- straightforward matters like the hours you require the work to be performed and where it is to be carried out
- costing issues, such as how much you propose to pay the employee, and what other benefits may be offered
- the range of tasks to be undertaken by the employee and the supervision to be received or exercised
- prerequisites that may be appropriate, such as previous work experience, literacy levels, computer skills, drivers' licences and recognised qualifications
- specific needs of your business, such as the way you require people to relate with other employees and customers
- how the new employee will be expected to work with or complement the skills of existing employees.

A related but separate issue is the training you are able or willing to provide for the successful applicant. Although providing training

involves costs for an employer, it can also be an investment that ensures employees can meet the needs of the job and progress over time.

Where training or supervision is expected to occur, it is important to ensure these requirements are realistic. An employer's failure to provide necessary training could later be used to respond to criticisms about an employee's performance.

The job description and proposed training and development opportunities should all be capable of meeting the test of good faith. They should be as clear as possible, and reflect genuine requirements and expectations.

It will also be important to consider whether there are any procedures that must be followed in making a new appointment. Many employers in the public sector, for example, are legally required to notify a vacancy in a way that ensures that suitably qualified applicants are aware of the vacancy, and are then required to appoint the applicant best suited to the position.

Some private sector employers may have agreed to certain hiring obligations in their collective or individual employment agreements. One example would be a preferential re-employment clause applying to any employees who have recently been made redundant. Another would be an agreement with staff that vacancies will be advertised internally as well as externally.

Taking the time to decide these preliminary issues is very important. Apart from ensuring you comply with the Employment Relations Act, getting these first steps right will help you to choose the right employee and to build a successful employment relationship.

4. Avoiding discrimination and unlawful preference during hiring

Having defined the job, you should then describe the personal characteristics you value and that the job requires (sometimes called a "personal profile"). These can often be put quite simply, but must be clear and able to be well understood.

Make sure the characteristics you identify are genuinely required by the job, and that they do not reflect unlawful discrimination.

The Human Rights and Employment Relations Acts make it unlawful to discriminate in employment (including when making a hiring decision) on the grounds of:

- colour
- race
- ethnic or national origin
- sex (which includes the gender of the person, and whether they may be pregnant or not)
- marital or family status (which includes issues related to having or not having a partner, or issues involving children or other family members)
- age
- disability
- religious or ethical belief
- political opinion
- employment status
- sexual orientation
- direct or indirect involvement in the activities of a union.

In some very limited situations, exceptions apply to the prohibition on making hiring decisions based on the above grounds. These exceptions are set out in the Human Rights Act. If you think one of these exceptions might apply, you are wise to assess the situation carefully and before advertising the position seek early guidance from the Human Rights Commission, an employers' organisation or an employment adviser.

It is important to avoid "habits" that result in discrimination. For example, you might be expecting to appoint to a job a person of a similar age or sex to the person who previously filled that role, or you might make presumptions about physical requirements for the job that are based around previous equipment or technology. Applying generalisations or stereotypes in hiring decisions can also lead to complaints of unlawful discrimination.

Likewise, it is not permissible under the Employment Relations Act to provide a job applicant with any preference in hiring or in conditions of employment because they are or are not a member of a union or a particular union.

5. How do I attract suitable job applicants?

How you attract the best applicants depends on the job, how much money you are able to spend, and how much time you have.

Options include:

- your existing employees: there may be someone who is ready for a promotion or who wants a new role, and advertising the role internally is a good way to find out
- engaging a recruitment agency
- using the Department of Work and Income's free service which matches qualified unemployed people to the jobs that employers list with them
- targeted advertising in industry journals, magazines and Internet sites
- advertising in daily newspapers and other media, which will often advise on circulation or listener numbers and strategies for reaching target audiences
- direct approaches to potential applicants, so long as you take care not to encourage an employee to break any employment obligations, including the need to give the correct period of notice and to comply with restraint-of-trade clauses.

When you prepare and publish an advertisement, you retain responsibility for what is said. It is no excuse to leave it up to the newspaper, for example, to make sure that what is said is accurate and not discriminatory.

6. How should I deal with the applications that I receive?

Make arrangements to protect the security and privacy of applicants. They can be placed in a very difficult position if confidentiality is not maintained. Disclosing details of an application without consent, even by accident, is likely to breach the Privacy Act and may ruin the relationship with a potential employee.

It is good practice to write confidentially to applicants confirming receipt of their application and advising what the next step in the process will be (for example, short-listing those to be interviewed).

Communicating clearly with applicants in writing avoids the risk of later misunderstandings.

Be careful to maintain this confidentiality. It is usually inappropriate to leave a message with a manager or workmate at their current workplace. To help with this, your application form may ask how and when the applicants prefer to be contacted.

