

**employer’s**

**Manual**

**as at January 2020**

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# INTRODUCTION

## Purpose of Manual

The Employer’s Manual has been created specifically for the use of accounting practices, particularly small to medium sized accounting practices. The Manual is a practical, ready-to-use employment manual for the accounting practice and should be read in conjunction with APES 320 (Quality Control of the Firm) of the CPA Australia Members’ Handbook. As an employer, it is essential to ensure that the appropriate policies and procedures as required by law are created, communicated to, accessible by and complied with by all employees, consultants and partners of the Practice.

This Manual is not intended to replace the CPA Australia Members’ Handbook. The Handbook remains an essential instrument for all accounting practices and should be read in conjunction with this Manual.

**It is important that the Employer’s Manual is accessible only by senior management who will be responsible for all aspects of policy development, quality assurance and human resources management. Unlike the Staff Manual, the Employer’s Manual should generally not be accessible to other staff. There may be certain exceptions where staff are legally entitled to see part or all of the Manual. If a staff member or worker who you consider not to be senior management requests access to the Employer’s Manual, we recommend that you seek legal advice prior to disclosing it to the individual concerned.**

Throughout the Employer’s Manual, standard terms have been consistently used, which will be applicable to most accounting practices. However, where such terms are not applicable to your particular Practice, it may be necessary to make appropriate amendments, for example, if the Practice has a human resources manager who is responsible for staffing issues and not a Staff Partner, it would be appropriate to replace the reference throughout the document from ‘Staff Partner’ to ‘Human Resources Manager’.

**EMPLOYMENT**

**AGREEMENTS**

# GENERAL GUIDE TO LETTERS OF APPOINTMENT

## Letters of appointment for use by your Practice

**Attached** to thisEmployer’s Manual contains the letter of appointment for professional employees, to be used as a template for an individual employment agreement.

**Attached** to thisEmployer’s Manual contains the letter of appointment for administrative employees, to be used as a template for an individual employment agreement.

## Letters of appointment - general information

An employer is legally required to have a written employment agreement with each of its employees. The letters of appointment which form part of this Manual are available for use by your Practice as templates set out the expectations, rights and obligations of both the employer and employee, and are drafted to comply with the minimum terms of relevant legislation.

There is a requirement for all employers to maintain an up-to-date employment file on each employee.  This file must contain a copy of the employee’s signed letter of appointment (and evidence of right to work in New Zealand, if applicable).

The letter of appointment sets out the terms and conditions of each employee’s employment with the Practice (in other words, this is their employment agreement with the Practice). There are two versions – a more detailed letter of appointment for professional staff and a simpler version for administrative staff that work in your Practice.

It is important that the letter of appointment is signed before the employee undertakes any work whatsoever. If it is not, and the letter of appointment contains a trial period, then the trial period provision will be unenforceable.

For all employees, the letter of appointment should be signed in duplicate. A signed copy must be retained by the employer and the other signed copy should be retained by the employee. The employer must retain a copy of the letter of appointment even if the employee has not yet signed it or agreed to any of its terms and conditions. The employer’s copy should be retained on the employee’s personnel file.

If requested by the employee, the employer must, as soon as is reasonably practicable, provide the employee with a copy of the employee's letter of appointment and any other applicable terms and conditions of employment.

It is not possible for an employer to unilaterally vary an employee’s existing terms and conditions of employment without the employee’s agreement. If the employee’s terms and conditions vary slightly, e.g. in the event of an increase in pay, there is no need to have those parties sign an entirely fresh agreement. The new pay level can simply be confirmed in writing to the employee. However, if the change is more significant and goes to the nature of the employee’s duties, the employee’s agreement to this change should be evidenced by signing a fresh agreement.

The letters of appointment:

### are suitable for both full-time and part-time employees

### are not intended for use with any casual or fixed term employees that your Practice may engage – specific legal requirements apply in these circumstances and you should obtain separate legal advice

### include highlighted sections which should be completed so that the letter of appointment is tailored to your Practice and individual employees.

It is also important to be aware that employment relationships in New Zealand are governed by a statutory duty, which applies both to employer and employee, to deal with each other **in good faith**. This duty requires parties to an employment relationship to be **active** and **constructive** in establishing and maintaining a **productive** employment relationship in which the parties are, amongst other things, **responsive** and **communicative**.It also means that a party to an employment relationship must not do anything to (or which is likely to) mislead or deceive the other. Although good faith duties apply to the entire employment relationship, you will see them referred to on a number of occasions in this document where they are particularly relevant. In the event of a breach of the duty of good faith, the Employment Relations Authority can award a penalty of up to $10,000 per breach against an individual and up to $20,000 per breach against a company or firm.

## Using letters of appointment for existing employees

The letters of appointment provided with this Manual may include additional matters which have not previously formed part of your existing employees’ terms and conditions. If any of your existing employees are not prepared to sign a new letter of appointment, then you cannot force them to do so, hence their employment would continue to be governed by their existing terms and conditions of employment. One way to avoid this situation is to introduce the letters of appointment at the same time as another change to the employee’s terms and conditions, which they will agree to, such as a pay increase.

If your existing employees are willing to sign a new letter of appointment containing a non-competition restraint when no such restraint was included under their previous terms of employment, it is necessary to record what additional consideration has been given to the employee in consideration of them agreeing to give that new restraint (e.g. pay increase, additional leave benefits under new agreement, etc.). If you do not, the restraint may be considered unenforceable.

## Position description

The position description to be completed and attached to the letter of appointment does not have to be in the format provided. You may already have a format that you use for this purpose. The ideal position description should concisely define the employee’s duties and responsibilities and reporting requirements. A well drafted position description will often be of assistance during performance reviews or disciplinary proceedings as a guide to what is expected of the employee.

# Guide to letter of appointment for Professional employees

This letter of appointment has been designed for salaried employees, such as accountants working in your Practice. It is more detailed than the letter of appointment designed for administrative employees.

## Remuneration and benefits

You may wish to include details of any profit sharing or incentive arrangements or any additional benefits enjoyed by the employee in Schedule 1. If any of these benefits is to be discretionary, you should ensure that this is clearly stated to be the case in the letter of appointment.

If there are any particular conditions for use associated with the further benefits, these should also be included in Schedule 1. For example, if a mobile phone is to be provided to an employee, but your Practice will only cover the cost of mobile phone calls to a maximum of $100 per month, this condition should be stated in Schedule 1.

## KiwiSaver and/or superannuation contributions

KiwiSaver is a voluntary, work-based savings initiative to help eligible employees with long-term saving for retirement. When a new employee joins your Practice, if they are not already a member of a KiwiSaver scheme and are eligible to join, their employer is required to automatically enrol them in KiwiSaver, unless specific exceptions apply. The employee then has a certain period within which they can request to opt-out of KiwiSaver.

In connection with this, employers are required to provide new employees with certain information about KiwiSaver which can be accessed by the following link:

<http://www.ird.govt.nz/forms-guides/number/forms-001-99/ks03-guide-ks-employee-info-pack.html>

Employers should use the following form to enroll eligible employees in KiwiSaver:

<http://www.ird.govt.nz/forms-guides/title/forms-k/ks01-form-ks-employee-details.html?id=righttabs>

Further guidance for employers about KiwiSaver can be access by the following link:

<http://www.ird.govt.nz/forms-guides/title/forms-k/ks04-guide-ks-employer-guide.html?id=righttabs>

If an employee is enrolled as a member of and contributing to a KiwiSaver scheme (at the default rate of 3% of the employee’s gross salary or wages or higher), then the employer is required to make a compulsory employer contribution to the employee’s scheme at the rate of 3% of the employee’s gross salary or wages (which is payable on top of the employee’s gross salary or wages unless the parties have expressly agreed otherwise).

The default letter of appointment sets out the minimum information relating to KiwiSaver.

If you require further information on your options in relation to KiwiSaver, or if you wish to operate a separate superannuation scheme in relation to the Practice’s employees, we recommend that you seek specialist legal advice prior to finalising an employment agreement with a prospective employee.

## Leave entitlements

The letter of appointment for professional employees reflects the minimum leave entitlements as per relevant legislation (as at the review date of this document). If professional employees working in your Practice receive more favourable leave entitlements than the legislated minimums, then the more favourable entitlements should be inserted in the letter of appointment used by your Practice. For example, the minimum entitlement to sick leave is five days leave per annum (after completion of six months’ service), but if you allow employees ten days sick leave per annum, and/or if you allow sick leave to accrue from the start of employment, these enhanced entitlements should be included.

## Confidential information

You should carefully read the definition of ‘[confidential information](#Confidential_Information_means)’ in the letter of appointment for professional employees to ensure that it covers all information that is confidential to your Practice, including any information specific to your clients and the services that you provide.

## Working environment

There is a provision in the letter of appointment for professional employees which imposes an obligation on the employee to uphold the Practice’s health and safety, discrimination, harassment and other policies. Compliance with the Practice’s policies and procedures is a mutual obligation, notwithstanding the Practice’s prerogative to amend its policies from time to time.

## Termination

The clause dealing with termination (outside of any trial period or probationary period, if applicable) provides that either party may terminate an employee’s employment by giving to the other 4 weeks’ notice in writing. Alternatively a payment of salary in lieu can be made in accordance with the clause.

If you think that a longer notice period is necessary in light of the employee’s length of service, seniority or prospect of obtaining other work, this period should be agreed upon and inserted into the employee’s letter of appointment at the relevant clause.

## [Restraint of trade](#RESTRAINT_OF_TRADE) and non-solicitation

The letter of appointment for professional employees contains restraint of trade and non-solicitation obligations.

There is a presumption at common law that all restraints of trade are contrary to public policy, on the basis that it is unreasonable to restrain an employee from working elsewhere to earn a living, and therefore restraints of trade are unenforceable. An employer seeking to enforce the restraint must rebut that presumption to be successful and the employer will need to show that each restraint is necessary to protect its legitimate goodwill and proprietary interests (see below) and that each restraint is reasonable in the circumstances. The restraint must be framed so as to afford no more than adequate protection to the party seeking to rely on it.

The onus of proof as to reasonableness is on the party wishing to rely on the restraint. Relevant factors include:

### the scope of the restraint in terms of subject matter and geographical area

### the impact of the restraint on the employee’s ability to earn a living

### the duration of the period in which the restraint operates

### whether the restraint protects a legitimate interest, such as

#### intellectual property or confidential information

#### the employer’s goodwill.

Where a restraint is held to be unreasonable it will be declared unenforceable. This is the case even if the legitimate interest protected could have been the subject of a valid restraint, but for the unreasonableness of the actual terms of the restraint.

The *Contract and Commercial Law Act 2017*, Part 2, Subpart 5 can operate to save post-employment restrictions that would otherwise be unenforceable on the grounds described above. Under this Act, the Employment Relations Authority (or Employment Court, as applicable) may modify the terms of a restraint to make it reasonable, for example, by reducing the time period or geographical area over which the restraint purports to apply or the nature of the conduct restrained. However, this power to modify is at the Authority’s discretion. Therefore, employers should not rely on the Authority’s intervention to modify otherwise unenforceable restrictions and must attempt to prepare a reasonable restraint at first instance. This is because the Authority may, on application of an employee, wholly invalidate a restraint if the restraint was obviously unreasonable when prepared.

The first restraint of trade in the letter of appointment for professional employees is designed to prevent employees, during their employment and for a specified period post-termination, from being associated with or engaged or interested in a business in the Restraint Area (as defined later in the clause) which competes with the Practice’s business (a non-compete restriction).

The other restraint of trade provision in the letter of appointment for professional employees is designed to prevent employees, during their employment and for a specified period post-termination, from:

(a) soliciting key employees, or other (non-key) employees or contractors employed or engaged by the Practice with whom the employee dealt in the 12 months preceding termination of their employment. When preparing a letter of appointment for an employee, you should clearly define in the highlighted section of this clause who the key employees are for the purposes of the restraint. For example: accountants, financial planners, supervisors, the Practice manager and/or other technical or managerial staff. It may be unreasonable to seek to restrain an employee from soliciting all employees working in your Practice, if this could cover employees with whom the departed employee has not worked closely or employees who, if they left, would not cause significant loss to the business (e.g. a junior receptionist). Therefore, wherever possible, you should try to define the key roles who the departed employee will be contractually restrained from encouraging to leave the Practice

(b) soliciting clients, customers or suppliers that employees have dealt with in the 12 months preceding termination of their employment. In most cases it would be unreasonable to seek to restrain a departed employee from soliciting **any** client of the Practice, as this would even include clients with whom the departed employee would not have an established connection. For this reason, the client related restraint only applies to those clients with whom the departed employee has had contact in the preceding 12 months

(c) becoming an employee of a client of the Practice in order to perform work which the Practice might reasonably expect to otherwise perform. This scenario arises less often but is still an important restraint to include for many practices (a non-solicitation restriction).

When preparing a letter of appointment for an employee, for the non-compete restriction, you will need to carefully tailor the restraint area to accurately reflect the Practice’s market and the area in which the employee seeking to be restrained has provided professional services. For example, for a Practice based solely in Invercargill, it would be unreasonable to restrain an employee who has only ever worked in Invercargill for Invercargill-based clients of the Practice to be restrained from carrying on the same type of work in any area outside of Invercargill.

Care should be taken to make sure that the shortest period and the smallest areas of the restraint are reasonable and no more than what is necessary to protect the Practice’s legitimate business interests including its goodwill and confidential information. As noted in the notes to the letter of appointment for professional staff, subject to the comments above about appropriate tailoring of restraints, a restraint period of three months is commonly applied to senior employees. Six months may be justified for executive or senior employees whose departure could pose a significant or high risk to the Practice’s confidential information. It would be rare for a 12 month non-compete restraint to be upheld.

It is generally considered to be more reasonable to seek to enforce a non-solicitation restriction for a longer period (say 6-12 months) than a non-compete restriction, since the latter is intended to prevent an employee from competing with the Practice altogether after their employment has ended. This is reflected in the sample restraints of trade in the letter of appointment for professional employees. Where there is any doubt as to what would be reasonable in the circumstances of the particular Practice or situation, it is recommended that legal advice be obtained.

# guide to letter of appointment for Administrative employees

## Use of the [letter of appointment](#Letter_of_Appointment) for administrative employees

This letter of appointment has been designed for administrative employees*.* It is much simpler in its terms than the letter of appointment for professional employees, and does not impose restraints of trade, non-solicitation clauses and extensive confidentiality obligations on administrative employees, as they are not usually involved directly with clients of the Practice. It is expected, however, that in the course of the performance of their duties, they will have access to confidential information of clients, which makes it necessary to impose an obligation of confidentiality upon them.

Other essential features of this letter of appointment include:

### the obligation to work exclusively for the Practice and to avoid conflicts of interest

### the protection of the intellectual property rights that may be created by the employee in the course of their employment

### the obligation to comply with the Practice’s policies.

## Leave entitlements

The leave entitlements reflect the minimum applicable leave entitlements. If the Practice already offers more generous leave entitlements, these should be reflected in the letter of appointment.

**EMPLOYMENT**

**TERMS AND**

**CONDITIONS**

# GUIDE TO TERMS AND CONDITIONS

## Introduction to terms and conditions

The following table is a national snapshot of the relevant legislation that forms the ‘minimum code’ of terms and conditions of employment for employees in New Zealand.

|  |  |
| --- | --- |
| **Name of Act** | **Contains minimum standards regarding** |
| *Employment Relations Act 2000* | Good faith, employment agreements, break entitlements, fixed-term employment, trial periods, flexible working arrangements, family violence entitlements, unions, collective bargaining and industrial action, process to be followed if dismissing or taking other action adverse to an employee |
| *Holidays Act 2003* | Annual holidays, public holidays, sick leave, bereavement leave, the requirement to keep holiday and leave records |
| *Minimum Wage Act 1983* | Minimum wage rate, the requirement to keep wage and time records |
| *Wages Protection Act 1983* | Deductions from wages, method of paying wages |
| *Kiwisaver Act 2006* | Compulsory employer contributions to KiwiSaver |
| *Parental Leave and Employment Protection Act 1987* | Paid parental leave, unpaid parental leave |
| *Health and Safety at Work Act 2015* | Duties to protect safety of employees and other individuals |
| *Equal Pay Act 1972* | Equal pay |
| *Human Rights Act 1993* | Discrimination, sexual harassment, racial harassment |
| *Privacy Act 1993* | Steps to notify individuals of the fact information is being collected about them and the purpose for which information is being collected |
| *Smoke-free Environments Act 1990* | Prohibitions on smoking in the workplace except in specified areas meeting specified requirements |

## Hours of work

Under the *Employment Relations Act 2000*, any hours of work agreed by an employer and employee must be specified in the employment agreement (at not more than 40 hours per week, not including overtime), together with details of any flexibility in the hours and the times at which the work is to be performed.

Where no hours are agreed to, the Practice must provide an indication of the arrangements relating to the employee’s working times.

If the employer wishes to include an ‘availability provision’ in the employment agreement, the Practice will be required to specify agreed hours of work in the employment agreement, and as part of those agreed hours, specify the guaranteed hours of work. An ‘availability provision’ is a provision in an employment agreement under which:

* the employee’s performance of the work is conditional upon the employer making work available to the employee
* the employee is required to be available to accept work that the employer makes available.

An availability provision may only be included in an employment agreement if the Practice has genuine reasons based on reasonable grounds for including the availability provision and the number of hours of work specified in that provision and must provide for the payment of reasonable compensation.