7. What are the benefits of using an application form?

It can be useful to ask applicants to request and fill out an application form. Although this can add to the time involved, it can have a number of advantages:

- It helps to ensure that all applicants cover the topics you are interested in.
- If certain pre-requisites are important, such as university or polytechnic grades, or trade qualifications, the form can expressly request the inclusion of this information. If this information is important, it is well worth requesting that they provide original certified transcripts from the institution in question.
- Other important questions can be included in the application form, such as asking what responsibilities an applicant had in previous jobs, and how they are relevant to the job you are trying to fill.
- It can be used to obtain details of the applicant's residency status, and where appropriate the nature of work permits held.
- The form can include a declaration for the employee to sign, acknowledging that he or she has provided all information relevant to the job and has not withheld any significant information. (In addition, it is sensible to draw attention to this with each applicant you interview, so that they understand the importance of the declaration to you. The presence of the declaration and the fact you have highlighted its importance can be relevant if any dispute about non-disclosure or misrepresentation arises later on.)

- The form can include a section for the applicant to sign to authorise the employer to contact referees and, where it is a requirement of the job, to conduct a security check to ascertain whether the employee has criminal convictions.
- You can explain in writing key features of the hiring process being followed, for example, that the terms of any offer of employment will be those recorded in the written job offer. (This can help to avoid problems of applicants later stating that binding verbal assurances were given during the hiring process.)

When using an application form it is important that the language skills required are at a literacy level appropriate to the position to be filled.

8. How do I prepare for and conduct an interview?

It is important to apply consistent criteria for determining who and how to interview. Make sure also that you respect the need for privacy and confidentiality. For example, you may need to schedule interviews to make sure applicants do not learn each other's identity.

You need to identify the best interview method to test against the criteria you established for the job. Approaches may include:

- a one-on-one discussion
- an interview panel
- a written project or examination
- a workshop environment
- skills and/or attribute testing
- a mix of the above.

The approach you take should be applied uniformly to all applicants to ensure consistency. Make sure that key information is not overlooked in respect of any applicant. It is wise to write out in advance the questions that each applicant will be asked. Follow the same procedure whether the interview is “formal” or more spontaneous, such as when a person rings up asking for work.

When you appoint someone to the job, your comments at the interview may be relied upon at a later time, so be clear and concise. Avoid making unintended commitments or assurances.

Think carefully before responding to any special requirements an applicant may raise, such as car parking needs or variations in

normal hours. If you reply in the negative you should explain your reasons, particularly if the rejection could be seen as discrimination against a particular disadvantaged group. If you make a positive commitment to meet the request, then reflect those arrangements accurately in the written employment agreement.

9. Using assessment tasks appropriately

Employers sometimes ask job applicants to perform tasks in order to assess whether they are suitable for a job. This can be helpful where the requirements of a job differ from the applicant's previous work experience, or to help you to make comparisons between the skills of different applicants. If assessment tasks are to be used, they should be of limited duration and be a genuine assessment of the applicant's capabilities. You should warn applicants in advance of the type of assessment that you will ask them to undertake.

10. Should I contact referees and make independent inquiries?

It is often crucial to follow up referees and make independent inquiries. Such inquiries can provide invaluable information and can also be used to test your assessment of an applicant.

The time for learning this information is before any offer is made. These checks should also be consistently applied to all applicants you are considering hiring. The following suggestions can help to avoid common pitfalls:

- Consider how many applicants' references you need to check. For example, you may decide that reference checks are needed only for short-listed applicants.
- Under the Privacy Act, it is advisable to obtain the applicant's consent, preferably in writing, to your obtaining information from referees or other sources, and the uses to which the information will be put. A straightforward way to obtain this consent is to include it in an application form that each applicant can fill out and sign.

- Give the applicant time to contact the referees before you approach them. This can save time, and ensures that the referee knows your inquiry is legitimate.
- Make sure that the scope of the information you request is genuinely relevant to the applicant's suitability for the job. Avoid seeking information that would, if relied on, breach the discrimination provisions in the Human Rights Act.
- Take note of whether the information is provided by the referee only on a confidential basis. This is relevant to whether the job applicant can later request access to it under the Privacy Act. A request for access may be refused if the referee has been given an express or implied promise that the information or their identity would be held in confidence.
- An applicant who does not want you to contact any referees in person, and wishes you to rely solely on written references, may be questioned on why this is so. Even where applicants want their interest in a job to remain entirely confidential, it would be unusual to ask you not to make contact with any referees at all.
- When assessing references, be aware of the distinction between referees who comment on character, and those with direct knowledge of performance in previous jobs. A distinguished family friend may give a glowing reference about a person's character, but without knowing anything of their skills, performance and application at work.
- Before talking to referees make a check list of questions and then keep notes of responses.

In addition to reference checking, other sources of information may be valuable:

- In some limited situations where previous criminal convictions are relevant to a job, obtain the employee's consent to checking this information with the Department for Courts.
- If financial responsibility is important, obtain the applicant's consent to carrying out a credit check.
- If relevant, you may ask the employee to identify who they have dealt with in their work (customers, others in the industry, public officials and the like), and seek the employee's permission to make contact with these individuals.

Care needs to be taken with pre-employment health screening. For instance, the collection of this information for the purposes of discriminating against applicants with a disability, where the relevant exception in the Human Rights Act does not apply, would be unlawful. Seeking information that is not relevant to the proper and safe performance of a job could also be in breach of the Privacy Act. Ask yourself what information is important and relevant. The other applicable requirements of the Privacy Act will also need to be complied with, including ensuring that the collection of the information does not intrude unreasonably on the applicant's personal affairs.

11. How do I make the selection decision?

Selecting the most suitable applicant may involve ranking each applicant against the needs of the job and the personal attributes you originally identified. But be careful that any ranking system you use is fair. Avoid considerations that amount to unlawful discrimination under the Human Rights Act.

It is not advisable to make a snap decision about offering an applicant a job during the course of an interview. Taking time to compare applicants and check with referees will lead to better decisions.

When you make a selection decision, remember that if a challenge is later taken by an unsuccessful candidate (for example, on the grounds of discrimination), documentation relevant to the appointment process and decision may have to be disclosed.

In the public sector internal applicants may also have a more general right to challenge appointment decisions. The challenge process must comply with the principles of natural justice.

You are not compelled to actually make an appointment. If the applications are not of a suitable standard, or if circumstances change during the recruitment process and you do not now need a new employee, you can before making an offer simply decide not to make an appointment.

12. What do I do with the applications of, and information collected about, applicants?

Any information received or collected must be dealt with in accordance with the Privacy Act. For instance, the information collected should be held for no longer than is required for the purposes for which it was collected (i.e. to assess the applicant's suitability for the job).

Some employers look to keep this information on file in case another job comes up. You should not do this unless the applicant gives permission. This type of information may not be disclosed to third parties or used for any other purposes without the applicant's prior permission.

When information is to be disposed of, it is preferable to obtain the applicant's agreement on what happens to it. Some people will be happy for you to destroy the information in a secure way, while others may want it returned to them. It can be useful to clarify this with the applicant either at the outset of the application process or at the interview.

Where an applicant has been offered and has accepted the job, his or her signed agreement, the job application, curriculum vitae, IRD number, bank account details and so on are all personal information that must be treated confidentially. All information that you retain should be stored securely and in a way that guards against unauthorised disclosure or loss.

Generally, employees are entitled to access information held about them. One exception would be a reference obtained on a confidential basis from a referee.

Also make sure that information is used only for the purposes for which it was originally collected. The temptation may be to rely on application information later on. Using this information for purposes other than those authorised by the employee could breach the Privacy Act.

In the Public Sector, information about an appointment may need to be held long enough to protect the rights of internal applicants to challenge the appointment.

13. How do I make an offer of employment if there is already a relevant collective agreement in place?

Whenever an offer of employment is to be made, you need to consider any collective employment agreements that apply in your workplace and, if so, whether the coverage clauses of those agreements cover the work to be done by the new employee.

If the work to be performed by the job applicant falls within the coverage clause of a collective agreement that currently applies in your workplace, then the following procedures must be followed.

Where the new employee is a member of a union party to the collective agreement

If a new employee is a member of a union that is a party to the collective agreement, then the collective agreement automatically covers him or her. The new employee can be offered additional or better terms so long as they are consistent with the collective agreement. In this situation the new employee should be provided with a copy of the collective agreement and a written copy of any additional terms you propose. A draft letter that could apply as a guide in this situation is set out in Appendix A.

Where the new employee is not a member of a union party to the collective agreement

If the new employee is not a member of a union that is party to the collective agreement, then the job offer should state that for the **first 30 days** of employment, the new employee will be employed on an individual employment agreement on the same terms as those in the collective agreement. The new employee can also be offered any additional proposed terms (so long as those additional terms are consistent with the collective agreement).

If during these 30 days the new employee joins the union that is a party to the collective agreement, then the collective agreement will continue to apply to him or her, as will any other agreed terms that are consistent with the collective agreement.

If the new employee chooses not to join the union during this 30-day period, the individual agreement will remain in place unless other terms are agreed to by you and the employee after the 30-day period ends. In this case these agreed terms may be inconsistent with the collective agreement. Neither you nor the employee has to agree to other terms, and if you don't agree then the individual agreement continues without any change.

It is also important to remember that where the employee is not a member of the union you must, at the time the employee enters into the individual employment agreement:

- inform the employee of the position regarding his or her terms of employment for the first 30 days of employment
- inform the employee:
 - that the collective agreement exists and covers work to be done by the employee (and if there is more than one collective agreement, advise the employee of the existence of each of them)
 - that the employee may join the union that is a party to the collective agreement and thereby become covered by the agreement
 - how to contact the union
- provide the employee with a copy of the collective agreement (and if there is more than one, provide a copy of the one that binds the largest number of your employees and tell the employee about the others)
- if the employee agrees, as soon as practicable tell the union that you have entered into an individual employment agreement with the employee.

It can be useful to record each of these items in writing with the employee so that there can be no misunderstanding as to what the employee has been told. A draft letter that could apply as a guide in this situation is set out in Appendix B.

Whenever an offer of employment is made, it is useful to record in the written letter of offer a reasonable time period within which the offer must be accepted. This helps to provide certainty for the employer, and avoids the risk of an offer dragging on for an inappropriate period of time.

It can also be useful to record whether or not the employee has agreed to your informing the union that he or she has entered into the agreement (see the letter in Appendix B).