Where the employee is paid a salary, the law in effect requires that the Practice and the employee must agree that the employee’s remuneration includes compensation for the employee making himself or herself available to work in excess of those agreed hours.

An employee may refuse to perform work that is in addition to any hours specified in the employee’s employment agreement if the agreement does not contain an availability provision that provides for the payment of reasonable compensation to the employee for making themselves available to perform that work. Under the *Employment Relations Act*, the Practice must not treat an employee adversely who exercises their right to refuse work.

If an employee is required to undertake shift work (defined as a period of work performed in a system of work in which periods of work are continuous or effectively continuous, and may occur at different times on different days of the week), the Practice must specify in the employment agreement the notice period required if the Practice proposes to cancel a shift and the compensation payable to the employee if the Practice does not comply with that notice requirement.

Both the notice period and the compensation must be ‘reasonable’. The nature of the employers business, including the employer’s ability to control or forsee the circumstances that have given rise to the proposed cancellation, the nature of the employee’s work, including the likely effect of the cancellation on the employee, and the nature of the employee’s employment arrangements, including whether there are agreed hours of work in the employee’s employment agreement are relevant considerations when determining what is reasonable notice. When determining what constitutes reasonable compensation, an employer must consider all relevant matters including the period of notice given before cancelling the shift specified in the employee’s employment agreement, the remuneration that the employee would have received for working the shift, and whether the nature of the work requires the employee to incur any costs in preparing for the shift.

## Break entitlements

*Requirements as at 1 January 2020*

The Practice and the employee should negotiate and agree as to when the employee takes their breaks, taking into account the nature of the work. The Practice does not have an overriding discretion to implement a reasonable rest and breaks structure for the employee if the parties cannot agree on the same. In the absence of any such agreement, the default rest and break structure specified in the *Employment Relations Act 2000*, as set out below, will apply.

|  |  |  |  |
| --- | --- | --- | --- |
| **Work Period** | **Rest Break** | **Meal Break** | **When during work period\*** |
| *Between 2 and 4 hours* | One 10-minute paid rest break | - | Middle |
| *Between 4 and 6 hours* | One 10-minute paid rest break | One 30-minute meal break | *Rest:* One third  *Meal:* Two thirds |
| *Between 6 and 8 hours* | Two 10-minute paid rest breaks | One 30-minute meal break | *Rest:* Halfway between start and meal  *Meal:* Middle  *Rest:* Halfway between meal and end |
| *Over 8 hours:* |  |  |  |
| *8 hours work period* | Two 10-minute paid rest breaks | One 30-minute meal break | *Rest:* Halfway between start and meal  *Meal:* Middle  *Rest:* Halfway between meal and end |
| *Subsequent period between 2 and 4 hours* | One 10-minute paid rest break | - | Middle |
| *Subsequent period between 4 and 6 hours* | One 10-minute paid rest break | One 30-minute meal break | *Rest:* One third  *Meal:* Two thirds |
| *Subsequent period between 6 and 8 hours* | Two 10-minute paid rest breaks | One 30-minute meal break | *Rest:* Halfway between start and meal  *Meal:* Middle  *Rest:* Halfway between meal and end |

*\* as far as reasonably practicable, and except as otherwise agreed between the employee and employer.*

The exemptions from these requirements apply only in relation to continuity of essential services. In no other case may the parties agree to forgo rest and meal breaks in return for compensation.

## Leave

**Annual leave**

An employee is entitled to four weeks of paid annual leave after each 12 months of continuous employment with the Practice. This entitlement to paid annual leave accrues at the end of each year of continuous service and accumulates from year to year. Any purported clause in an employment agreement or other policy document indicating that annual leave not taken in the year in which it was accrued is forfeited is void and unenforceable.

Annual leave should be taken at a time agreed between the parties. If you cannot agree, the Practice may require an employee to take annual leave on 14 days notice.

Under existing law, once an employee becomes entitled to annual leave, they can request that the employer cash out up to one week of their yearly accrual in each subsequent 12 month period. Such requests must be in writing, and may be made on one or more separate occasions until a maximum of one week of the employee's annual holidays is paid out each year. The employer must consider the request within a reasonable time, and advise the employee in writing whether or not they agree to the request. If they agree, they must ensure that the payment is made as soon as practicable. An employer may decline an employee’s request (without needing to provide a reason), and may have a policy providing that it will not consider requests to cash out leave. It is unlawful to cash out an employee’s leave unless they request that the employer do so (except upon termination of employment).

If the Practice operates a closedown period, where it customarily closes down some or all of its operations for a period each year (typically over the Christmas period), you can require those employees whose work is affected by the closedown to take all or some of their annual holidays during this closedown period. Although an employer may have different closedown periods for separate parts of its business, if your Practice intends to operate more than one closedown period in a 12 month period, you should seek specific legal advice before doing so as this can be a complex area.

**Sick leave**

After six months of current continuous employment with an employer, an employee is entitled to five days of sick leave for each ensuing year of service with their employer. The employee’s entitlement to sick leave accrues at the end of the first six months of service, and at the end of each year of continuous service thereafter. It accumulates from year to year to a maximum of 20 days (including the current year’s entitlement). An employee can take sick leave either because the employee is sick or injured, or the employee’s spouse or partner, or a person who depends on the employee for care, is sick or injured. An employer may require an employee to produce proof of sickness or injury for sick leave taken (usually a doctor’s certificate) from the first day of sickness absence. This is subject to the provision that if the employer requests the proof before the employee has been absent for three consecutive calendar days, the employer must agree to meet the employee’s reasonable costs in obtaining the proof.

**Bereavement leave**

An employee is entitled to bereavement leave after six months of current continuous employment with an employer. Employees are entitled to:

### three days’ bereavement leave upon the death of the employee’s spouse or partner, child, brother or sister, grandparent, grandchild or spouse’s or partner’s parent

### one day’s bereavement leave upon the death of any other person if the employer accepts that the employee has suffered a bereavement as a result of the death.

In deciding whether an employee has suffered a bereavement, the employer must take into account the closeness of the association between the employee and the deceased, whether the employee has significant responsibility for all or any of the arrangements for the ceremonies relating to the death, and any cultural responsibilities of the employee in relation to the death.

## Public holidays

Employees are entitled to 11 paid public holidays each year, where they fall on a day that would otherwise be a working day for the employee concerned.

An employer may require an employee to work on a public holiday if that day would otherwise be a working day for the employee, and the employee is required to work on the public holiday under the employee's employment agreement.

If an employee works on a public holiday, they must be paid for the hours actually worked at the rate of 1.5 times their relevant daily pay. They are also entitled to a paid alternative holiday (often called a ‘day in lieu’) if:

### the public holiday falls on a day that would otherwise be an ordinary working day for the employee

### the employee is required to work, and actually works, on any part of that day.

## 90-day trial periods

Only employers who as at the date of entering into the relevant employment agreement, employ fewer than 20 employees (whether full time, part time, fixed term, casual and in whatever jurisdiction) may include trial periods in their employment agreements. If you hire 20 or more employees, you must delete any trial period clause, but you may insert a probationary period clause.

If the Practice is entitled to use trial period provisions, the employment agreement must specify when the trial period will commence and the period of the trial, which may be a period of up to 90 days (a lesser period may be chosen).

The effect of a valid trial period is that if the employee is dismissed during that period, they are unable to bring a personal grievance (or other legal proceedings) against the Practice in relation to that dismissal.

It is only possible to use a trial period where:

### the employee is a ‘new employee’ who has never previously worked for the employer

### the employee agrees to the trial period

### the employment agreement contains (**in writing**) a trial period provision which complies with the requirements of the Act.

Specifically, the trial period provision must state that:

### for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period

### during that period the employer may dismiss the employee

### if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

In addition, there are certain statutory requirements in relation to fair bargaining which apply when a trial period is proposed. These require that the employer must provide the employee with a copy of the intended agreement under discussion, advise the employee of their entitlement to seek independent advice, give them a reasonable opportunity to do so, and consider any issues that the employee raises and respond to them.

The trial period must be agreed in writing **before** the prospective employee becomes an employee (which for the purpose of a trial period occurs at the time they accept an offer of employment). The prospective employee must therefore agree to the trial period in writing at the same time as accepting the offer of employment. If they verbally accept an offer of employment (thereby becoming the employer’s employee), but do not sign a written agreement containing a trial period clause at the same time, the trial period is likely to be invalid.

The following steps should therefore be followed if engaging an employee on a trial period:

### provide the intended employee with the employment agreement containing the trial period provision at the same time as, and as part of, making offer of employment (e.g. attached to the letter of offer)

### inform the employee that they can only accept the offer by signing and returning the employment agreement (or such amended version of it as may be agreed on after discussion about its terms), and that verbal acceptance of the offer prior to return of the signed agreement will not be sufficient

### inform the employee of their right to take independent advice, and provide them with a reasonable opportunity to do so

### provide the employee with a reasonable opportunity to discuss the terms of the agreement, and genuinely consider any requested changes (although note that this does not mean that you need to agree to any such changes).

If the legal requirements are not met and the trial period is therefore invalid, the employer loses the protection of the trial period and an employee who is dismissed will is entitled to raise a personal grievance in relation to the dismissal.

While an employee employed on a valid trial period cannot bring a personal grievance in relation to their dismissal, they retain all of their other employment rights, including the right to raise other types of personal grievances (such as for unjustified disadvantage and sexual harassment). Care therefore needs to be taken to ensure that the employee is treated fairly and lawfully during the trial period.

In addition, the mutual statutory obligations to act in good faith continue to apply. This means that the employer must not do anything to (or likely to) mislead or deceive the employee, and must be active and constructive in maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

Given the many risks involved in engaging employees under trial periods, it is recommended that you seek specific legal advice before engaging an employee under a trial period, and before dismissing an employee during a trial period.

*Probationary periods*

A Practice that is not able to use trial period provisions (i.e. employs 20 or more employees) is able to include comprehensive probationary period provisions in their employment agreements.

While probabationary periods put an employee on notice that their performance will be under assessment during that period, and may include during that period a shorter notice period, probationary periods are subject to far more restricted controls and place far greater obligations on employers than does a 90 day trial period. When exercising a right to terminate pursuant to a probationary period provision, employers must follow a fair process and have a fair reason for dismissal which is required to be communicated to the employee (i.e. employers must comply with all usual requirements of a fair dismissal that would apply whether or not a probationary period was in place).

As with trial periods, it is recommended that you seek specific legal advice before dismissing an employee during a probationary period.

## Employee protection and redundancy

Most employment agreements must contain an employee protection provision, which provides protection to employees if, as a result of a restructuring, their work is to be performed by or on behalf of another person. The only exceptions to this are employment agreements relating to ‘vulnerable workers’ (primarily cleaning and catering staff) who have additional employment rights in restructuring situations.

The employment protection provision must set out:

### a process that the employer must follow in negotiating with a new employer about the restructuring (to the extent that it relates to their employees)

### the matters that the employer will negotiate with the new employer relating to the affected employees' employment, including whether they will transfer to the new employer on the same terms and conditions of employment

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

There is no statutory entitlement to redundancy compensation, however there may be a contractual entitlement contained in an employee’s employment agreement.

## Secondary employment

Any provision in an employment agreement that prohibits an employee from performing work for another employer is unenforceable unless there is a genuine reason based on reasonable grounds for that prohibition and that reason is set out in the employee’s employment agreement. A genuine reason may relate to protecting a Practice’s commercially sensitive information, protecting the Practice’s intellectual property rights, protecting the Practice’s commercial reputation, or preventing a real conflict of interest.

## Requests for flexible work arrangements

All employees are entitled to request flexible working arrangements at any time, and for any reason. All requests for flexible working arrangements must be made in writing, stating the employee’s name, the date, that the request is made under Part 6AA of the *Employment Relations Act 2000*. The request must also specify the nature of the flexibility sought, the date it would take effect, and what changes (if any) they think the employer may need to make to accommodate the request.

The Practice must give consideration to an employee’s request as soon as possible, and the Practice may only refuse the request if it cannot be accommodated on the grounds specified in the Act.

The Practice must notify the employee whether it has approved or refused the request. If the request is refused it must tell the employee that it was refused because of one or more of the specified grounds of refusal. It must say which ground, and explain the reasons for that ground. The response must be given as soon as practicable and no later than one month after the request is made.

The specified grounds of refusal are:

### inability to reorganise work among existing staff

### inability to recruit extra staff

### detrimental impact on quality or performance

### insufficiency of work during the periods the employee proposes to work

### planned structural changes

### burden of additional costs

### detrimental effect on ability to meet customer demand.

### In addition, see section 5.11 regarding the right of employees who are affected by family violence to request short term flexible working arrangements.

## Parental leave

Employees are entitled to paid and unpaid leave parental leave in accordance with the *Parental Leave and Employment Protection Act 1987*.

Upon return to work, an employee is entitled to return:

### to the position they held immediately before commencing parental leave

### if they had been transferred to a “safe” position before commencing parental leave - to the position they occupied immediately before being transferred to the “safe” position or

### if the original position no longer exists - to an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

Absence on parental leave does not interrupt an employee’s continuity of service, but entitlements such as annual leave, long service leave and personal, sick leave and bereavement do not accrue during the unpaid parental leave period. Any period of unpaid parental leave does not count towards the length of the employee’s continuous service.

A replacement employee may be engaged on a temporary contract basis to replace an employee on parental leave.

**Primary carer leave**

As at 1 January 2020, an employee is entitled to take up to 22 weeks of paid parental leave if the employee is a ‘primary carer’ and if the employee has worked for the Practice for at least an average of 10 hours per week for the six months immediately preceding the expected date of delivery of the child or the assumption of responsibility for the care of the child.

The entitlement to paid parental leave will increase to 26 weeks on 1 July 2020.

Under the Act, a primary carer is:

### a female biological mother who is pregnant or has given birth to a child

### the spouse or partner of the biological mother if the spouse or partner has succeeded to all or part of the biological mother’s entitlement to a parental leave payment (if the biological mother dies or the spouse or partner become the sole guardian of the child); or if the biological mother has transferred all or part of her entitlement to that spouse or partner

### a person other than the biological mother or her spouse or partner, who assumes primary responsibility for the day-to-day care of a child under 6 years of age, other than as a foster carer or on any other temporary basis (e.g. a grandparent).

Primary carer leave must be taken in one continuous period, ten weeks of which the employee is entitled to take after the expected date of delivery. Primary carer leave may, by agreement between the employee and the Practice, begin on any date before the expected date of delivery or the date on which the employee intends to become the primary carer in respect of the child. However, it may commence early if certain medical or incapacity issues arise. The latest date that primary carer leave can commence is on the date of confinement where a child is born to the employee, or in any other case, on the date that the employee becomes the primary carer in respect of the child.

The cost of the primary carer leave is met by the Inland Revenue Department, and the Practice is not required to pay the employee during this time (or during any subsequent period of extended leave – see discussion below) unless the Practice has agreed specific enhanced entitlements with the employee as part of the employment agreement.

Female employees are also entitled to up to 10 days of unpaid special leave before primary carer leave begins for reasons connected to the pregnancy. These 10 days are not taken into account when assessing the duration of either primary carer leave, or extended leave.

An employee is not treated as having returned to work if they perform 52 hours or fewer of paid work for the employer during the primary carer leave period as “Keeping in Touch” days, provided the employee does not perform paid work within 28 days after the birth of the child.

The entitlement to Keeping in Touch days will also proportionately increase with the increase to the entitlement to paid parental leave, increasing to 64 hours from 1 July 2020.

An employee must notify the Practice in writing at least 21 days prior to the expiration of parental leave of their intention to return to work or extend the period of parental leave.

An employee whose period of unpaid parental leave has started can make a request to reduce the period of unpaid parental leave that they take. The request must be received by the Practice at least 21 days prior to the date on which the employee is seeking to return to work. The Practice may, at its sole discretion, refuse the employee's request unless the employee or the employee’s spouse or partner are no longer the primary carer of the child, or if the child is miscarried, stillborn or dies.

**Negotiated carer leave**

Under the Act, primary carers who are not eligible for primary carer leave may request a period of leave from the Practice to enable them to receive parental leave payments.

In order to be eligible for negotiated carer leave, the employee must be a primary carer and must have been employed (by either the Practice or an entity other than the Practice) for at least an average of 10 hours per week over any of the 26 of the 52 weeks immediately preceding the date of the delivery of the child, or the date on which the employee becomes the primary carer.

Where a child is to be born to the employee or to the employee’s spouse or partner, the request must be made at least three months before the expected date of delivery or, in any other case, at least 14 days prior to the date on which the employee intends to become the primary carer in respect of the child.

The request must be in writing and must state:

### the employee’s name

### the date of the request

### that the request is made under Part 3A of the *Parental Leave and Employment Protection Act 1987*

### the proposed date on which the employee wishes to begin negotiated carer leave and the proposed duration of the leave

### that the employee will be the primary carer in respect of the child during the specified period and will, if the request is approved, be entitled to receive parental leave payments under the Act for that period.

In the request, the employee must also explain, in the employee’s view, what changes, if any the employer may need to make to the Practice’s arrangements if the employee’s request is approved.

The Practice must deal with a request as soon as possible, but not later than one month after receiving it. The Practice may only refuse a request if it cannot be accommodated on one or more of the following grounds:

### inability to reorganise work among existing staff

### inability to recruit additional staff

### detrimental impact on quality

### detrimental impact on performance

### planned structural changes

### burden of additional costs

### detrimental effect on ability to meet customer demand.

If the Practice refuses a request, it must provide the employee with a written explanation of the reason(s) why.