14. How do I make an offer of employment if there is *no* relevant collective agreement in place?

If there is no relevant collective agreement that applies in your workplace and that covers the work to be performed by the new employee, then you may enter into an individual employment agreement. In order to do this, you must:

- provide the job applicant with a written copy of the intended agreement
- advise the employee that he or she is entitled to seek independent advice about the agreement and its terms
- give the employee a reasonable opportunity to seek that advice. (What is reasonable will depend on the circumstances. It can be helpful to agree with the employee in advance how long they anticipate they would need in order to take advice.)

A draft letter that could apply as a guide in this situation is set out in Appendix C.

If these requirements are not followed, this would be taken into account by the Employment Relations Authority if an employee later brings a claim alleging unfair bargaining. This is discussed further in section 20.

15. What terms have to be contained in an individual employment agreement?

If an individual employment agreement is to be offered, it must be in writing. This ensures that there is a clear and mutual understanding of the terms and conditions on which employment has been offered, and can help to prevent later disputes. Individual employment agreements are required to contain the following core terms:

- the names of the parties
- a description of the work to be performed
- an indication of the place and hours of work
- the wages or salary payable
- the right of the employee to receive at least time and a half if they work on a public holiday
- a plain-language clause explaining the services available for resolving employment relationship problems
- if a trial or probation period applies, the terms of that period.

In addition to these core terms, the parties are free to record whatever additional terms they agree to. The only restriction is that an employment agreement cannot contain terms that are unlawful, such as:

- a wage rate that is less than the relevant minimum wage (adult or youth, depending on the employee's age)
- annual holiday, public holiday, sick or bereavement leave entitlements that are less than those in the Holidays Act, or
- a clause that seeks to deprive an employee of rights under the Employment Relations Act.

Additional terms of employment that are typically dealt with in an agreement include:

- leave entitlements
- entitlements to lunch and tea breaks
- how the employee's salary or wage rate is calculated, and when salary/wage reviews will be carried out
- how the wage or salary will be paid (such as by cheque or direct credit) and when (in arrears or in advance for instance)

- what other benefits the employee is entitled to, such as a tool allowance, a clothing allowance, medical insurance or superannuation
- what process will be followed if changes to the employer's business occur, such as the business being sold or a potential redundancy situation arising, including whether the employee will be entitled to redundancy compensation and if so, how much
- what training will be provided
- health and safety obligations of the parties
- notice periods (for resignation, redundancy and the like)
- variation provisions
- expected standards of conduct/performance
- confidential information and restraints applying after termination.

It is important to ensure that the agreement also records all of the agreed benefits that the employee will be entitled to. If any assurances were given in the interview stage, then it is wise also to clearly record those assurances in the written agreement.

To assist employers in developing lawful and customised employment agreements the Employment Relations Service website www.ers.dol.govt.nz contains a facility to build and print out agreements.

16. Employment agreements for part-time jobs

Employment agreements for part-time jobs have to comply with the same requirements that apply to full-time employment. The obligations on employers that are discussed in the previous sections therefore apply.

17. Employment agreements for casual jobs

The requirements above in relation to collective and individual terms of employment also apply when you are offering someone casual employment. Casual employees have similar minimum employment rights as other employees. For example, casual employees are covered by minimum statutory entitlements such as the minimum wage, the holiday and leave provisions of the Holidays Act and the right to bring grievances under the Employment Relations Act.

Where the casual job is not covered by a relevant collective agreement, the job applicant will need to be provided with a written individual employment agreement that contains at least the following core terms:

- the names of the parties
- a description of the work to be performed
- an indication of the place and hours of work
- the wages or salary payable
- the right of the employee to receive time and a half if they work on a public holiday
- a clause on how to resolve employment relationship problems
- if a trial or probationary period applies, the terms of that period.

In some circumstances where the employee's employment is so irregular or intermittent that it is unreasonable to provide for three weeks annual leave the employee can be offered holiday pay on a "pay as you go basis"; for example, an employee on \$12.00 per hour would have 72c per hour added for holiday pay. This needs to be explicitly provided for in the employment agreement and the payment must be recorded as a separate 6% in wage records.

Casual employees also need to be given a reasonable opportunity to seek advice on the agreement and its terms. However, sometimes (for example, fruit-picking that starts the next day, or where the employee has been engaged on casual employment previously on the same terms and conditions) a shorter time to seek advice is reasonable.

18. Additional requirements in relation to fixed-term employment agreements

In addition to including the necessary core terms referred to in section 15 above, a fixed-term individual employment agreement can be entered into only if you have genuine operational reasons based on reasonable grounds for seeking a fixed term. Such reasons could include situations where:

- you require a replacement for another employee who is absent on long-term sick leave or maternity leave
- the work in question relates to a one-off project
- the work is seasonal.

Valid reasons for entering into a fixed-term agreement do not include wanting to exclude or limit the rights of an employee under the Employment Relations Act, or wanting to see whether an employee will be suitable as a permanent employee.

You should be clear at the outset about the operational reasons you are relying on when requiring a fixed-term agreement. The fact that the proposed agreement is for a fixed term and the reasons for this should be clearly explained to the job applicant at the time the proposed agreement is offered. It is advisable to record these matters in writing when you make the job offer.

Where the fixed-term agreement is for less than 12 months the employment agreement can provide for annual holiday pay to be made on a "pay as you go basis". This needs to be explicitly provided for in the employment agreement, and must be shown as a separate item in the employee's pay slip.

Failing to comply with requirements relating to fixed-term agreements could affect your ability to end the employment at the expiry of the fixed term.

19. Recording probationary periods in the employment agreement

If you wish to have the first part of the employment relationship as a probationary or trial period, you must record the probation or trial period in writing in the employment agreement. It is also advisable to clearly record its duration.

Realistic expectations for the probation or trial period should be clearly specified from the start so that the employee knows what standard he or she is being judged against.

- The use of a trial period does not affect the right of employees to be treated fairly and reasonably before any decision is made to dismiss them. This means that if a probationary employee is not performing to your expectations, you should discuss your concerns with the employee, and provide reasonable guidance and assistance.

- If you have promised specific training or support, this should be provided, especially where this is intended to help the employee to improve.
- An employee who is on a probationary period is still entitled to his or her other terms and conditions, including the agreed salary and leave entitlements.

The Employment Relations Service has produced a publication *Probation/trial periods* which is available by phoning 0800 800 863 or can be downloaded from www.ers.dol.govt.nz.

20. Avoiding a claim of unfair bargaining

The Act seeks to ensure that new employees have the opportunity to take advice about proposed terms of employment. This is part of the protection against unfair bargaining.

Under the Employment Relations Act 2000, an employee can take a claim against you if the bargaining that occurred over the terms of their individual employment agreement was unfair. “Unfair bargaining” is defined as including situations where the employee:

- was unable to understand what the agreement says or means because of a diminished capacity caused by, for example, age, sickness, mental or educational disability, a disability relating to communication, or emotional distress
- reasonably relied on your skill, care or advice, or that of another representative of the employer
- was induced to enter into the agreement by oppressive means, duress or undue influence
- was not given a reasonable opportunity to seek independent advice about the agreement before entering into it.

If an employee and you are unable to resolve a problem about unfair bargaining through direct discussion, either yourself or the employee has the option of seeking assistance from the Mediation Service. If the matter is not settled satisfactorily at mediation there is the option of bringing a claim before the Employment Relations Authority. When a claim is received by the Authority, it will consider whether to direct you and the employee to mediation or further mediation.

If mediation does not solve the problem, the Authority can decide how the problem is to be resolved.

If the Authority agrees that the bargaining was unfair then it can award compensation, and if it considers that any remedy other than cancellation is inappropriate or inadequate it may cancel or vary the agreement.

21. The early days after hiring

Once the new employee starts in the job, the obligations discussed during the hiring stage do not end.

If the employment agreement contains a probation or trial period, make sure that the employee gets sufficient support and guidance during that period.

If assurances were made about training and supervision, these should be adhered to. You may also want to consider recording in writing when training is provided, or setting down a training programme to ensure that promised training does occur.

The time to best raise and discuss problems that may arise about the new employment relationship is as soon as they surface. In this way the parties will have the best chance of getting their employment relationship off on the right foot.

It is also important to start wage and time records and holiday and leave records for the new employee, so as to keep a track of what has been paid, and what necessary deductions (such as for PAYE) have occurred. The system you establish should record:

- the name of the employee
- the date employment commenced
- the employee's age, if under 20 years of age
- the employee's postal address
- the kind of work on which the employee is usually employed
- whether the employee is employed under a collective or individual employment agreement
- if employed under a collective employment agreement, the title and expiry date of the agreement and the employee's classification under it

- where necessary to calculate the employee's pay, the hours between which the employee is employed each pay period
- the wages paid to the employee each pay period and the method of calculation
- details of any employment relations leave taken by the employee
- the days on which an employee works, if the information is relevant to entitlement or payment under the Holidays Act
- the date the employee last became entitled to annual holidays
- 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 date of and payment for any public holiday worked
- the number of hours worked on any public holiday
- 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 cash value of any alternative holidays that the employee has surrendered for payment
- the date of termination
- the amount of pay for holidays on termination.

You can obtain examples of wages and time records and holidays and leave records that meet these requirements either by phoning 0800 800 863 or by downloading them from www.ers.dol.govt.nz.

22. Resolving problems that arise in relation to hiring

Although you are required to bargain fairly over the terms of employment offered to a job applicant, the terms you offer (such as salary and benefits) are for you to determine. This is provided that the minimum legislative requirements (such as the minimum wage and annual leave entitlements) and coverage of any collective employment agreement (as discussed in section 13) are met. A job applicant is always free to negotiate over your offer or to refuse the position you have offered.

If an offer is accepted and a dispute or problem arises over the interpretation of the agreement or how it operates, you should first try to resolve the problem promptly through open and honest discussion with the employee.

If discussion does not resolve a problem, or if you or the employee wish to seek guidance on ways the problem might be resolved, then support, information and assistance can be obtained at short notice.

It is important to remember, though, that even when outside help is sought, an employment relationship problem still belongs to the parties themselves. If productive relationships are to be maintained, parties themselves must be prepared to spend the time and energy needed to identify the cause of the problem and to try to resolve it.