**Partner’s/Paternity leave**

An employee may take partner’s leave if the employee is:

### the spouse or partner of the primary carer in respect of a child

### assumes or intends to assume responsibility for the care of that child

### has worked for the Practice for at least an average of 10 hours per week for 6 months immediately prior.

Partner’s leave must be taken in one continuous period not exceeding:

### 2 weeks, if the employee has been employed by the Practice for at least an average of 10 hours a week over the immediately preceding 12 months or

### 1 week, if the employee has been employed by the Practice for at least an average of 10 hours a week over the immediately preceding 6 months.

Partner’s leave will begin on the date of confinement if a child is born to the employee’s spouse or partner, or on the date on which the employee’s spouse or partner becomes the primary carer in respect of the child. Alternatively, the employee may decide to comment partner’s leave at an earlier date.

Where a child is born to the employee’s spouse or partner, on any date in the period:

### beginning on the 21st day before the expected date of delivery

### ending with the close of the 21st day after delivery or, if the child is discharged from a hospital or a similar establishment more than 21 days after the actual date of delivery, the close of the day on which the child is discharged from that hospital or establishment.

In any other case, on any date in the period:

### beginning on the 21st day before the date on which the employee’s spouse or partner intends to become the primary carer in respect of the child

### ending with the close of the 21st day after the actual date on which the employee’s spouse or partner becomes the primary carer in respect of the child.

The Practice and the employee may also come to an agreement about the date on which the partner’s leave begins.

**Extended leave**

Employees are entitled to extended leave if:

### the employee:

#### is the primary carer in respect of a child or

#### is the spouse or partner of the primary carer in respect of a child and assumes or intends to assume responsibility for the care of that child and

### the employee has:

#### been working for the Practice for at least ten days per week for the immediately preceding 6 months (in which case the maximum duration of extended leave is 26 weeks) or

#### been working for the Practice for at least ten days per week for the immediately preceding 12 months (in which case the maximum duration of extended leave is 52 weeks).

Any paid primary carer leave taken by the employee (up to 22 weeks, increasing to 26 weeks from 1 July 2020) reduces the period of extended leave to which a primary carer or their spouse or partner are entitled (i.e. so the combined period of primary carer leave and extended leave cannot exceed 26 or 52 weeks (as applicable) in total). The one or two weeks of partner’s leave is not included in the 26 or 52 week extended leave period.

An employee may take one or more periods of extended leave (up to the maximum amount to which the employee is entitled) at any time within the applicable start and applicable end date of the extended leave.

*The applicable start date of extended leave*

Where an employee takes primary carer leave, the extended leave begins at the end of the employee’s primary carer leave.

If an employee takes partner’s leave, the extended leave begins at the end of the employee’s partner’s leave.

If the employee is entitled to take primary carer leave or partner’s leave in respect of a child and has not taken any such leave, the extended leave begins on either the date of confinement or the first date on which either the employee or the employee’s spouse or partner becomes the primary carer in respect of the child.

Alternatively, the employee and the Practice may agree on the date that the extended leave is to begin.

*The applicable end date of extended leave*

Where an employee or the employee’s spouse or partner qualifies for 26 weeks of extended leave, the extended leave will end on the date on which the child attains the age of 6 months when a child is born to the employee or the employee’s spouse or partner, or the date that is six months after the date on which the employee or the employee’s spouse or partner became the primary caregiver in respect of the child.

Where an employee or the employee’s spouse or partner qualifies for 52 weeks of extended leave, the extended leave will end on the date on which the child attains the age of 12 months, or the date that is 12 months after the date on which the employee or the employee’s spouse or partner became the primary caregiver in respect of the child.

*Sharing extended leave*

The maximum combined period of extended leave may be shared between the employee and that employee’s spouse or partner provided that, neither the employee nor the employee’s spouse or partner total period of extended leave exceeds the amount that that person is individually entitled to, and the total period formed by adding together all periods of extended leave taken by both the employee and their partner or spouse does not exceed the maximum combined period of extended leave.

The maximum combined entitlement of the employee and his or her spouse is:

### 26 weeks, if both have been employed by the same respective employer for 6 months or

### 52 weeks if both have been employed by the same respective employer for 12 months or

### 52 weeks if one has been employed by the same employer for 12 months and the other has been employed by the same employer for 6 months (however, the person who has been employed for 6 months must not take more than 26 weeks of extended leave out of the combined total entitlement of 52 weeks).

*Taking extended leave*

The employee, the Practice and the employee’s partner or spouse and their employer must agree on how the extended leave will be shared or taken.

The period of extended leave may be taken:

### consecutively with any period of primary carer or partner’s leave taken by the employee

### consecutively or concurrently with any period of primary carer leave, partner’s leave, or extended leave taken by the employee’s spouse or partner, or with any period for which the employee’s spouse or partner receives a parental leave payment.

**Notice requirements**

Every employee who intends to take parental leave must give written notice to Practice, stating certain matters specified in the Act, including the proposed date on which the parental leave is to begin and its duration.

The notice should be given three months prior to the expected date of delivery and must be accompanied by a doctor’s certificate. If an employee intends to be the primary carer in respect of a child to whom the employee or the employee’s spouse did not give birth, the notice must include a statement by the employee that the employee will be the primary carer and be given at least 14 days before the employee intends to become the primary carer in respect of the child and also be accompanied by evidence required under regulations.

Once the Practice has received the employee’s notice, the Practice has 21 days to provide a notice in response, stating whether or not the employee is entitled to take parental leave (and if not why) and whether or not the employee’s position can be kept open for the duration of their parental leave. If the employee’s position cannot be kept open, there are certain other things specified in the Act which the notice must address.

## Family violence entitlements

After six months’ continuous employment, employees who are affected by family violence (regardless of when the family violence occurred) have the right under the *Employment Relations Act 2000* to take up to 10 days’ of paid family violence leave each year (separate from annual leave, sick leave, or bereavement leave), to ask for short-term (up to two months) flexible working, and to not be treated badly at work because they might be affected by family violence. The entitlements are designed to help those affected by family violence to deal with the effects of family violence. For example, to get help from a family violence support service, move house, go to court, or to support their children.

Family violence means all forms of violence in family and intimate relationships. Family violence can be physical, sexual or psychological abuse. Someone is affected by family violence if either they have experienced family violence themselves, or a child who has experienced family violence lives with them, even if it’s not all the time. This can happen to women or men, and within heterosexual or same-sex couples. Someone who carries out domestic violence might not live with the person they are abusing. Some examples of abuse include intimidation, harassment, threatening to abuse someone, damaging a person’s property, financial abuse (e.g. taking their money or stopping them from working), and emotional or psychological abuse.

The family violence rights do not apply to people who carry out family violence (i.e. those who are voilenct or abusive to someone they are in a family or domestic relationship with).

It does not matter when the family violence took place. The employee will have these rights even if they experienced family violence before they began working for the Practice or before these legal entitlements were introduced.

The conditions for the family violence entitlements are the same for getting sick leave and bereavement leave. That is, an employee can take paid family violence leave if they have worked for the Practice continuously for at least 6 months, or if during a 6 month period the employee has worked an average of 10 hours a week (having worked either 1 hour per week or 40 hours per month). The employee has the right to 10 new days of family violence leave each year if they continue to be affected by family violence.

All family violence matters should be dealt with discreetly.

*Family violence leave*

Family violence leave is not exactly like sick leave or holiday leave because if an employee:

### does not use their family violence leave in 12 months, they cannot carry it over to the next year

### stops working for the Practice, you do not have to pay them for any family violence leave they have not taken.

Employers must pay employees who take family violence leave. You are entitled to ask for proof that the employee is affected by domestic violence. The employer does not need to pay the employee until they get this proof, unless the employee has a ‘reasonable excuse’. The law does not define this. An example of a ‘reasonable excuse’ could be that the employee had to move home quickly and has not had time to get proof.

Getting proof may not be simple, given the nature of family violence. Family violence often takes place behind closed doors, making it hard to ‘prove’. Ringing police or applying for a protection order are usually very big steps for someone affected by family violence.

If the Practice requests proof, both parties should act in good faith. That means being open, honest and quick to respond. The Employment Relations Act 2000 does not state what kind of proof is required. Some examples of proof that might be provided include:

### letter or email about what’s going on and how it affects the employee from either a support organisation (for example, a domestic violence support service or Oranga Tamariki) or a support person

### a report from a doctor or nurse

### a report from a school

### a declaration (a letter of evidence witnessed by an authorised person like a justice of the peace

### any court or police documents about the family violence.

If the employee does not have enough family violence leave, you can (but are not obliged to) agree that they can take annual leave or unpaid leave instead.

*Short-term flexible working*

Employees who are affected by domestic violence have the right, at any time, to ask for short-term flexible working arrangements to help them deal with the effects of domestic violence. These arrangements can last for up to 2 months. The request must be made in writing, and someone else can make this request on behalf of the employee.

‘Working arrangements’ means things that affect how employees do their jobs:

### hours and days of work

### where their workplace is

### where in the workplace they do their job

### duties at work

### contact details that they must give to their employer

### any other employment term that they think needs to change so they can deal with the effects of the domestic violence. An example is that the employee does not need to answer phone calls from the public.

The employee’s request must include the following things:

### their name

### the date they are making the request on

### that they are asking for short-term flexible working, as set out in Part 6AB of the Employment Relations Act 2000

### details of what they want to change about their normal working arrangements

### how long they want these changes to last (up to a maximum of 2 months)

### when they want these changes to start and finish

### how these changes will help them

### what changes the employer may need to make to the employer’s arrangements if they agree to the employee’s request.

You must see to a request for short-term flexible working urgently because an employee may wish to change their working arrangements to stay safe. You must reply in writing as soon as possible and within 10 working days at the latest, confiming whether you approve or refuse the request. You must also give your employee details about suitable support services that can help with family violence.

If you want proof that the employee is affected by family violence (see above regarding what might constitute acceptable proof and the mutual obligations of good faith), you must request that within 3 working days of receiving the request. If the employee doesn’t give proof when asked, you may refuse their request for short-term flexible working until proof is provided.

You can refuse a request **only if**:

### you did not get the proof you requested within 10 working days of the employee getting your request

### the employer cannot reasonably change working arrangements on specified grounds (and no other) – the ‘non-accommodation grounds’.

If you propose to refuse to give short-term flexible working to an employee, you must:

### say that the request is refused

### say why it has been refused

### explain the non-accommodation grounds on which that refusal is based.

Non-accommodation grounds are:

### not being able to reorganise work among other workers

### not being able to recruit more workers

### detrimental impact on quality – making the quality of work worse

### detrimental impact on performance – making the performance of the workplace worse

### not enough work expected at the times the employee wants to work

### changes to the workplace structure that are already planned

### burden of additional costs – having to spend more money

### detrimental effect on ability to meet customer demand – making it harder to serve customers properly.

An employee can ask for expert help if their request is refused and they think that their employer has not followed the right process or has got it wrong.

Employers must always keep short-term flexible working records, just as they must keep records of all kinds of working arrangements.

*Mediation*

The employee may want to go to mediation with their employer. Both employee and employer must agree to go to mediation.

During mediation, a trained person helps the employer and employee talk about what is wrong. The mediator helps the parties agree how to resolve it. Mediation through Employment New Zealand (a part of the Ministry of Business, Innovation and Employment, or MBIE) is free, but if it is proposed, we recommend you obtain legal advice. Mediation is confidential side.

If the problem is not resolved at mediation, the employee can get in touch with either the Labour Inspectorate (at any time) or the Employment Relations Authority (within 6 months for issues relating to short-term flexible working, or within 12 months for issues relating to family violence leave).

## Minimum wage

All employees working in your Practice are entitled to receive, as a minimum, at least the applicable minimum wage for each hour worked (including any overtime). Each of the amounts referenced below are before tax.

The adult minimum wage applies to all workers aged 16 years or more, except those who are starting out or trainee workers. The adult minimum wage, as at 1 January 2020, is NZ$17.70 per hour or NZ$141.60 per 8 hour day or NZ$708 per 40 hour week or NZ$1,416.00 per 80 hour fortnight (each before tax). From 1 April 2020, the adult minimum wage will be increased to NZ$18.90 per hour (with correlating increases per day, week, and fortnight). It is proposed that this will increase to NZ$20 as at 1 April 2021.

The starting out minimum wage is 80% of the adult minimum wage, being, as at 1 January 2020, NZ$14.16 per hour or NZ$113.28 per 8 hour day or NZ$566.40 per 40 hour week or NZ$1,132.80 per 80 hour fortnight (each before tax). This will increase to NZ$15.12 per hour with effect from 1 April 2020, with a proposed increase to NZ$16 as at 1 April 2021. The starting out minimum wage applies to:

### Workers aged 16 or 17 years of age who have not yet completed 6 months’ continuous employment with their current employer.

### Workers aged 18 or 19 years of age who:

#### Have been continuously paid 1 or more specified social security benefits for not less than 6 months

#### Have not completed 6 months' continuous employment with any employer (excluding any employment undertaken before the worker started to be paid any 1 or more specified social security benefits).

### Workers aged 16, 17, 18, or 19 years who are required by their contract of service to undertake at least 40 credits a year of an industry training programme for the purpose of becoming qualified for the occupation to which the contract of service relates.

The trainee minimum wage is 80% of the adult minimum wage, being, as at 1 January 2020, NZ$14.16 per hour or NZ$113.28 per 8 hour day or NZ$566.40 per 40 hour week or NZ$1,132.80 per 80 hour fortnight (each before tax). This will increase to NZ$15.12 per hour with effect from 1 April 2020, with a proposed increase to NZ$16 as at 1 April 2021. The trainee minimum wage applies to workers who are aged 20 years or more to whom the Act applies and who are required by their contract of service to undertake at least 60 credits a year of an industry training programme for the purpose of becoming qualified for the occupation to which the contract of service relates. The starting out and trainee wages do **not** apply to workers involved in supervising or training other workers.

The minimum wage may be adjusted annually.

## Link to useful website

For more information regarding employment terms and conditions in New Zealand, visit the [Ministry of Business, Innovation and Employment website](http://employment.govt.nz/er/).

**PROCEDURES**

# PRIVACY OBLIGATIONS

**PRIVACY OBLIGATIONS IN RESPECT OF EMPLOYEES, CONTRACTORS, WORK EXPERIENCE STAFF, VOLUNTEERS AND JOB APPLICANTS ONLY**

## General

Employers are bound by the Information Privacy Principles (**IPP**) as contained in the *Privacy Act 1993* to protect personal information handled by them. Of particular relevant to Practices, the IPPs cover purposes of collection (IPP1), sources of information (IPP2), collection of information from subject (IPP3), manner of collection (IPP4), storage and security (IPP5), access (IPP6), correction (IPP7), accuracy (IPP8), retention (IPP9) and limits on use (IPP10), limits on disclosure (IPP11), and unique identifiers (IPP12).

Personal Information is defined by the *Privacy Act* to mean information about an identifiable individual.

The IPPs are administered by the Privacy Commissioner. The Privacy Commissioner has a range of powers, including the power to:

### investigate a complaint an individual has made to the Commissioner

### inquire into any matter where it appears that individual privacy may be affected.

During the course of your business, you may collect personal information from the following people (amongst others, such as clients):

### contractors and prospective contractors

### employees and prospective employees

### medical providers with the consent of the individuals

### from referees provided by individuals or previous employers.

The kinds of personal information that may be collected include the following personal information:

### names, addresses and contact numbers

### educational qualifications

### residency status

### health information directly related to the inherent requirements of the position performed or being applied for

### tax file numbers

### contact details for next-of-kin or emergency contacts

### employment or work history

### names of referees and previous employers.

The purposes for which the information is collected include the following:

### to make contact with the individual

### to enable you to properly assess whether an individual is suitable for employment or contract work

### to ensure that information collected is accurate, complete and up to date

### to ensure that you are complying with your workplace health and safety obligations

### internal accounting and administration purposes.

A brief summary of the how the IPPs relate to the above practices is set out below.

**IPPs 1, 2, 3 and 4 – Collection of personal information**

The main obligations required by IPPs 1 to 4 are to:

### Only collect information necessary for a lawful purpose connected with a function or activity of the agency.

### Only collect personal information directly from the person concerned, unless the information is publicly available, the individual authorises the collection from someone else, non-compliance would prejudice the individual’s interests, or non-compliance is necessary for one of the reasons stated in the Act (including that compliance would prejudice the purposes of collection, or is not reasonably practicable in the circumstances).

### Take reasonable steps before, or as soon as practicable after the time of collection, to inform the person that:

#### the information has been collected

#### the purposes of the collection

#### the intended recipients of the information

#### the name and address of the agency collecting and holding the information

#### any consequences that will apply for not providing the information

#### the rights of access to and correction of, the information provided.

In addition, if the collection is authorised or required under a law, the individual must be told which law, and whether the supply of the information is voluntary or mandatory.

These matters can be communicated through the use of a privacy collection statement such as the one contained in the attached ‘letter to job applicant’. It is not necessary to comply with these requirements if certain exceptions stated in the Act apply (which are similar to the exceptions for collecting information directly from the individual listed above).

### Not collect personal information by unlawful means or by means that, in the circumstances of the case, are unfair or intrude to an unreasonable extent upon the personal affairs of the individual concerned.

In practice, this means that:

### you should know precisely what personal information your business collects and why

### as far as possible, collect personal information directly from the individual and inform that individual, in writing, before, or as reasonably practical after the time of collection, of the proposed uses and disclosures of their personal information

### you should not use deceptive means to obtain information from individuals or require more information than you need from individuals.

**IPP5 – storage and security of personal information**

IPP5 requires that if you hold personal information you must ensure that it is protected by such security safeguards as it is reasonable in the circumstances to take, against:

### loss

### access, use, modification, or disclosure (except with your authority)

### other misuse.

In addition, if it is necessary for the information to be given to a person in connection with the provision of a service to the Practice, you must ensure that everything reasonably within the power of the Practice is done to prevent unauthorised use or unauthorised disclosure of the information.

**IPPs 6 and 7 – Access to, accuracy of, and correction of personal information**

Where you hold personal information in such a way that it can be readily retrieved, the individual concerned is entitled to obtain confirmation of whether or not you hold that information, and to have access to it. Where such access is given, you must also advise the individual of their right to request correction of their personal information.

The individual is also entitled to request that you attach to the information a statement of any correction they have sought, but which you have not made, to the information. If this request is made, you must take reasonable steps to attach to the information any statement they provide containing the correction. This should be attached in such a way that it will always be read with the information.

Where a request for correction, or a request to attach a statement of correction, is made you must inform the individual concerned of what action you have taken in response to the request.

You must take reasonable steps to ensure that the information is accurate, up to date, complete, and not misleading. You must not use the information until you have taken such steps.

Where information is corrected, or a statement of a correction sought is attached to it, you must, if reasonably practicable, inform each person, body or agency to whom the personal information has been disclosed that you have taken those steps.

**IPPs 9 and 10 – Limits on retention and use of personal information**

You must not keep personal information for longer than is required for the purposes for which it may lawfully be used.

Where you hold personal information obtained in connection with one purpose you must not use the information for any other purpose, unless you believe, on reasonable grounds that:

### the source of the information is a publicly available publication

### the use of the information for that other purpose is authorised by the individual concerned

### non-compliance is necessary for one of the reasons stated in the Act

### use of the information is necessary to prevent or lessen a serious threat to public health or safety, or to the life or health of the individual or another individual

### the purpose for which the information is used is directly related to the purpose in connection with which the information was obtained

### the information is used in a form in which the individual concerned is not identified or

### the Privacy Commissioner has authorised the use of the information for that purpose.

**IPP 10 – Limits on disclosure of personal information**

If you hold personal information, you must not disclose the information to a person, body or agency unless you believe, on reasonable grounds, that:

### the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to one of those purposes or

### the source of the information is a publicly available publication or

### the disclosure is to the individual concerned or

### the disclosure is authorised by the individual concerned or

### non-compliance is necessary for one of the reasons stated in the Act or

### disclosure of the information is necessary to prevent or lessen a serious threat to public health or safety, or to the life or health of the individual or another individual or

### the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern or

### the information is disclosed in a form in which the individual concerned is not identified or

### the Privacy Commissioner has authorised the disclosure of the information.

**IPP12 – Unique identifiers**

A unique identifier is an identifier that you may assign to an individual for the purposes of the Practice’s operations which uniquely identifies that individual in relation to the Practice (but does not include the individual’s name).

You must not assign a unique identifier to an individual unless it is necessary to enable you to carry out one or more of the Practice’s functions efficiently. If you do use unique identifiers, you must not assign one that, to the Practice’s knowledge, has been assigned to that individual by another agency, unless those 2 agencies are ‘associated persons’ (within the meaning of subpart YB of the Income Tax Act 2007).

If you assign unique identifiers to individuals, you must take all reasonable steps to ensure that unique identifiers are assigned only to individuals whose identity is clearly established.

You must not require an individual to disclose any unique identifier assigned to them unless the disclosure is for one of the purposes in connection with which that unique identifier was assigned or for a purpose that is directly related to one of those purposes.

## Privacy Officer

Under the *Privacy Act*, each agency (which term will include your Practice) is required to have an appointed Privacy Officer.

No special training or qualification is required to be a Privacy Officer, but the appointed employee needs to understand the *Privacy Act's* privacy principles. Nor does the Privacy Officer need to be a New Zealander.

The Privacy Officer is responsible for:

### ensuring your Practice complies with the *Privacy Act*;

### dealing with requests made to your Practice for access to, or correction of, personal information (in large Practices, the Privacy Officer may do this by ensuring there is a process in place for responding to such requests. In a smaller Practice, the Privacy Officer might deal with such requests directly).

### Working with the Privacy Commissioner during the investigation of complaints.

Privacy Officers can contact the Office of the Privacy Commissioner on 0800 803 909 with general enquiries. Basic online training modules are also available at the [Privacy Commissioner’s](http://www.privacy.org.nz.) website.

## Reform

The *Privacy Act* is currently subject to reform, with a *Privacy Bill* introduced to Parliament on 20 March 2018. It had its second reading on 7 August 2019. If enacted, the amendments will come into force on 1 March 2020. Aamong other things, the *Privacy Bill* will provide strong powers for the Privacy Commissioner (including to issue compliance notices and issuing determinations when a person has requested access to personal information and has been refused). There will also be mandatory reporting of harmful privacy breaches, and new offences (including for destroying any document containing personal information knowning that a request has been made for that information) and increased fines.

Your obligations under the *Privacy Act* in relation to employees, contractors, volunteers, work experience staff and job applicants have only been briefly canvassed here. More information about your broader obligations under the *Privacy Act*, particularly in relation to client and other personal information can be found at the [Privacy Commissioner’s](http://www.privacy.org.nz.) website.

## GDPR

Internationally, the European Union’s *General Data Protection Regulation (GDPR)* took effect in May 2018, with widespread implications on the rules that govern global data flows. The *GDPR* imposes a comprehensive set of principles and obligations which agencies working in or with the EU will need to be aware of and comply with. See <https://www.privacy.org.nz/assets/Uploads/EUMR-The-principles-of-the-GDPR-09-2017.pdf> for general information. If this may affect your Practice, we recommend you obtain separate legal advice regarding your obligations.

# RECRUITMENT AND SELECTION OF EMPLOYEES

## Overview

Before deciding to engage any employee, you should give very careful thought to the knowledge, skills and abilities a person will need to adequately perform the vacant position. The recruitment and selection process involves defining the right balance of these requirements, carrying out a fair and equitable process to enable you to source and select a candidate with this balance of attributes.

It is recommended that you always prepare an analysis of the tasks, duties and responsibilities of a job, as well as the necessary knowledge, skills and abilities a person will need to perform a job adequately. It is important to undertake such an analysis before a person accepts a position as it can be difficult to change it once they are in that position.

The job analysis should include the tasks, duties and responsibilities of a job, as well as the necessary knowledge, skills and abilities a person needs to perform the job adequately. It should include any physical or manual labour required (for example, an office services position may require a person to lift archive boxes of up to 15kg) and any travel that may be required within certain geographical distances (regionally, nationally or overseas). You could also list the types of equipment, software or training that a person could expect to experience as part of the job. Generally, you have no obligation to circulate this job analysis publicly. You have no legal obligation to set any particular selection criteria for a position, provided that the criteria that you do use are not discriminatory.

However, it is also recommended that you prepare a further list of the tasks, duties and responsibilities, knowledge, skills and abilities that are ‘inherent requirements’ of a position, that is, the essential or fundamental aspects of a position that a person must be able to perform in order to meet the needs of the position. In turn, when advertising a position, you should list these ‘inherent requirements’, with a view to attracting applicants that possess those abilities.

Different rules apply to the selection of internal candidates during a restructuring process, including a requirement to disclose all relevant information to the employees concerned (including job analysis and selection criteria), and to give them the opportunity to comment on it before any decisions are made. This is discussed further below in this Employer’s Manual at section **17.10**.

Anti-discrimination and equal opportunity legislation and requirements are discussed below in this Employer’s Manual at section **12**. Employers should review that section for a full explanation of the concepts and legal obligations they impose on employers, including in the recruitment and selection process. Job applicants must not be discriminated against on the basis of their race, sex, religion, age, nationality or other prohibited grounds of discrimination, which are discussed in detail in section **12** of this Employer’s Manual.

This means that you must take care not to question a job applicant about any of these features that they may or may not have. For example, you should not ask in a job interview whether an applicant has children and, if so, how those children will be cared for while the applicant is at work, or, if not, whether the applicant intends to have children.

Despite all of the above, it is not discrimination to decline to employ someone who is not qualified for the position you have available. For example, if it is necessary that the applicant be able to speak English, to allow them to communicate with your clients and other employees, it is not discrimination to decline to employ someone if they cannot. In addition, the *Human Rights Act 1993* permits employers to discriminate in limited circumstances where the person *is* qualified for the work. For example, if a person has a disability that means they could only perform the duties of the position satisfactorily with the aid of special facilities, and it is not reasonable to expect the employer to provide those facilities, the employer does not have to employ the person.

When considering applicants for positions, you should focus on the inherent requirements of the position that the successful applicant will have to carry out, and the applicant’s ability to carry out these inherent requirements.

If you do propose taking any of the prohibited grounds of discrimination into account in selecting an applicant for a position, it is recommended that you obtain legal advice before doing so. This is because discrimination laws are strict and a range of remedies may be available to unsuccessful applicants in the event they are found to have been unlawfully discriminated against in a recruitment or selection process.

An example employment application form is provided in the management forms section of this Employer’s Manual at section **20**.

## Type of employment relationship

Another part of the recruitment and selection process, will be determining whether you wish to employ a person on a full time, part time, or casual basis, or whether the position lends itself to being suitable for a fixed term contract. You will need to make it clear to prospective employees during the recruitment and selection process what the Practice’s expectations are with respect to the type of employment being offered, and the likely hours of work of that position. Set out below is an overview of the common forms an employment relationship may take.

## Full time employees

Full time employees are permanent employees who, on average, work 40 hours per week. Such employees must devote their full time and attention during normal business hours to the employer’s business.

## Part time employees

Part time employees work fewer hours than full time employees, but are still employed on a permanent basis. Part time employees are generally entitled to the same service-related entitlements as full time employees, although some are on a proportional basis based on their hours of work.

## Casual employees

Casual employees are generally engaged intermittently and irregularly and are not guaranteed ongoing employment. Casual employees are often engaged on a daily or weekly basis and, at the end of that time period, there is no obligation on the employer to provide them with further work, nor for the employee to accept further work beyond that time period.Where a casual employee’s work is so intermittent or irregular that it is impracticable for the employer to provide them with 4 weeks annual holidays each year, they may be paid annual holiday pay on a pay-as-you-go basis with their regular pay, provided that:

### the employee agrees to this in their employment agreement

### the annual holiday pay is paid as an ‘identifiable component’ of the employee's pay (i.e. is shown separately on their pay slip)

### the annual holiday pay is paid at a rate not less than 8% of the employee's gross earnings.

Casual employees will not qualify for sick leave or bereavement leave unless they have, over a period of six months, worked for the employer for—

### at least an average of 10 hours a week

### no less than one hour in every week or no less than 40 hours in every month during that period.

In an office environment such as an accounting practice, there are generally few employees who are truly casual, as most employees tend to work fairly regular hours and are not in a position where they do not know whether there will be any work for them from week to week.

However, it is a common scenario that employers engage employees as casuals, but the employees end up working regular days and hours of work. Although these employees may be referred to as casuals, their legal status may actually be (or become) permanent. Simply referring to an employee as a casual will not ensure that they are considered to be a casual. This could have unanticipated and undesirable consequences (for example, a requirement to provide annual leave, even if “pay-as-you-go” holiday loading has already been paid to the employee).

It is recommended that you regularly review your working relationship with any casual employees, to see if a degree of permanency has developed about the relationship, such that it is more appropriate to engage that person as a permanent employee.

## Fixed term employees

In certain circumstances, it is possible to offer employees an employment agreement that specifies that the employment will end at the close of a specified date or period, on the occurrence of a particular event, or at the conclusion of a particular project. Unlike the types of employment described above, this means that employees are not engaged indefinitely.

The expiry of a valid fixed term employment agreement is not a dismissal. Therefore, employees whose employment ends upon the expiry of truly fixed term employment agreements generally cannot bring a personal grievance for unjustified dismissal. These laws are explained in more detail in the Performance Management, Disciplinary and Dismissal Procedure in this Employer’s Manual at section **17**.

The only circumstances in which an employee should be engaged as a fixed term employee is where you have a genuine reason based on reasonable grounds’ for requiring a fixed term employee. For example, if you had an employee absent on a six month leave of absence, or an employee on parental leave for six months, in both cases it would be appropriate to engage a replacement employee for a fixed term of six months.

It is not lawful to engage someone as a fixed term employee for the purpose of excluding or limiting their rights under the *Employment Relations Act 2000*, or the *Holidays Act 2003*. Nor is it lawful to use a fixed term agreement to establish the suitability of the employee for permanent employment. These do not qualify as ‘genuine reasons’ for the purposes of the legislation.

In addition to having a genuine reason, the employer must tell the employee when or how their employment will end and advise them of the reason for their employment ending in that way. The employee’s employment agreement **must** state in writing:

### the way in which the employment will end

### the reasons for ending the employment in that way.

If these criteria are not met, the employer may not rely on the fixed term to end the employee’s employment if the employee elects at any time to treat the fixed term as ineffective (or as having been ineffective in the case of a former employee). Rather, the employee’s employment is regarded as having become permanent.

Given the many risks involved in engaging employees under fixed term employment arrangements, it is recommended that you seek specific legal advice before engaging any employees under fixed term employment contracts.

# SELECTION PROCESS – THE EMPLOYMENT INTERVIEW

## Overview

Selection is a process of evaluation and decision-making, in which employers need to make a judgment call about which candidate, across a range of candidates, is the most suitable for an advertised position. A good selection process should be fair to all applicants and take into consideration ethical and legal requirements.

Interviews are one of the most common selection methods utilised by employers.

The goal of an employment interview is to find out as much as possible about a candidate’s ability to perform an advertised position, and to ensure that you have enough information to select the best person for the job amongst a range of candidates.

Because interviews involve judgements about people that can stir up perceptions of fairness/unfairness, it is important that the interview process is conducted in such a way across all candidates, so as to increase the perceived fairness amongst candidates. This means ensuring that all interviews are conducted similarly across all candidates. For example, you should consider asking candidates the same pre-determined questions, and having more than one organisational member interviewing candidates at the same time, so that a variety of opinions can be obtained in relation to the suitability of a particular candidate.

Organisations also tend to avoid legal challenge if the selection/interviewing process has the following four characteristics:

### job relatedness

### an opportunity for the candidate to demonstrate ability

### considerate, inter-personal treatment

### questions that are not perceived as improper.

The following is a list of sample questions that may be considered relevant in assessing an interviewee’s ability to adequately perform an advertised position, and may provide guidance for you when conducting employment interviews.

## Questions suitable for management positions

When hiring someone for a management role, it is important to assess not only their past experience but their ability to expand on what is already being achieved at your Practice, to think creatively, work well in a supervisory capacity and manage and delegate tasks.

Below are some questions that you may like to ask.

### Describe your experiences at other accounting practices.

### Use a hypothetical accounting/taxation problem and ask the applicant ways to best resolve it or the options open to a client faced with such a problem.

### What skills do you consider necessary to effectively service the clients of our Practice?

### How do you develop and maintain professional working relationships with clients?

### Have you ever had to deal with a difficult client? Give an example and explain how you did or would deal with this situation.

### Give examples of the types of work and transactions you have been involved with.

### What would be the most important skill that you have learnt in your previous employment?

### What special qualities can you bring to our Practice?

### What do you believe to be your weaknesses and your strengths?

### What are your career goals?

### What other interests do you have outside of work?

It is most important that an applicant is not discriminated against on the basis of any answers given to these questions, for example, eliminating an otherwise appropriately qualified applicant because he or she states that their out of hours interests include performing voluntary work for and attending political rallies in support of the trade union that their partner belongs to.

## Questions for non-managerial positions

Many of the above questions can also be used or tailored when interviewing applicants for non-managerial positions.

When interviewing for non-managerial and administrative-related positions, it is important that applicants are able to demonstrate the following personal characteristics:

### good communication and interpersonal skills with employees, clients and other professionals

### a willingness to follow reasonable directions

### a need to be mature, reliable and respect confidential information that may be imparted to them

### good organisational skills, prioritisation and time management skills

### a well groomed appearance appropriate for a professional practice

### an ability to work in a team or for more than one professional.

With these objectives in mind, you may like to ask the following questions.

### Why would you like to work at our Practice?

### Can you give some examples of a situation in previous employment where you have had to delegate responsibility to others? What type of instructions did you give to achieve your objectives and how did you ensure that it was successful?

### What career goals have you set for yourself?

### What do you perceive to be your weaknesses and how can these be improved upon?

It is also important to ask general questions about interests, hobbies and outside activities.

As noted above, anti-discrimination and equal opportunity legislation and requirements are discussed below in this Employer’s Manual at section **12**. Employers should review that section for a full explanation of the concepts and legal obligations they impose on employers, including in the recruitment and selection process. Amongst these requirements, you are not entitled to ask questions about the prohibited grounds of discrimination listed in that section, including personal details such as a candidate’s:

### age

### marital status

### family status

### religious beliefs

### political opinions.

At the conclusion of the interview, be sure to ask applicants if they have any questions about your Practice. The answer to this final question can reveal a lot about the applicant’s understanding of the type of work carried out by your Practice and what the applicant believes the job will entail.

In summary, a structured approach to interviewing should ensure that all applicants are treated equally and on the basis of merit, and that the best applicant for the job will be found.