23. Information and guidance are available from the Department of Labour's Employment Relations Service

If you require further information and guidance about any matter covered in this publication or about any other employment relations matter:

- call Employment Relations Infoline free on 0800 800 863, or
- visit our website at www.ers.dol.govt.nz.

You can also get easy-to-read publications, pamphlets and fact sheets on specific employment issues to assist you in better creating and managing workplace relationships, which include:

- *Employment relationship problems*
- *Using mediation services effectively*
- *Managing change smoothly under the Holidays Act 2003*

- *Going to the Employment Relations Authority*
- *Employers' guide to employment rights.*

All are available on request from Employment Relations Infoline. You can also download them or order them online from our website.

Labour Inspectors

Labour Inspectors enforce certain employment relations laws relating to minimum conditions of employment, such as minimum wages and holidays and the keeping of wages and holiday records. They carry out investigations to ensure these records and systems, agreements and policies meet at least the minimum required by law. They investigate in an impartial manner at all times and work with employers to ensure that problems are resolved in a manner that stops them re-occurring.

If it appears that you may have breached any of these laws, employees can ask a Labour Inspector to investigate the matter on their behalf.

Inspectors are based at seven centres around New Zealand.

Go to Mediation

Our Mediators can, if invited, assist you in dealing with and fixing workplace problems that arise. They operate informally, can provide you with information, visit your workplace, and meet both parties separately or together or by a series of meetings. They can also assist you in more formal situations such as collective bargaining or dispute resolution.

Mediators are based at seven centres around New Zealand.

Apply to the Employment Relations Authority

If you have tried mediation, or believe the problem cannot be solved by mediation, the Employment Relations Authority is available to formally investigate issues, determine whether mediation could assist, and, if not, decide the issue itself.

The Authority is based at three centres around New Zealand.

Should all these avenues fail, the Employment Court is available to all parties.

Employment Relations Infoline can provide you with email, fax, mailing and street addresses of your nearest Labour Inspectors, Mediators and Employment Relations Authority, or you can find their contact details on our website.

Other legal obligations

This booklet focuses on matters mostly under the Employment Relations Act, the Holidays Act and the Minimum Wage Act. You should also be aware that other legislation impacts on employment relationships.

Employment Relations Infoline on 0800 800 863 will put you in touch with the appropriate source of advice on these matters.

You can get assistance from other Services of the Department of Labour

1. Health and safety in the workplace is another area where employers and employees need to be able to work effectively together. Often unsatisfactory management of safety issues can eventually result in employment relations problems, as well as unsafe working environments. The **Occupational Safety and Health Service (OSH)** is available on www.osh.govt.nz or call Workinfo free on 0800 20 90 20.
2. The **New Zealand Immigration Service (NZIS)** is available on www.immigration.govt.nz or by calling 0508 55 88 55 (outside Auckland) or 914 4100 (from the Auckland area). You can:
 - find out about immigration in New Zealand
 - get information for new migrants to settle in New Zealand
 - get information on how to apply for a permit to work or study in New Zealand
 - get information on how to apply for a visa to work or study in New Zealand.
3. **Community Employment Group (CEG)** is available on www.ceg.govt.nz or by calling 04 915 4270. CEG works alongside communities and the organisations within them building their capacity to plan and create positive change, leading to sustainable local economic and employment opportunities.
4. The **Labour Market Policy Group (LMPG)** is available on 04 915 4742. LMPG advises government on a range of labour market matters and provides information to assist employers and employees in the workplace. You can:
 - get information on skills, research, trends and demographics at www.dol.govt.nz

- get information on the changing nature and future of work, work/life balance, skills needs and research at www.futureofwork.govt.nz
- get information to help you at work from WorkSite: your gateway to skills and work (www.worksite.govt.nz). WorkSite covers training, careers and work planning, finding work and finding staff, research and publications as well as employment relations and health and safety.

Appendix A: Sample letter – collective agreement and union member

Draft letter offering employment where there is a relevant collective agreement and the successful applicant is a member of a union that is a party to the collective agreement. To download this letter visit www.ers.dol.govt.nz.

[Date]

[name of successful applicant]

[address]

Dear **[name]**

Offer of Employment

I am pleased to offer you the position of **[title]** at **[location]** starting on **[date]**. If you wish to accept this position, please sign the duplicate copy of this letter and return it to me by **[date]**.

The work you will do is covered by an existing collective employment agreement between **[the employer]**, and the **[name of union]**. A copy of that collective agreement is attached. I understand from you that you are a member of this union. Please feel free to discuss this agreement with your union if you wish. If you accept this offer of employment, you will be bound by that collective agreement. If there is anything you are unclear about, disagree with or wish to discuss, please contact me.

I look forward to working with you.

Yours sincerely,

[Name of Employer]

[Address of Employer]

I, **[name of successful applicant]**, confirm that I have read the terms of employment set out in this letter and in the attached collective employment agreement and accept the offer of employment. I confirm that by signing this letter I agree to be bound by the terms of the collective agreement.

.....