## Questions for referees

You may wish to undertake reference checks with the previous employers of job candidates.

It is also recommended that you verify any references provided by an applicant with the source of the reference and contact any nominated referees.

In all cases, before doing so, it is recommended that you obtain consent from the applicant to do so.

In all cases, reference enquiries should be relevant to the position applied for and should not be related to any potentially discriminatory matter, except where the question relates to an inherent requirement of the job applied for.

A reference checklist appears in the Management Forms section of this Employer’s Manual at section **20**.

# CRIMINAL HISTORY, CREDIT CHECKS aND IMMIGRATION REQUIREMENTS

## Criminal history checks

The Ministry of Justice can supply criminal record information upon request. An individual can obtain a copy of his or her criminal record, and an employer can request a copy of that record from the Ministry of Justice with that person’s written consent.

‘Clean slate’ legislation operates in New Zealand. Under the *Criminal Records (Clean Slate) Act 2004*, eligible individuals are deemed to have no criminal record for the purposes of any question asked of them about their criminal record. They may answer a question asked about their criminal record by stating that they have no criminal record. The premise behind this legislation is to allow certain individuals with prior criminal records to start with a ‘clean slate’.

Generally, an individual may be eligible under this Act to have their prior offending ‘clean slated’ if at least seven consecutive years have elapsed since they were last sentenced for an offence, and they have not been convicted of any offence since. There are certain other requirements which also apply, including that they must never have been given a sentence of imprisonment, or convicted of one of a list of serious ‘specified offences’. These requirements are set out in the summary table below.

It is a criminal offence to unlawfully disclose information required by the Act to be concealed. It is also a criminal offence to ask that an individual disregard the clean slate scheme when answering a question about their criminal record, or to ask that they disclose (or consent to the disclosure of) their criminal record if it is protected by the scheme.

|  |  |
| --- | --- |
| **Legislation** | *Criminal Records (Clean Slate) Act 2004* |
| **Definition of conviction** | Conviction entered by a court in New Zealand for an offence, including conviction for a traffic offence |
| **Rehabilitation (waiting) period** | Seven years since last sentenced, with no further convictions since |
| **Individual eligibility criteria** | * Rehabilitation period complete * Never had a custodial sentence imposed (unless an order by court that custodial sentence be disregarded) * Never been convicted of a specified offence (certain sexual offences as listed in the Act) * Never had an order made under certain legislation (specified in the Act) that, rather than being sentenced, the offender be treated or cared for manner that the offender's mental impairment requires * No outstanding fines, reparation, costs or compensation payments from prior sentences * Never been disqualified from holding or obtaining a driver’s licence under certain sections listed in the Act (relating to repeat offences involving alcohol or drugs). |
| **Means by which conviction is ‘clean slated’** | Automatically upon completing the rehabilitation period, provided there have been no further convictions since |
| **Commencement of the rehabilitation (waiting) period** | From the date sentenced for the offence |

## Credit checks

With respect to performing credit checks, there is no relevant prohibited ground of discrimination that could form the basis of a discrimination claim.

However, credit checks must be undertaken in accordance with the *Credit Reporting Privacy Code 2004*. Under the Code, employers can only undertake a pre-employment credit check where the position applied for involves ‘significant financial risk’. The terms is not defined in the Code, but would logically involve having access to (or responsibility for managing) client funds or Practice funds, and the consequential ability to mismanage or misuse those funds.

If the nature of the position (e.g. a receptionist) does not give rise to any significant financial risk, any request for consent to undertake a credit check is likely to be unlawful on the basis that it breaches the Privacy Act 1993.

The job applicant’s consent must be obtained prior to undertaking any credit check.

## Immigration obligations

Under the *Immigration Act 2009*, an employer commits an offence if they allow a person to work for them if the person is not entitled to work in that employer’s service. The penalties for employing someone who is not legally entitled to work for the employer can be up to $10,000 per offence, or in cases where the employer knowingly employed someone not legally entitled to work, up to $50,000 per offence. In cases where the offence relates to serious failures to pay an unlawful or temporary worker, or where an employer takes action to prevent or hinder an unlawful or temporary worker from leaving the employer’s service or New Zealand or from disclosing their circumstances or seeking their entitlements, the penalties can include imprisonment and fines not exceeding $100,000 per offence.

Not knowing that an employee was not legally entitled to work for the employer in New Zealand will not be a valid defence on its own. An employer must also show that it took ‘reasonable precautions’ and ‘exercised due diligence’ to ascertain whether the person was entitled to do the work.

As a minimum, you should ask to see an original passport for **every** employee you employ before they start work in your Practice. If the employee does not have a passport, you should ask them to provide their birth certificate. If an individual supplies a non-New Zealand passport, you should check the validity of their work visa and that the terms of their visa permit them to work in your Practice. You should record the key details of any such work visa and obtain a photocopy for the individual’s personal file. As a double-check, you should also register to use Immigration New Zealand’s VisaView service, which allows New Zealand employers to check whether a person who is not a New Zealand citizen can work in New Zealand for that employer. Further details are available on [Immigration New Zealand’s](http://www.immigration.govt.nz/employers/resources/visaview/default.htm) website.

# EMPLOYING STAFF

## Offer of employment

Once you have selected a preferred applicant for a position and have obtained proof of their qualifications and their entitlement to work for you in New Zealand, you should give that person a written offer of employment.

Standard written offers of employment (in the form of letters of appointment) are **attached** to this Employer’s Manual – see section **2** and the Schedules. There are different options within the standard letters of appointment which can be tailored to individual employees.

You should select appropriate alternatives throughout the standard documents to tailor the letters of appointment to the particular circumstances. It is very important that you have a record that the employee agreed to the terms. This is why the letter contains an acknowledgment to be signed by the employee at the bottom of the last page, stating that they agree to all of the terms and conditions contained in the offer.

In a variety of individual bargaining situations (including where there is no collective employment agreement that covers the work to be done by the employee or where a fixed term, trial period (if permitted), or probationary period is proposed), you must:

### provide the employee with a copy of the intended employment agreement

### advise the employee that they are entitled to seek independent advice about the intended agreement

### give the employee a reasonable opportunity to seek that advice

### consider and respond to any issues they raise.

When you give the letter to the applicant, you should provide two copies and ask the employee to sign one copy and return it to you. The other copy can be retained by the employee for their records. If you have not received the copy of the letter back from the employee within a short time of your offer being made (for example, between three to five working days), you may wish to contact the applicant and advise them that they will not be able to start employment until they have signed and returned the letter to you. You should explain to them that the letter sets out the basis on which they will be employed and that it is just as important to them as it is to you, to have a written record of those terms and conditions.

Once you have provided an employee with an intended employment agreement, you must retain a copy of that agreement even if the employee has not yet signed it or agreed to any of the terms and conditions specified in it. Once the terms are agreed, you must retain a signed copy of the employee's individual employment agreement or the current terms and conditions of employment that make up the employee's individual terms and conditions of employment.

If the employee asks, you must, as soon as is reasonably practicable, provide the employee with a copy of the employee's individual employment agreement or intended agreement (as the case may be).

If you are entitled to and intend to employ an employee on a 90-day trial period, there are some very strict rules that must be followed at the time of making the offer of employment to ensure that the trial period is valid. These are detailed in the Employer’s Manual at section **5.6**.

## Payment of wages

A Bank Account Details Form is included in the Staff Manual. It is vital that this form is completed and returned by an employee as soon as possible after they accept your offer of employment. Without this form being completed, you have no authorisation to deposit funds into any bank account and it will be necessary for you to make alternative pay arrangements with the employee.

## Other documents

When an employee accepts your offer of employment, you should also have them complete a tax code declaration form (IR330). The IR330 will show the tax code that you must use to deduct the appropriate amount of PAYE from the employee’s wages.

If there has been no IR330 completed, you must deduct tax at the no-notification rate. All employers have an obligation to withhold the appropriate amount of PAYE tax from each employee’s salary/wages. If you fail to do this, you could be legally liable for any additional tax which should have been deducted.

## Employee induction

A positive start to a new job is essential for any new employee. As such, an informative, well-planned and conducted induction is an effective way to transition new starters into productive employees.

Induction involves providing information, guidance and support to new employees about their new working environment, the operation of the Practice and the tasks that they will be performing, to enable them to adjust to their new working environment and begin productive work as soon as possible.

It is recommended that induction be conducted as a two-way process, so that as well as providing new employees with information about the Practice, employees are encouraged to ask questions and to engage in the induction process.

As a minimum, it is recommended that employers cover the terms of key workplace policies and procedures (including appropriate computer usage, work health and safety and the Practice’s appropriate workplace behaviour policy, i.e. its discrimination and harassment policies, and the complaints mechanisms available to employees). It is also advisable to discuss the conventions and customs of the Practice, for example, can you eat at your desk, or can you only eat in a designated staffroom or outside the Practice’s premises.

Beyond these matters, different groups of employees will have different needs in terms of induction processes relating to the actual tasks and duties they will be performing. Administrative employees, for example, will need to be shown how to operate equipment such as photocopiers and fax machines and be advised about relevant aspects of the Practice’s operation, such as when mail is collected/delivered. Thought will also need to be given to appropriate induction processes for, for example, graduate accountants, for whom this may be their first professional position. They will need to learn about the operation of the Practice, as well as being given support and guidance to enable them to undertake their technical/professional work.

The Practice should give thought to assigning new employees a buddy or mentor to assist with the above matters, and in relation to their transition into the workplace generally.

By ensuring that all new starters are properly inducted, you will provide new employees with the information and tools to be able to perform their role effectively.

A comprehensive employee induction program may also assist the Practice to mount a legal defence to show that the employee was aware of the policies and procedures of the Practice and may therefore negate the liability of the Practice for the employee’s personal actions, for example, a claim of discrimination or harassment against the employee.

## Induction checklist

There is an induction checklist included in the Management Forms section of this Employer’s Manual at section **20**. This checklist sets out those matters which you should ensure are completed as a minimum, as soon as possible after new employees start work. The checklist confirms that you have provided employees with copies of all documents that they need to be given and that you have given all employees the details and training which they require to carry out their jobs effectively and safely. Once an induction checklist has been completed for an employee it should be placed on their personnel file. This checklist will later serve as proof that certain matters were discussed with the employee, should these matters arise as an issue.

It is also a good idea for a senior employee to meet with new employees after they have completed their first week of work, to discuss their progress over the course of that week, and to clarify any questions they have about their role with the Practice.

The risk of turnover, absenteeism, poor work habits or conflict situations occurring at the Practice will be minimised if each employee is clear about what is expected of them.

# PERFORMANCE APPRAISALS

It should be the Practice’s policy that work is undertaken in the most efficient and productive manner possible. Giving regular, contemporaneous feedback to your employees in a positive manner will play an important part in ensuring that this occurs.

To facilitate this, constructive, open communication is essential. Regular verbal and written feedback will help employees to gauge their standard of performance. The idea is not to make an employee feel threatened or insecure but to reinforce the notion that your Practice has high standards and will always strive for the provision of high quality service to its clients. Regular performance appraisals can also assist in achieving this objective.

## Objectives of performance appraisals

Very generally, performance appraisal is a formal system of planning and reviewing employee performance. It provides employers with an opportunity to comprehensively review key aspects of their employees’ performance, including employees’ skills and knowledge, their behaviours and achievements, and their working environment and supervisory requirements. It also provides employees with the opportunity to voice their concerns and aspirations in relation to their employment.

## How often should performance appraisals be conducted?

There is no legal obligation to conduct performance appraisals. However, they play an essential part in the good management of the Practice’s employees.

Moreover, if you should find yourself in a situation where you are contemplating commencing a formal ‘performance management’ process in relation to a poor performing employee, a record of regular performance appraisals in which you have discussed what the Practice’s expectations of an employee are, and provided guidance on how to achieve those expectations, will provide the Practice with evidence of the deficiencies in that employee’s performance to support your actions.

It is up to you to decide how often you conduct performance appraisals. The size of the Practice and the demographic of its workforce will help inform a decision as to how regularly formal performance appraisals are undertaken. However, as a guide, it is recommended that they are undertaken at least every six to 12 months.

## Guidelines for the use of performance appraisals

Broadly speaking, the performance appraisal involves:

### determining how well employees are doing their job

### communicating this information to employees

### establishing a plan for performance improvement or development

### assisting employees to implement this plan, including providing access to training and development tools as required.

## Before the performance appraisal meeting

A performance appraisal requires preparation before the meeting can occur.

Before you conduct any performance appraisal, the employee should be made aware of the grounds on which their performance will be assessed. Ideally, you should advise new employees when they commence that you have a system of performance appraisals, when appraisals will be conducted and what factors will be used to assess their performance. This will give the employee a clear indication of the goals and objectives of the Practice and what is expected of them.

Prior to conducting a performance appraisal, employers need to consider the purpose of the appraisal and have sufficient and correct information on hand, for example, copies of previous performance appraisals, specific performance criteria, performance against budget statistics, and training and development undertaken since the last appraisal.

Both employer and employee should also fill out an appraisal form, with a view to comparing and discussing these forms with the employee during the appraisal. This will help maximise the benefits obtained from the appraisal process and provide honest feedback how employees gauge their own conduct and ability.

## During the performance appraisal meeting

The performance appraisal should be conducted in a private confidential area.

A performance appraisal is a mutual communication process which should seek to adopt a balanced approach towards both positive aspects of performance, and those where there is room for improvement. A two way conversation between employer and employee is essential to make the appraisal procedure effective. It is recommended that employers use probing questions, for example, *‘Are there any parts of your job which you feel you could perform better?’,* *‘Are there any areas for training and development that you consider would assist you to more effectively perform your role?’ etc*.

You should endeavour to discuss areas for improvement in such a way as to show that it is the employee’s performance and not their personality which is under scrutiny. You should assist employees with strategies to assist with continued development and performance in those areas and to agree on timeframes within which this will occur. In raising concerns over an employee’s performance, it is best to do so as objectively as possible, and not in such a way as to seem like a personal attack on the employee.

At all times you should show respect for an employee’s position, but also show your leadership and support. Your role is to encourage continued learning and recommend initiatives for further improvement, while showing appreciation for the efforts that have been made by the employee.

Appraisal forms should be signed and dated by both the employer and the employee as a record of the points discussed and agreed upon. Completion of performance appraisal documentation and can at times be treated as a nuisance. However, in seeking to retain talented employees, it is vital for employers to participate fully in the process and to ensure that matters discussed, including agreed outcomes and training and development needs highlighted are properly recorded and actioned upon.

## After the performance appraisal meeting

It is necessary for employers to ensure that the feedback and outcomes from the performance appraisal are put into practice. This may include implementing training and development for an employee, or reviewing an employee’s technical skills on a regular basis.

A sample Staff Appraisal Sheet is included in the Staff Manual. It is a basic document which provides an example of the kinds of questions employers and employees can consider prior to the performance appraisal meeting. However, it is only intended as an example, and you should make appropriate adjustments to the sheet if there are other matters which are particularly relevant to your Practice or to the employee whose performance is being considered.

# Discrimination, bullying And Harassment

## Overview

In the Staff Manual, the Practice commits itself as being an equal opportunity employer. The underlying principle of equal employment opportunity is the notion of merit, and it is on this basis that the Practice undertakes to make appointments and promotions.

Equal opportunity also means that the Practice must commit to fostering a work environment free from discrimination, bullying and harassment.

The prevention of discrimination, bullying and harassment is important because, as well as the obvious risk of litigation:

### work performance can suffer as a result of these behaviours creating an intimidating and hostile work environment

### the detrimental effects on work output are seldom limited to one person and are often spread across a section or work unit

### service delivery to clients may subsequently be negatively affected

### the health of people subjected to discriminatory behaviours, bullying and harassment may suffer, resulting in increased sick leave or compensation claims as well as personal duress to the individuals concerned

### such behaviours may result in staff resigning. This incurs a loss of the investment made in those people and it may lead to increased recruitment and retraining costs.

## Discrimination

Discrimination in employment is prohibited under the *Human Rights Act 1993* and the *Employment Relations Act 2000*.

Such legislation also applies to the provisions of goods and services. To this extent, you need to be aware that this policy applies equally to the Practice and its employees’ dealings with clients. In other words, both the Practice and individual employees can also be liable for acts of discrimination against clients that the Practice and its employees may deal with in the course of employment.

Generally speaking, discrimination occurs when a person with is treated less favourably than another person is or would be treated in the same or similar circumstances based on a prohibited ground of discrimination (as listed below).

Anti-discrimination legislation prohibits discrimination against someone (either directly or indirectly) on any of the following grounds:

### sex

### marital status

### religious belief

### ethical belief

### colour

### race

### ethnic or national origins

### disability

### age

### political opinion

### employment status

### family status

### sexual orientation.

It is unlawful to discriminate against anyone on the basis of the factors listed above. In the employment context, where an applicant for employment or an employee is qualified for work of any description, it is unlawful for an employer (or someone acting on their behalf) take the following actions by reason of any of the prohibited grounds of discrimination:

### refuse or omit to employ the applicant or

### offer or afford the applicant or the employee less favourable employment terms (including conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer) than are made available to applicants or employees of substantially similar capabilities employed in substantially similar circumstances on work of that description or

### terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be or

### retire the employee, or to require or cause the employee to retire or resign.

The *Human Rights Act 1993* provides certain limited exceptions to the prohibition on discrimination in the employment context. For example, discrimination on the basis of an employee’s or job applicant’s disability is permitted where:

### the employee or applicant would require the aid of special services or facilities to perform the duties of a position satisfactorily, and it is not reasonable to expect the employer to provide those or

### the environment in which the duties are to be performed or the nature of those duties is such that the person could perform those duties only with a risk of harm to that person or to others (including the risk of infecting others with an illness) and it is not reasonable to take that risk.