[Signature of successful applicant]

Date:

Appendix B: Sample letter – collective agreement and non-member of union

Draft letter offering employment where there is a relevant collective agreement and the successful applicant is not a member of a union that is a party to the collective agreement. To download this letter visit www.ers.dol.govt.nz.

[Date]

[name of successful applicant]

[address]

Dear **[name]**

Offer of Employment

I am pleased to offer you the position of **[title]** at **[location]**, starting **[date]**. If you wish to accept this position, please sign the duplicate copy of this letter, and return it to me by **[date]**.

The work you will do is covered by a collective employment agreement between **[name of the employer]**, and the **[name of union]**. A copy of that collective agreement is attached.

I understand from you that you are not currently a member of the **[name of union]**. You have a right to join that union if you wish. Joining or not joining this or any other union is your choice. If you do choose to join the **[name of union]**, then you will become covered by the attached collective agreement.

If you wish to join the **[name of union]**, you should contact **[name of contact person within the union]** who is the local union organiser and can be contacted on **[phone number]**.

If you choose not to join the union, the following situation applies:

- For the first 30 days of your employment, your minimum individual terms of employment are those in the collective agreement
- After the 30-day period, if you have not joined the union your individual employment agreement can be varied by mutual agreement. If no variations are made, your terms of employment will continue unaltered.

If you agree to accept this offer of employment, the law requires me to ask if you consent to me letting the **[name of union]** know that we have entered into this agreement. If you give such consent, I am required to inform the **[name of the union]** as soon as is practicable.

[continued next page](#)

If you wish to accept this offer, then when you sign and return the duplicate copy of this letter to me could you please advise me whether you consent to the **[name of the union]** being informed (see below). If there is anything you are unclear about, disagree with or wish to discuss, please contact me.

I look forward to working with you.

Yours sincerely,

[Employer name]

[Employer address]

I, **[name of successful applicant]**, confirm that I have read the terms of employment set out in this letter and in the attached collective employment agreement, and accept the offer of employment. I also confirm that I have been informed of how to contact the **[name of union]**.

I consent/do not consent to the **[name of union]** being informed that I have entered into this agreement.

.....

[Signature of successful applicant]

Appendix C: Sample letter – individual agreement with no collective agreement

Draft letter offering employment where there is no relevant collective agreement and the employee is offered an individual employment agreement. To download this letter or develop a customised employment agreement visit www.ers.dol.govt.nz.

[Date]

[name of successful applicant]

[address]

Dear **[name]**

Offer of Employment

I am pleased to offer you the position of **[title]** at **[location]** starting on **[date]**. I propose that the terms of employment will be those in the attached draft individual employment agreement.

Please note that you are entitled to discuss this offer and to seek advice on the attached proposed agreement with your family, a union, a lawyer, or someone else you trust. If you want some information on your employment rights, you can also contact the Employment Relations Service's Free Information and Advice Service, the Employment Relations Infoline, on phone 0800 800 863, or website **www.ers.dol.govt.nz**.

Also, if you disagree with or do not understand or wish to clarify anything in this offer, please ring me to discuss any issue you wish to raise.

If you are happy with the proposed terms and wish to accept this offer of employment, please sign the duplicate copy of this letter and return it to me by **[date]**. In the event I have not heard from you by that date, this offer will be automatically withdrawn on that date. I look forward to working with you.

Yours sincerely,

[Name of employer]

[Address of employer]

I, **[name of successful applicant]**, confirm that I have read the terms of employment set out in this letter and in the attached individual employment agreement, that I fully understand them and their implications and that I now accept the offer of employment.

.....

[Signature of successful applicant]

Date:

Appendix D: Sample problem-solving procedure in an employment agreement

The written employment agreement between an employer and an employee must include a problem-solving procedure which, if the parties agree, may be similar to this one.

Procedure for Resolving Employment Relationship Problems

If the employment relationship is to be as successful as possible, it is important that the Employer and Employee deal effectively with any problems that may arise.

This procedure sets out information on how problems can be raised and worked through.

What is an employment relationship problem?

It can be anything that harms or may harm the employment relationship, other than problems relating to setting the terms and conditions of employment.

Clarify the problem

If either the Employer or Employee feels that there may be a problem in the employment relationship, the first step is to check the facts and make sure there really is a problem, and not simply a misunderstanding.

Either party might want to discuss a situation with someone else to clarify whether a problem exists, but in doing so they should take care to respect the privacy of other employees and managers, and to protect confidential information belonging to the Employer. For example, the Employee could seek information from:

- friends and family
- the Employment Relations Infoline on 0800 800 863 or on its website at www.ers.dol.govt.nz
- pamphlets/fact sheets from the Employment Relations Service
- their union (if they are a union member), a lawyer, a community law centre or an employment relations consultant.

Discuss the problem

If either party considers that there is a problem, it should be raised as soon as possible. This can be done in writing or verbally. Provided the Employee feels comfortable doing so, they should ordinarily raise the problem with their direct manager. Otherwise the problem can be raised with another appropriate manager. A meeting will usually then be arranged where the problem can be discussed. The Employee should feel free to bring a support person with them to the meeting if they wish.

The parties will then try to establish the facts of the problem and discuss possible solutions.

continued next page

The next steps

If the parties are not able to resolve the problem by talking to each other, a number of options exist:

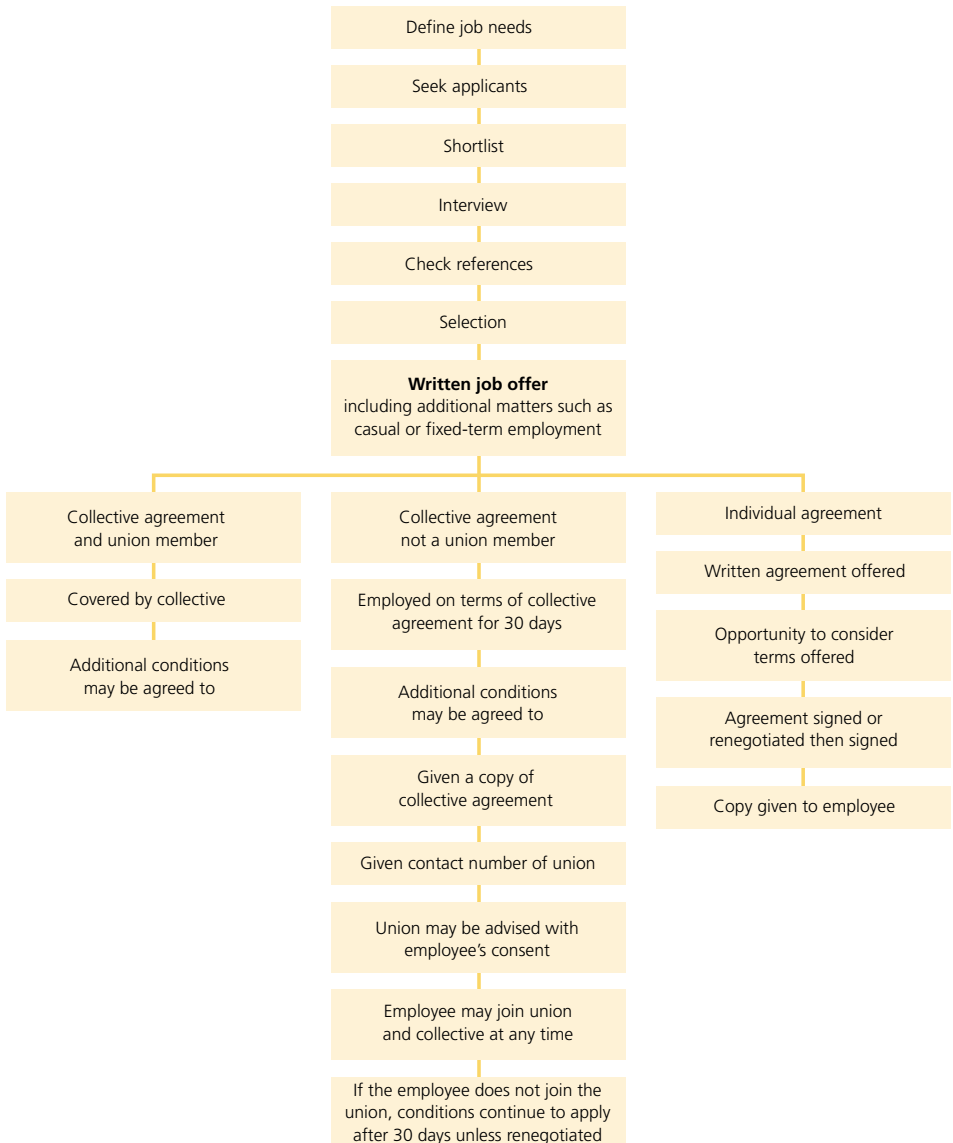
- Either party can contact the Employment Relations Infoline, which can provide information and/or refer the parties to mediation.
- Depending on the nature of the problem, the issues involved may also be ones that the Labour Inspectors employed by the Department of Labour can assist with, e.g. minimum statutory entitlements such as holiday, leave or wages provision.
- Either party can take part in mediation provided by the Employment Relations Service (or the parties can agree to get an independent mediator).
- If the parties reach agreement, a mediator provided by the Employment Relations Service can sign the agreed settlement, which will then be binding on the parties.
- The parties can both agree to have the mediator provided by the ERS decide the problem, in which case that decision will be binding.
- If mediation does not resolve the problem, either party can refer the problem to the Employment Relations Authority for investigation.
- The Authority can direct the parties to mediation, or can investigate the problem and issue a determination.
- If one or other of the parties is not happy with the Authority's determination, they can refer the problem to the Employment Court.

In limited cases, there is a right to appeal a decision of the Employment Court to the Court of Appeal.

Personal grievances

If the problem is a personal grievance, then the Employee must raise it within 90 days of when the facts that give rise to the grievance occur or come to their attention. A personal grievance can only be raised outside this time frame with the agreement of the Employer or in exceptional circumstances.

Appendix E: Flow-chart of the hiring process





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This pamphlet is a guide only and may not be accurate for all situations. It should not be used as a substitute for legislation or for legal or other expert advice.

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