If you are considering relying on one of these exceptions, it is recommended that you seek legal advice before doing so.

If any of your employees discriminate against a person on the basis of these attributes in the pre-work or work area, or in the provision of goods and services, then the Practice may also be liable for the discrimination, unless it can prove that it took such steps as were reasonably practicable to prevent the employee from doing that discriminatory act (or acts of that description).

It is necessary to ensure that employees have this information fully explained to them when they begin employment. This is the reason why you need to take great care to ensure that all employees are adequately trained about discrimination and harassment laws.

## Ensuring that you do not discriminate against employees or potential employees

The principles of discrimination relate to pre-employment stages, such as advertising and interviewing for applications, as well as to conduct during employment. Further information about discrimination during advertising and interviewing for applications can be found in sections **7** and **8** of this Employer’s Manual.

As the employer you must be careful to ensure that no unlawful discrimination occurs in your workplace. In all your decisions and actions you must ensure that no-one is treated unfavourably on the basis of any of the prohibited grounds listed above.

## Two types of discrimination - direct and indirect

Direct discrimination occurs when a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.

Examples of treating someone less favourably on the basis of an attribute they possess or by an act involving a distinction, exclusion or preference, include:

### judging someone on their political or religious beliefs rather than their work performance

### using stereotypes or assumptions to guide decision-making about a person’s career

### undermining a person’s authority because of their race, gender or sexual preference

### making offensive jokes or comments about another worker’s racial or ethnic background, gender, sexual preference, age, disability or physical appearance or

### denying further training to employees on the basis of impairment.

Indirect discrimination occurs when a requirement is imposed which:

### a person with the attribute does not or is not able to comply

### a higher proportion of people without the attribute comply or are able to comply

### is not reasonable.

It may initially appear fair because the same rules are applied to everyone but a closer look at the effect of the requirement being imposed will show that some people are disproportionately affected by the requirement.

Examples of indirect discrimination:

### height and weight provisions not genuinely necessary for the job - this can exclude a significant proportion of women

### promotion on the basis of seniority - this can mean indirect discrimination against women because many have had time off work to care for children.

Sometimes it is hard to recognise acts of discrimination or decisions that have been based on discriminatory grounds. The following are some examples of discrimination in the workplace that would be considered unlawful under the legislation.

## Discrimination on the basis of age

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| *Glenda is a mother of four who have now all grown up. Glenda has returned to work to fill in some of her spare time. Glenda is 53 years old. After one year of being back at work the boss feels Glenda is getting a little too old for her position despite the fact that all her tasks are completed well and on time. Glenda is given four weeks’ notice and asked to retire.* |

This constitutes discrimination. Employees can bring an age discrimination complaint if they are forced to retire because of their age. It is important to remember however that it is not against the law to end an employee’s employment if they are not performing effectively.

## Discrimination on the basis of sex

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| *Brendan, who is 20 years old, applies for the position of receptionist at ‘JB Accounting and Associates’. The staff partner has never heard or seen a male receptionist in an accounting practice and is a little sceptical as to how his conservative clients will respond to being greeted by a young man. Although Brendan has two years experience working for another professional practice and presents well in the interview, the staff partner is of the opinion that it just won’t work. The position is given to a 17 year old female with no prior experience and average presentation and communication skills.* |

If Brendan was turned down for the position on that basis, it would be direct discrimination on the grounds of sex. Brendan would have been treated unfairly because he is a male. The actions of the staff partner in this example are against the law and Brendan would have a right of action against the staff partner and the Practice.

## Discrimination on the grounds of family status

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| *Mary has applied for a job as administration manager with ‘ABC Accounting Practice’. Mary has a lot of experience in similar positions and worked in the accounting profession for 5 years before taking time off to raise her family. Mary now has two children in primary school and shares the responsibility of caring for the children with her husband. During the interview the employer asks if Mary has any responsibilities that would prevent her fulfilling her job to her highest capacity. Mary says no but at this time mentions her two children and her family and states that she and her husband share the responsibility for their care. There is only one other applicant for the position and the employer notes that the other applicant has no children or other responsibilities. Mary is the more qualified for the job but the employer decides to give it to the other applicant because she assumes that as a mother, Mary must be the primary care giver and it may detract from her work responsibilities.* |

This would constitute discrimination on the basis of parental status. You should also keep in mind that discrimination on the grounds of parental status can include discrimination against someone on the basis that they do not have children.

## Discrimination on the basis of race

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| *Mike is Kiwi, his father is Caucasian and his mother is Maori. Mike has a couple of years experience as a tax accountant and applies for a position with ‘The Tax Specialist’. The Tax Specialist is situated in an area where there is a strong Asian community. Mike is unsuccessful in his application for the position. He is told that he is underqualified and in any event that he ‘doesn’t look like most of the clients so he won’t fit in’.* |

It appears that Mike is not given the job because of two reasons - (1) that he is underqualified, and (2) because of his race. Even if the first reason is true, Mike may still have a case because race is an irrelevant consideration when determining someone’s suitability for a certain position. If Mike can establish that race was the substantial reason why he did not obtain the position, then the employer will have acted unlawfully and both the employing partner and the Practice may be liable.

## Discrimination on the basis of religion

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| *Jane is a Muslim. She has been working at the ‘All Kiwi Practice’ now for 2 months. Every day Jane wears a scarf to work to cover her hair and uses her lunch breaks to attend the local mosque to pray in accordance with her religious beliefs. The Employer is annoyed that Jane’s scarf is not in accordance with the Practice’s clerical staff uniform and the other staff are ostracising her saying that she doesn’t try to fit in and never talks to them during breaks. Because of the disharmony Jane’s arrival has caused among the staff in the workplace, the employer decides to terminate Jane’s employment.* |

This constitutes discrimination on the ground of religious belief. Jane’s headdress in no way constituted a health or safety risk to herself or other employees and her attendance at the nearby mosque during designated breaks causes no disruption to the workplace. Therefore the only reason she was dismissed is because of her religious beliefs.

Employers must be aware of their own personal prejudices when making decisions that would affect an employee’s future. It is important that when making decisions you look closely at the reasons behind these decisions to ensure these reasons are valid and not an exercise of your own personal preferences.

## Discrimination rights

An employee who believes they have been discriminated against has a choice of procedures. They can choose to pursue a personal grievance for discrimination to the Employment Relations Authority under the *Employment Relations Act 2000*, or they can choose to make a complaint to the Human Rights Commission under the *Human Rights Act 1993*.

There is no distinction between direct and indirect discrimination under the legislationand a complainant will not have to demonstrate how someone else without the discriminatory attribute would have been treated in the same or similar circumstances.

## Sexual harassment

The *Human Rights Act 1993* makes sexual harassment unlawful in a range of contexts including in employment, and in relation to making an application for employment. Sexual harassment is also a ground upon which an employee can raise a personal grievance.

Sexual harassment is essentially unwelcome sexual attention or unwelcome conduct of a sexual nature. It encompasses situations where a person is subjected to unsolicited and unwelcome sexual conduct by another person. It may take the form of unwelcome touching or physical contact, remarks with sexual connotations, requests for sexual favours, leering or display of offensive material.

More specifically, in the employment context, sexual harassment happens if the employer or their representative:

### makes a request of an employee for sexual intercourse, sexual contact, or other form of sexual activity which contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment in the employee’s employment (or about the present or future employment status of the employee) or

### uses language (whether written or spoken), visual material, or physical behavior of a sexual nature to subject any other person to behaviour that —

* 1. is unwelcome or offensive to that person
  2. is either repeated, or of such a significant nature, that it has a detrimental effect on that employee's employment, job performance, or job satisfaction.

An employee may also be sexually harassed in their employment if they are subjected to the behaviour outlined above by a co-worker, customer or client of the employer. In those circumstances, the employee may make a complaint about that behaviour to their employer or to a representative of the employer. The employer or their representative must inquire into the facts, and if they are satisfied that the behaviour took place, they must take whatever steps are practicable to prevent any repetition of such a request or of such behaviour. Examples of conduct which could amount to sexual harassment include:

### unwelcome touching, kissing, attempts at sexual intercourse or overt sexual conduct

### sexually explicit conversations or references to sexual activity

### gender based insults, teasing or taunting

### intrusive questions of a sexual nature at a job interview

### proposals of marriage or declarations of love or

### innuendos and crude jokes.

Sexual harassment is not behaviour which is based on mutual attraction, friendship or respect. If the interaction is consensual, welcome and reciprocated, it is not sexual harassment.

## Racial harassment

The *Human Rights Act 1993* also makes racial harassment unlawful in a range of contexts including in employment, and in relation to making an application for employment. Like sexual harassment, racial harassment is a ground upon which an employee can raise a personal grievance.

An employee is racially harassed in their employment if the employee's employer or the employer’s representative uses language (whether written or spoken), or visual material, or physical behaviour that:

### expresses hostility against, or brings into contempt or ridicule, the employee on the ground of the race, colour, or ethnic or national origins of the employee

### is hurtful or offensive to the employee (whether or not that is conveyed to the employer or representative)

### has, either by its nature or through repetition, a detrimental effect on the employee's employment, job performance, or job satisfaction.

## Who is liable for sexual and racial harassment

Someone who harasses another person will be personally liable for that harassment. As with unlawful discrimination, an employer may be vicariously liable for sexual or racial harassment which is committed by its employees or by its agents unless ‘all reasonably practicable steps’ have been taken to prevent that harassment occurring.

Not knowing that an employee has sexually or racially harassed someone will not discharge your liability.

## Bullying

Employers have obligations to ensure the health and safety of employees under the *Health and Safety at Work Act 2015*.

Bullying has the potential to harm the health and safety of employees, and consequently, employers need to take seriously their obligation to minimise the risk of bullying occurring in the workplace.

WorkSafe NZ’s Best Practice Guideline [Preventing and Responding to Bullying at Work](https://worksafe.govt.nz/the-toolshed/tools/bullying-prevention-toolbox/) set out what WorkSafe NZ considers to be best practice in relation to preventing and responding to workplace bullying, and contain practical information and guidance for employers. Guidance for workers is provided in a separate guide *Bullying at Work: Advice for Workers*.

The Guideline defines bullying as where a person (or group of people) is subjected to:

### repeated behaviour

### that is unreasonable

### that can lead to physical or psychological harm (as this creates a risk to health and safety).

This definition is slightly different to those which appear in New Zealand case law, which tend to focus on the motivation behind the bullying behaviour e.g. to gain power, control or dominance over another person, or to cause fear or distress.

Bullying can include direct personal attacks and indirect (task-related) attacks. Some examples of behaviour which, if they occur repeatedly, may amount to bullying include:

### verbally abusing a person

### repeated threats of dismissal or other severe punishment for no reason

### constant ridicule and being put down

### leaving offensive messages on email or the telephone

### sabotaging a person’s work, for example, by deliberately withholding or supplying incorrect information, hiding documents or equipment, not passing on messages and getting a person into trouble in other ways

### maliciously excluding and isolating a person from workplace activities

### persistent and unjustified criticisms, often about petty, irrelevant or insignificant matters

### humiliating a person through gestures, sarcasm, criticism and insults, often in front of customers, management or other workers or

### spreading gossip or false, malicious rumours about a person with an intent to cause the person harm.

In addition, institutional bullying can occur where an organisation’s structures, practices, polices or requirements unreasonably burden staff without concern for their wellbeing, such as setting unrealistic productivity targets for staff, or pressuring staff to work late.

Bullying does not include:

### occasional instances of forgetfulness, rudeness or tactlessness

### setting high performance standards because of quality or safety

### giving constructive feedback or peer review

### differences in opinion or personality clashes that do not escalate into bullying, harassment or violence

### requiring reasonable instructions to be carried out

### reasonable management action taken in a reasonable way by the person’s employer in connection with the person’s employment (e.g. a legitimate disciplinary process)

### a single incident of unreasonable behaviour. Whilst a single incident will not amount to bullying it is still unacceptable (and may nonetheless amount to misconduct and/or escalate).

## Obligations on the Practice

To reduce the risk of the Practice being liable for bullying, sexual or racial harassment, or discrimination perpetuated by its employees or agents, the Practice must ensure so far as is reasonably practicable that its workers are safe and healthy while at work. This means that the Practice must take active precautionary measures to eliminate, or if it is not reasonably practicable, minimise the risk of bullying, sexual and racial harassment, and discrimination occurring. To be able to prove that the Practice met its obligations, it is vital that you develop a strategy to address the possibility of bullying, sexual and racial harassment, and discrimination at the Practice. As part of this strategy, all employees must receive training and become very familiar with what is and is not acceptable at your workplace.

The policy on bullying, sexual or racial harassment, and discrimination included in the Staff Manual is a good start to discharging your obligation as an employer to ensure all workers are safe while they are at work. However by itself, this will not be enough. It is also necessary to provide employees with education and training on bullying, discrimination, and sexual and racial harassment, including what it is, how to recognise it and what to do if you experience such behaviour, or are aware that someone else in the workplace is perpetrating, or being subjected to, such behaviour. For this reason, it is recommended that you officially launch your anti-discrimination and harassment policy at staff meetings. As the employer you should give the policy your full endorsement and emphasise the fact that all employees (including managerial employees) are required to comply with it.

A further means of ensuring that the policy is promoted on an ongoing basis is to periodically remind employees of the policy and provide them with additional copies. The policy should also be displayed on the Practice’s intranet, or notice boards, or other places accessible to employees. You should always provide a copy of the policy to new employees as a standard part of your induction procedure.

To ensure that the policy is widely promoted and regularly updated you should allocate time periods for ongoing training and review of the policy (at least every two years is recommended).

## What to do if you receive a complaint of bullying, sexual or racial harassment or discrimination

As part of your legal responsibility to deal with harassment and discrimination there must be effective and accessible complaint procedures for all employees.

Complaints of bullying, sexual or racial harassment, or discrimination may be extremely varied. They may be against a senior employee who has authority over the complainant or they may involve a co-worker. The allegations may be extremely serious or relatively minor. Complaints may be about a single incident or a series of incidents. The parties may be angry, distressed or anxious. A complex investigation may be required or the matter may be resolved quickly and informally. Because of the variables that can arise in harassment and discrimination cases it is important to offer both internal and external mechanisms for dealing with the complaint.

## Internal complaint procedure

An internal complaint procedure refers to an in-house complaint procedure. In the Staff Manual all staff have been provided with details of procedures to be followed if they have any grievance arising in relation to work. This includes:

### employees choosing to approach the person who is perpetrating the behaviour with a view to discussing their concerns with them and asking them to cease their behaviour

### employees approaching their supervisor to report the matter and to ask for assistance. If employees do not feel comfortable approaching their supervisor, then they may choose to approach another senior employee to report the matter.

The Staff Manual provides that every complaint will be treated seriously. Disciplinary action may be taken against employees who are found to have unlawfully discriminated against, bullied, or harassed, other employees. It is particularly important that the Practice ‘lead by example’ and follow these steps in every case, particularly in the event that a complaint is made against a senior or managerial employee.

It is also important that the Practice ensure that managerial employees and supervisors have been provided with training, not only with respect to their obligations in these areas, but also, in how to deal with a scenario when an employee approaches them with a complaint that they have been discriminated against, harassed or bullied. It is advisable to specifically list such a senior employee or employees within the Practice as contact officer/s.

Managerial employees and supervisors must ensure that:

### if they are approached by an employee about a complaint of discriminatory behaviour, bullying or harassment, that the complaint is treated seriously and that steps are taken as soon as practicable to investigate the complaints and to keep the complainant/victim safe

### employees are treated equitably and are not subjected to unlawful discrimination

### employees who make complaints are not victimised in any way

### the rights of any individual against whom a complaint has been raised to a fair investigation and process are recognised and adhered to.

It is important to remember that bullying, harassment, and discrimination issues can be very difficult and sensitive to deal with. You must make sure that every complaint is handled with impartiality and sensitivity. If you deem it necessary and/or appropriate, seek specific legal advice to assist you in investigating complaints and in dealing with employees who are found to have breached their obligations in these areas.

After the issue has been raised with the senior employee/contact officer it is important to call a meeting with the complainant, so all the allegations can be ascertained. It is important that notes are taken during this interview and the contact officer confirms with the complainant that the notes are accurate.

After the initial interview, a decision needs to be made about whether a formal investigation is appropriate, or whether the employee’s concerns can be addressed informally. Generally, a formal investigation will be appropriate where the allegations are more than minor, and disciplinary action may be contemplated against the alleged perpetrator. A formal investigation is often also required where the facts are unclear and/or disputed (in which case the investigator needs to make clear findings on the facts about what took place).

If you decide that a formal investigation is required, consideration should be given to whether there is a sufficiently neutral senior manager within the Practice to conduct that investigation, or whether an external third party investigator should be used.

You will also need to consider:

### what the Terms of Reference for the investigation will be (i.e. what is the investigator being asked to do)

### who should be interviewed

### what other sources of evidence may be available (e.g. emails between the employees concerned)

### whether it is safe and appropriate for both the complainant and the alleged perpetrator to remain in the workplace while the investigation is conducted.

The alleged perpetrator must be informed of the allegations, and advised that an investigation will be conducted. They must have the opportunity during the investigation to respond to the allegations, and should also be offered the opportunity to have a representative or support person present during that process. It is usual to provide both the complainant and the alleged perpetrator with a copy of the draft investigation report, and give them the opportunity to comment on that before it is finalised.

After investigations have been carried out it is important to consult with the complainant again about the decision reached in the matter, and the proposed solution. It may be that the Practice is satisfied that the conduct complained of did not occur. Alternatively, the Practice may be satisfied that the alleged conduct did occur, and that a disciplinary process should be commenced with the perpetrator as a consequence. In the event the Practice determines that the alleged behaviour is more likely than not to have occurred, it is recommended that the Practice seek information from the complainant as to any further resolution they may be seeking, for example a change in work practices. However, ultimately it is up to the Practice to determine what steps are necessary and appropriate to take.

## External complaints procedure

If the complainant remains unsatisfied with the outcome of the internal process, or if they feel uncomfortable generally about utilising the internal complaints procedure, they may make a formal complaint to the Human Rights Commission (if their allegations relate to discrimination or sexual or racial harassment) or they may raise a personal grievance. An employee may also complain to WorkSafe NZ about bullying.

Employees are encouraged in the Staff Manual to use the internal complaints procedure first. However, if they choose to make a complaint or raise a personal grievance, this is their legislative right, and they should not be threatened or treated unfairly for doing so, or ‘encouraged’ to withdraw their complaint. This will only make things worse.

If the complainant decides to make a complaint to the Human Rights Commission, it is likely that the Commission will convene a mediation to try to resolve the complaint. If the matter is not resolved at mediation, the complainant may take their claim to the Human Rights Review Tribunal for determination.

If the complainant decides to make a complaint to Worksafe NZ, WorkSafe NZ may investigate the complaint and, in extreme cases, could prosecute the Practice and/or the bully concerned for breaching their health and safety obligations. Although to date this has never happened in New Zealand, it has occurred in Victoria Australia under health and safety legislation which has substantially similar obligations as the New Zealand legislation in respect of ensuring the health and safety of workers.

Once you have been notified of the existence of a complaint or a personal grievance it is important that you seek legal advice as to the conduct of the matter. Again, it is vitally important that the complainant is not treated detrimentally or victimised because they have made a complaint. This will only compound the matter and potentially make it worse for the Practice in seeking to defend the claim.

## Enforcing the policy

Any complaints should be investigated and appropriately dealt with. The alleged bully/harasser should not be presumed guilty, and it is equally important that this person is afforded natural justice, just as much as it is to ensure that the complainant’s complaint is properly investigated and treated with sensitivity. Litigation can often be avoided if a complaint is given proper consideration right from the start.

If after investigation it is concluded that an employee has breached the policy, he/she should be cautioned and counselled about their conduct or, if appropriate in the circumstances, a disciplinary process commenced. Where the employee’s conduct is sufficiently serious, or where there is a pattern of inappropriate conduct by the employee, it may be warranted to dismiss the employee. Records of disciplinary action should be maintained.

## Contact details for discrimination complaints

Employees are able to lodge complaint through the Human Rights Commission by telephoning 0800 496 877, emailing [infoline@hrc.co.nz](mailto:infoline@hrc.co.nz), filling out an online complaint form or writing to the Human Rights Commission, PO Box 6751, Auckland, New Zealand.

It has been made clear in the Staff Manual that anyone found guilty of bullying, harassment, or discrimination against a co-worker, client or any other member of the public may be subject to serious disciplinary action. It is the employer’s responsibility to ensure that no bullying, harassment, or discrimination is tolerated.

# GENERAL EMPLOYEE GRIEVANCES

## Introduction to employment relationship problems and personal grievances

For the purposes of this policy, an employment relationship problem includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.

An employment relationship problem may be about any act, omission, situation or decision by the Practice or a co-worker/co-workers, that the aggrieved employee considers to be unfair, inappropriate or unreasonable.

A personal grievance is any grievance that an employee may have against their employer or former employer because of a claim —

### that the employee has been unjustifiably dismissed

### that the employee's employment, or one or more conditions of the employee's employment, has been affected to the employee's disadvantage by some unjustifiable action by the employer

### that the employee has been discriminated against in the employee's employment

### that the employee has been sexually harassed or racially harassed in the employee's employment

### that the employee has been subject to duress in the employee's employment in relation to membership or non-membership of a union or employees organisation

### that the employee’s employer has, in relation to the employee –

#### engaged in adverse conduct for a prohibited health and safety reason or

#### engaged in coercion or inducement in breach of the the Health and Safety at Work Act or

### that the employee's employer has failed to comply with a requirement of Part 6A of the *Employment Relations Act 2000* (this relates to the transfer of employment of employees who mainly provide cleaning or food catering services in a restructuring situation).

If an employee wishes to pursue a personal grievance, they must raise a grievance with the Practice within 90 days beginning with the date of the alleged action giving rise to the grievance, or coming to the notice of the employee, whichever is the later. To raise a personal grievance, an employee does not have to use those words (and, in fact, just using those words is unlikely to be sufficient on their own to raise a valid personal grievance). Instead, an employee is required to raise their complaint with the employer in sufficient detail to enable the employer to understand the complaint and what the employee wants the employer to do to resolve it (i.e. how the complaint may be addressed).

If the employee is outside the 90 day period, and the Practice does not consent to waive the time limit, the employee can apply to the Employment Relations Authority for leave to pursue the grievance on the grounds that the Employee’s delay in raising the grievance was caused by exceptional circumstances.

**Note:** in the case of complaints of discrimination or harassment, employees should be referred to the complaints mechanisms in that policy in the Staff Manual, and complaints in those areas should be addressed in accordance with that policy.

It is in the Practice’s best interests to encourage a productive and responsive working environment. It should aim to ensure that employment relationship problems and grievances that impact on or affect the Practice are resolved in a fair, prompt and considerate manner.

Most employment relationship problems and grievances can be avoided by establishing clear guidelines, policies and procedures with respect to the running of the Practice. Therefore, it is important that you make yourself available to employees to discuss any queries or concerns that they may have in relation to the information contained in the Staff Manual.

All senior members of the Practice are responsible for making themselves available to employees for listening, investigating and resolving individual complaints and problems.

## Procedures for dealing with employee conflict

Direct resolution

If the behaviour of an employee is causing conflict with another employee it is recommended that the aggrieved employee seek to approach the person directly and try to work out a mutual resolution if they feel safe and comfortable doing so. The aggrieved employee should be encouraged to tell the person who they feel is acting in an unfair or inappropriate way why they feel that his or her behaviour is unfair or unacceptable, and request that they alter or refrain from their behaviour.

If the aggrieved employee is uncomfortable approaching the person directly, then they can refer their concern to their supervisor or another senior member of the Practice in accordance with the following paragraphs.

Referral to supervisor or another senior member of the Practice

If the problem remains unresolved, the aggrieved employee should be encouraged to go to their supervisor to seek to resolve the issue.

There are some situations where an aggrieved employee may not want to take a complaint to their supervisor, for example, where concern relates to the supervisor, or where there is a personality conflict. In this case, the aggrieved employee can refer their complaint to another senior member of the Practice.

All complaints taken to a supervisor should be treated seriously and sensitively. All conversations and discussions should take place in a quiet area away from other employees.

It is not always possible for an employee’s concerns to be kept confidential, particularly where an employee discloses conduct of a co-worker which may require a disciplinary investigation. This is because natural justice generally requires that the alleged perpetrator be told who has complained about them, and what the substance of that complaint is, so that they have a fair opportunity to respond to the complaint. You should make it clear to the employee making the complaint that (in almost all cases) you will not be able to keep their identity anonymous (even if they ask you to) if they wish you to take investigate the complaint.

If a supervisor is approached to deal with a complaint, but considers that it would be improper for them to deal with the matter personally (because, for example, they have a particular relationship with the aggrieved employee, or the person the complaint is about), the complaint should be referred to another senior member of the Practice or an external investigator.

The supervisor, external investigator or senior member of the Practice (as the case may be – referred to in the remainder of this policy as ‘supervisor’) should fully discuss the aggrieved employee’s concerns, to get a full understanding of the issues. The supervisor has the responsibility to listen, investigate, evaluate and respond to the aggrieved employee.

It may be necessary for the supervisor to talk to other people involved and to impartially hear their side of the story, before taking any steps to seek to resolve the matter.

Written records of the complaint and the interview processes should be taken for future reference.

Following a full consideration of the matter, the supervisor should offer suggestions as to how the dispute can be resolved. For example, a conflict may be resolved by:

### compromise or

### seeking an apology from the party complained about or

### offering a change of working arrangements, if practicable.

### Mediation and workplace facilitation are often effective tools for discussing and resolving interpersonal conflict in the workplace.

It is always advisable to respond to an aggrieved employee in writing, so that there is a written record that the grievance has been considered and addressed.

If appropriate in a particular case, any disciplinary action against the person complained about should be conducted following the disciplinary guidelines in this Employer’s Manual.

All stages of the grievance process should be documented and file notes provided to the parties involved as appropriate.

Grievance paths beyond the Practice

If the problem cannot be resolved between the parties directly, or with the assistance of the employer, the parties may jointly agree to attend mediation. The parties can agree to engage the services of a private mediator (who will generally charge a fee for their services). Alternatively (and more usually), the parties can agree to use the free mediation services provided by Employment New Zealand (part of the Ministry of Business, Innovation and Employment or MBIE). The mediation services provided by MBIE are covered by statutory confidentiality provisions (in other words, matters discussed at a mediation with an MBIE-appointed mediator cannot be disclosed by either party without both parties’ consent and cannot be relied on in any subsequent litigation).

Further information on the mediation services offered by MBIE (together with contact details for their centres around New Zealand) is available from the following link:

<https://www.employment.govt.nz/resolving-problems/steps-to-resolve/mediation/request-mediation/>.

Where the problem cannot be resolved through mediation, and it is in the nature of a personal grievance, the employee may ask the Employment Relations Authority to determine the problem. This will generally commence with the employee filing a statement of problem in the Employment Relations Authority, setting out the nature of their problem and the remedies which they are seeking. This is a potentially complex area and there are particular requirements which the Practice will need to comply with in filing its reply to the statement of problem and in engaging in the Authority process (including specific timeframes within which your reply must be filed). If you receive a statement of problem from the Employment Relations Authority which has been filed by one of your current or former employees, you should seek specific legal advice on the steps required to respond to it as soon as possible.

## Procedure for dealing with employee/client conflict

Never allow employees to involve themselves in an argument with a client. At all times, employees must be courteous and professional towards clients. The Staff Manual advises employees that if they are involved in a discussion with a client which becomes heated or if they receive a complaint from a client, they should refer the issue to their supervisor. If you become aware that any employee has become involved in an altercation with a client, you should immediately discuss this matter with the employee to obtain clarification as to what has occurred. If appropriate, you may wish to make it clear to him or her that such behaviour is not acceptable and may result in disciplinary action being taken if the incident is serious enough or if certain behaviour re-occurs.

If a problem arises between an employee and a client, you must first speak with the relevant employee directly about the issue and not with other employees. Kindly point out your reasons for concern and ask for suggestions or recommendations as to how the issue can be dealt with.

If you believe it necessary, you may engage the employee and client in a discussion in an attempt to resolve the matter.

# INJURIES AT WORK

The *Health and Safety at Work Act 2015* aims to protect the health, safety and welfare of all workers by imposing obligations on a range of duty-holders.

Under this legislation, the Practice is a person conducting a business or undertaking (PCBU). PCBUs are obliged to ensure (so far as is reasonably practicable) the safety of their own workers (including employees, contractors and others), and other workers whose work is influenced or directed by the PCBU. They must also take steps to ensure that the health and safety of others is not put at risk by the PCBU’s work.

Workers have obligations to take reasonable care for their own health and safety, and to take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons. Workers must also comply, so far as they are reasonably able, with any reasonable instructions given by the Practice relating to health and safety, and cooperate with any reasonable health and safety policies and procedures of the Practice.

## Work health and safety guidelines

In order to ensure that the Practice meets obligations for work health and safety, you must ensure that work health and safety guidelines are set and maintained at all times. Guidelines which are appropriate will depend on the circumstances of your Practice but some key guidelines that are recommended as a minimum are set out below:

### the workplace should be kept clean and tidy and with a minimum of clutter on shelves and floors

### fixing in place furniture such as shelves so that they cannot fall on employees in the event of an earthquake

### work station layouts should be inspected to ensure that employees are not exposed to overuse or strain-related injuries

### all equipment, furniture and electrical appliances should be regularly inspected and any defects or faults reported and actioned

### outlining through training and regular reminders to employees, safe methods of work, for example, safe manual handling of heavy boxes and other office equipment, encouraging clerical/administrative employees to take regular breaks from computer usage etc.

### clearly outlining supervisory and managerial responsibilities in relation to work health and safety

### providing first aid and emergency equipment, and ensuring that staff are trained in relation to emergency procedures and evacuation plans in the event of an emergency such as a fire or earthquake

### putting in place mechanisms to ensure that employees consistently take annual leave each year and that there are processes in place to recognise and deal with serious workplace stress.

It is the Practice’s obligation to ensure that all workers at the workplace understand the work health and safety guidelines that are in place and understand the importance of complying with those guidelines.

The induction process for new workers should include training on work health and safety issues. Once new employees have commenced with the Practice, you should ensure that work health and safety is not simply put to one side. Although professional accounting practices are generally low-risk in respect of potential for injury to employees and others, psychological and overuse-related injuries are commonly sustained in office environments.

Circumstances may change or new equipment or work methods may be introduced which potentially have an impact on work health and safety, and you will need to be aware of this at all times.

**Worker participation**

The Practice must provide reasonable opportunities for their workers to participate effectively in ongoing processes for improvement of health and safety in their work. As part of this, workers should be given the opportunity to provide feedback on training methods to ensure that the quality of the training that is being provided is as high as possible.

The Practice must, so far as is reasonably practicable, engage with workers who carry out work for it, or who are (or are likely to be) directly affected by a matter relating to work health or safety. Engagement is required in relation to the following work health and safety matters:

### when identifying hazards and assessing risks to work health and safety arising from the work carried out or to be carried out as part of the conduct of the business or undertaking

### when making decisions about ways to eliminate or minimise those risks

### when making decisions about the adequacy of facilities for the welfare of workers

### when proposing changes that may affect the health or safety of workers

### when making decisions about the procedures for the following:

#### engaging with workers

#### monitoring the health of workers

#### monitoring the conditions at any workplace under the management or control of the Practice

#### providing information and training for workers

### when making decisions about the procedures (if any) for resolving work health or safety issues at the workplace

### when developing worker participation practices, including when determining work groups

### when carrying out any other activity prescribed by regulations for the purposes of this section.

Engagement is essentially consultation. It requires that:

### relevant information about the matter be shared with workers

### workers be given a reasonable opportunity to express their views, to raise work health or safety issues in relation to the matter, and to contribute to the decision-making process relating to the matter

### the views of workers be taken into account by the Practice

### the workers be advised of the outcome of the engagement in a timely manner.

If the workers are represented by a health and safety representative, the engagement must involve that representative.

The Practice must have practices that provide reasonable opportunities for effective worker participation in improving health and safety in the Practice on an ongoing basis.

*Health and safety representatives*

Subject to the paragraph below, if a worker requests, the Practice must initiate the election of one or more health and safety representatives. Health and safety representatives have a range of functions including representing workers in relation to health and safety and investigating complaints.

However, if the work at the Practice is carried out by less than 20 workers, and is not within the scope of any ‘high risk industry’, the Practice is not required to initiate the election of health and safety representatives. If the Practice decides to refuse a request for the election of a health and safety representative, the Practice must provide the worker with written notice of that decision within a reasonable time.

If a health and safety representative is elected, the Practice must determine at least one work group that comprises all of the workers in the Practice. In order to ensure effective representation of the health and safety interests of all workers, the health and safety representative should be accessible to the workers that he or she represents. Accordingly, the Practice may need to determine more than one work group.

*Health and safety committees*

Subject to the paragraph below, if requested to do so by a health and safety representative, or 5 or more workers, the Practice must decide whether to establish a health and safety committee, within two months of receiving the request. The committee’s roles include facilitating cooperation between the Practice and workers in relation to health and safety, and assisting with the development of health and safety policies and procedures.

However, the Practice is not required to decide whether to establish a health and safety committee if the work of the Practice is carried out by less than 20 workers and is not within the scope of a ‘high risk industry’. If the Practice considers that in the circumstances, it is not required to decide whether to establish a health and safety committee, it must give written notice to that effect within a reasonable time to the worker who made the request.

The Practice may refuse a request to establish a health and safety committee if it is satisfied that existing worker participation practices at the Practice are sufficient. The Practice must give written notice of its decision to those who have an interest in the decision as soon as practicable. In the written notice, the Practice must set out the reasons for the decision and a statement that the workers may raise the decision to refuse the request as an issue to be resolved between the parties. In addition, if a health and safety committee or a health and safety representative makes a recommendation regarding health and safety at the Practice, the Practice must either adopt the recommendation or provide a written statement to the health and safety committee or representative setting out the reasons for not adopting the recommendation. The Practice must also consult with health and safety committees and representatives about health and safety matters, and provide them with resources and paid time to perform their roles.

## What happens if an employee is injured at work?

In certain circumstances, you may have a statutory obligation under legislation to provide notice to WorkSafe NZ if an employee is injured at work or involved in certain types of near miss incidents. Notifiable events include:

### The death of a person

### A notifiable injury or illness, including certain serious injuries requiring immediate treatment and any injury or illness requiring admission to hospital for immediate treatment

### A notifiable incident, being a workplace incident that exposes a person to a serious risk to their health and safety through immediate or imminent exposure to certain events e.g. fire, explosion, gas leak, structural collapse, electric shock.

Every employer is required to maintain a record of notifiable events.

The Practice must report notifiable events to WorkSafe NZ immediately after it becomes aware that the event has occurred. If the Practice gives notice by telephone, it must give details of the incident requested by WorkSafe and if required by WorkSafe, give written notice of the incident within 48 hours of being informed of the requirement. In the event an employee sustains a notifiable injury or illness at work or a notifiable event occurs in the workplace, it is recommended that the Practice obtain prompt legal advice as to the steps it is obliged to take statutorily and as a matter of good practice.

# WORKERS COMPENSATION

## Overview

The Accident Compensation Corporation (‘ACC’) provides no-fault personal injury insurance cover for everyone in New Zealand.

The rights given to employees and workers under ACC cannot be excluded, modified or ‘contracted out of’ by way of private arrangement between employer and employee. Every employer must provide ACC business cover for themselves and their employees.

A personal injury can be physical (including diseases or infections contracted at work) or psychological (arising from a physical injury, certain criminal acts or certain work-related circumstances).

Generally, ACC covers the majority of costs associated with an injured worker’s loss of earnings, and medical and related expenses, including expenses incurred as part of the rehabilitation process. Increasingly, emphasis is being given to the rehabilitative strategies in respect of injured workers, with a view to assisting them to return to work.

## ACC legislation, links and contact details

The relevant legislation is the *Accident Compensation Act 2001*. ACC can be contacted for business inquiries on 0800 222 776, or by post: ACC Business Service Centre, PO Box 795, Wellington 6140. Further information is available on the [ACC website](http://www.acc.co.nz).

# WORK HEALTH AND SAFETY

## Overview

The *Health and Safety at Work Act 2015* places an obligation on PCBUs to ensure their workers’ health and safety at work. It provides general standards for PCBUs to meet in this area, and also allows for prosecutions to occur, and for fines and reparation payments to be ordered, where these standards are not met.

Under the work health and safety legislation PCBUs must take all reasonably practicable steps to ensure the safety of workers who work for the PCBU, while the workers are at work and workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work. This includes taking all reasonably practicable steps to:

### provide and maintain a safe working environment

### provide and maintain safe plant and structures

### provide and maintain safe systems of work

### provide adequate facilities for the welfare of workers

### ensure the safe use, handling and storage of plant, substances and structures

### provide information, training, instruction or supervision necessary to protect persons from risks to their health and safety arising from the Practice’s work; and

### ensure that the health of workers and the conditions of the workplace are monitored for the purpose of preventing injury or illness to workers.

Where the Practice commissions a structure (such as a building or addition to a building), there are additional detailed duties that apply.

The facilities that employers must provide for their employees safety and health include toilets and hand washing facilities, drinking water, first aid facilities, and facilities for employees to have meal breaks in reasonable shelter and comfort. The facilities must be maintained in good working order and be clean, safe and accessible.

A PCBU who has management or control of a workplace must also ensure, so far as is reasonably practicable, that the workplace, means of entry and exit, and anything arising from the workplace are without risks to the health and safety of any person.

Under the Health and Safety at Work (General Risk and Workplace) Regulations 2016, the Practice must ensure that an emergency plan is prepared and implemented in the event of an emergency. The emergency plan must provide for emergency procedures, including evacuation procedures, procedures for notifying emergency services, medical treatment and assistance procedures, and procedures to ensure effective communication between the Practice and the workers in an emergency. The emergency plan must also provide for frequent testing of the emergency procedures, and information, training and instruction in relation to implementing the emergency procedures.

There are also detailed regulations that apply where a building contains asbestos and there is a risk that workers may be exposed to it.

Workers must take reasonable care for their own safety at work, and that no action or omission of theirs at work adversely affects the health and safety of any other person. They must also comply, so far as they are reasonably able, with reasonable instructions, and cooperate with reasonable policies and procedures of the PCBU, relating to health and safety.

‘Officers’ also have duties in relation to the PCBU under the *Health and Safety at Work Act 2015*. Officers are company directors, partners in a partnership, those in comparable positions within other body corporates, unincorporated bodies, and limited partnerships. The definition of an officer also includes any other person occupying a position which allows them to exercise significant influence over the management of the Practice, which means that the Chief Executive (if there is one), and often other members of the senior management team will have duties as an officer. However, an officer is not someone who merely advises or makes recommendations to an officer. Officers at the Practice have a duty to exercise due diligence to ensure that the Practice complies with its duties and obligations under the *Health and Safety at Work Act 2015*. Officers must exercise the care, diligence, and skill that a reasonable officer would exercise in the same circumstances, taking into account the nature of the Practice and the position of the officer and the nature of the responsibilities undertaken by the officer.

Due diligence includes taking the following reasonable steps:

### to acquire, and keep up to date, knowledge of work health and safety matters

### to gain an understanding of the nature of the operations of the Practice and generally of the hazards and risks associated with those operations

### to ensure that the Practice has available for use, and uses, appropriate resources and processes to eliminate or minimize risks to health and safety from work carried out as part of the conduct of the Practice

### to ensure that the Practice has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information

### to ensure that the Practice has, and implements, processes for complying with any duty or obligation of the Practice under the Health and Safety at Work Act 2015

### to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

# PERFORMANCE MANAGEMENT, discipline AND DISMISSAL PROCEDURES

## Purpose

Significant resources are invested in training and selecting employees. Dismissal should be a last resort and any termination of employment should occur in accordance with those obligations imposed by legislation, common law, and under the agreement between the parties. The following steps are designed to minimise the risk that dismissal is unfair or unlawful because it fails to comply with those obligations.

Reference should be made to the employee’s personnel file before undertaking any step in this procedure. In particular, you should familiarise yourself with the employee’s terms and conditions of employment, and the employee’s history of employment with your Practice.

Where the issues relate to unsatisfactory performance, in light of duty of good faith, it would be normal to expect the Practice to have had informal discussions with the employee over the aspects of their performance which are falling below required standards and the steps the employee might take to address those issues before commencing a formal performance process (see paragraph 17.6 below for further information on a suggested formal performance process).

## Unjustified dismissal

The *Employment Relations Act 2000* sets out the ‘test of justification’, which is the test by which the justifiability of a dismissal or other action will be measured by the Employment Relations Authority or Employment Court in the event of a personal grievance claim.

The test is whether the employer's actions, and how the employer acted, were what a ‘fair and reasonable employer’ could have done in all the circumstances at the time the dismissal or action occurred.

There are two main ways that a dismissal can be unjustified. The first is if the employer did not have a sufficiently good reason to dismiss the employee (for example, they dismissed the employee for something minor that should only have resulted in a warning). The second is if the employer failed to follow proper procedure prior to dismissing the employee.

These two aspects are explained separately below in more detail.

Once the legal aspects have been explained, some practical steps are then set out to help you with the process of performance management and/or a disciplinary process and, if necessary, dismissal. These practical steps are intended to assist you to satisfy your legal obligations before a decision is made to dismiss an employee and to provide you with sufficient evidence to defend an unfair dismissal claim, should one be made against you.

## When will a dismissal /other action be unjustified?

### Whether a dismissal or other action is unjustified depends on the circumstances of each case. Generally, the following factors will be considered when determining this question: whether there was a sufficiently good reason for dismissing the employee or taking other action against them e.g. sufficiently serious (or repeat) misconduct, sufficiently poor performance, or a genuine redundancy situation.

### Whether (in the case of poor performance or misconduct) the employee has been given prior warnings, and the opportunity to improve their performance or conduct, prior to dismissal/other action being taken.

### Whether, before dismissing or taking action against the employee, the employer:

#### sufficiently investigated the allegations against the employee (having regard to the resources available to them)

#### raised their concerns with the employee

#### gave the employee a reasonable opportunity to respond to the employer's concerns

#### considered the employee's explanation (if any) in relation to the allegations against the employee.

### Whether the decision to dismiss has been pre-determined, or considered other than with an open mind.

#### Whenever an employer is proposing to make a decision to end an employee’s employment, there is a specific statutory obligation to provide the employee with information relevant to that decision, and an opportunity to comment on that information to their employer, before the decision is made.

The key to satisfying these requirements is open communication with your employees and ensuring that you do not jump to conclusions about an employee’s performance before you give them a chance to tell you their side of the story. Disciplinary process tips are set out below and these are aimed at ensuring that these requirements have been met.

## When will a dismissal be for an invalid reason?

Employment and human rights legislation specifically prohibits termination of employment on any of the prohibited grounds of discrimination.

A termination on any one of these grounds is unlawful and the employee may seek reinstatement and/or compensation. Penalties may also be awarded against the employer.

If you are considering dismissing an employee and any of these reasons may be involved (even if it is not your reason for dismissal but the circumstances may suggest that it could be your reason for dismissal), you should seek legal advice before proceeding with the dismissal.

## Possible reasons for dismissing employees

There are three common types of circumstances in which you may need to dismiss an employee. These are:

### if the employee’s performance is unsatisfactory

### if the employee has been guilty of serious misconduct and/or repeated acts of misconduct or

### if the employee’s position becomes redundant.

There are also a number of less common circumstances, such as ill health, incompatibility and situations where the continuation of the employee’s employment is prevented by external circumstances (e.g. loss of a work visa) in which you may wish to dismiss an employee. These situations can be complex and difficult, and we recommend that legal advice is sought before proceeding.

The same principles apply to the discussions that you should have with an employee in each of these circumstances, but a slightly different approach will be necessary in each case.

## Dismissing an employee for unsatisfactory performance

If you wish to dismiss an employee due to their unsatisfactory performance, you will need to show that the employee has:

### been made aware of your concerns about their performance (including specific examples), and made aware what action may be taken (e.g. warnings and/or dismissal) if their performance does not improve

### been given a clear and objective statement of the standards you require them to meet and the timeframe within which to do so (commonly referred to as a performance improvement plan)

### been given a chance to explain the reasons for their poor performance, and to specify what resources they consider may be required to facilitate improvement of their performance

### been allowed an opportunity to improve their performance (over a reasonable timeframe and with a reasonable level of support, resources, and/or training being offered) after you have discussed it with them.

There is no set rule about the number of warnings that you should give an employee.

However, you should give your employee a reasonable opportunity to improve their performance. As part of this process, it is common to give at least one and more commonly two formal warnings for failing to achieve the required performance standards before dismissing an employee for poor performance. The number of warnings given and timeframe for improvement may also depend on the employee’s level of experience and/or the seniority of the role. Warnings are, in effect, a disciplinary response and a proper disciplinary process must be followed prior to a warning being given for unsatisfactory performance. This should include meeting with the employee and considering any explanation they may give for not meeting the required standards. Any warning should be in writing and should clearly state the employee’s performance shortcomings, and the standards that they are expected to meet. The employee must be informed in advance of the potential for disciplinary consequences (including dismissal) if their performance does not improve.

Discussions held should be clear and focussed enough to ensure that if the employee is eventually dismissed, that dismissal is not unjustified. When discussing poor performance you should keep the following in mind:

### You should be as specific as possible when outlining the aspects of the employee’s performance that are not satisfactory. For example, you should talk about a particular incident that the employee was involved in, the manner in which they dealt with that situation and why that was unsatisfactory. It will not be sufficient to tell an employee that they just do not have a good attitude.

### You need to ask the employee if there is any explanation for what has happened. If they refer you to an incident in which someone else was involved, you should tell them that you will need to follow this up further. For example, if the employee tells you that they were unable to complete a particular task because another employee failed to get all relevant particulars or necessary details, you should follow this up with the other employee and not simply assume that the employee you are meeting with was at fault.

### You should set a reasonable time frame for improvement and clearly state the targets that you expect the employee to meet. These should be objective and measurable. You should take care that any expectations set are reasonable and are achievable. If unreasonable targets are set, then you will not be able to justify the dismissal on the basis that the employee has not met those targets.

### You should offer support to the employee to assist them to improve such as additional training, feedback sessions, counselling, etc.

## Other matters

Dismissal for poor performance should be on notice, or with pay in lieu of notice (if the employment agreement permits). You should ensure that the employee receives their final pay, and payment of any accrued holiday pay.

Steps should be taken to ensure the employee returns all of the Practice’s property in any form (including any confidential information) in their possession.

The Staff Partner or other person responsible for the termination, should complete a Statement of Service - if requested by the employee, copies of which should be retained on the employee’s personnel file.

## Dismissing an employee for misconduct

**What amounts to misconduct?**

Employees must be made aware at the beginning of their employment what is and what is not acceptable conduct at a professional practice. Misconduct is conduct that breaches the employee’s statutory, common law, or contractual obligations to the employer. Misconduct (other than serious misconduct) is usually conduct that may result in a formal warning, to mark the employer’s dissatisfaction with the behaviour, and set out expected behavioural standards for the future. In some circumstances employees can be dismissed for repeated incidents of misconduct (although that usually depends on the similarity between the incidents, and the length of time between them).

Serious misconduct is misconduct that is serious enough to deeply impair or destroy the relationship of trust and confidence between employer and employee. Where a finding of serious misconduct is made, this may result in the employer proceeding straight to summary dismissal (i.e. dismissal without notice), without first issuing any formal warnings.

Some examples of conduct often regarded as serious misconduct are:

### stealing

### reporting to work under the influence of drugs or alcohol

### inflicting or threatening to inflict physical or sexual abuse or harassment

### dishonesty

### failing to disclose a situation of conflict

### a serious breach of confidentiality

### insubordination.

What does and does not amount to misconduct is not listed exhaustively in any legislation. It remains at your discretion to determine the limits and guidelines within which your staff should act and behave. Whether a particular breach of obligations amounts to misconduct or serious misconduct will depend on the nature of the breach, the workplace, the employee’s role and responsibilities, and the surrounding circumstances. As the employer, it is your responsibility to make employees aware of policies and guidelines and ensure proper warning procedures are in place so issues of misconduct can be dealt with early, and termination of employment is not necessarily the only option.

That said, it is not possible for you or the Practice to simply nominate conduct that will be taken to be misconduct. In order to be misconduct, actions must amount to a fundamental breach of the employee’s obligations and your trust and confidence in the employee that is fundamental to the employment relationship.

**Termination for misconduct**

If a finding of serious misconduct or repeat misconduct is made and dismissal is contemplated, certain steps need to be followed to ensure that the dismissal conforms with guidelines and requirements set down by the law.

If an employee is guilty of serious misconduct, it is possible for you to lawfully dismiss that employee because of that serious misconduct, without providing a second chance. There are limits to the cases in which this applies though and you should seek specific advice before dismissing an employee for misconduct, to confirm that the misconduct is serious enough to justify summary dismissal and that you have adequately investigated the incident(s) and otherwise conducted in the process in a procedurally fair manner.

## Procedure

If you think that an employee has committed misconduct or serious misconduct you should take the following steps.

### Ensure that you have adequately investigated the facts to make sure that you understand what appears to have happened. For example, if bank documents appear to show that money has been stolen from the takings, you should firstly confirm with your bank that the documents are accurate. Note that if the alleged conduct may involve potential criminal activity, you should seek specific legal advice before alerting the employee to the matter or carrying out any further investigation which may risk ‘tipping off’ the employee before you have notified the police or other relevant authorities (for example, anti-money laundering regulatory authorities).

### Advise the employee of the concerns that you have. Ideally, the concerns about which you are seeking the employee’s explanation should be communicated to the employee in writing. Whether you do this before or after your initial investigation is likely to depend on the facts of the particular case. Provide the employee with the results of any investigations that you have made to date, together with any other relevant information so that they can review and consider it. Warn the employee that you are treating the issue as a disciplinary matter, and indicate the range of disciplinary outcomes that may result (based on the information you have at that time). In particular, if dismissal is a potential outcome, it is important that you notify the employee that their job may be in jeopardy.

### You may consider it necessary to suspend the employee (on pay) pending the conclusion of the disciplinary process. Suspension may be unjustified unless the employee’s ongoing presence in the workplace risks prejudicing the investigation, or the allegations are particularly serious. You should check the employee’s employment agreement to ensure that you have the contractual right to do so (the template letters of appointment contain an express power to suspend). If you are considering suspension, you should allow the employee an opportunity to comment on any proposal to suspend them (in writing and/or in person) and consider any comment they make before deciding to do so. If you proceed to suspend the employee, you should keep the suspension under ongoing review as the employment investigation and disciplinary process progresses. If, having considered the employee’s comments, you decide to suspend the employee, you should confirm the suspension in writing.

### Invite the employee to a meeting to discuss the allegations and tell him/her that they may have a representative or support person present at the meeting if they wish. A reasonable time before the meeting, you should have provided the employee with any material that is relevant to the allegations and to your investigation of them [see (b) above]. You should have a witness present at the meeting whose role it will be to take detailed notes of the meeting. Alternatively, you may tape the meeting to avoid later problems with establishing what was discussed, although this may inhibit the matters discussed at the meeting. If you decide to record the meeting, let the employee know that you are doing so and explain that it will provide both of you with an accurate record of what is discussed.

### At the meeting, you should address the following steps:

#### ask the employee to respond to the disciplinary concerns raised, and to offer any explanation they may have

#### consider the employee’s responses. If they offer alternative explanations for the events, obtain full details and follow it up further. If necessary, adjourn the meeting to obtain any further information that you may need and then reconvene the meeting to deal with those matters

#### if the responses are inadequate, explain to the employee why you think that they are inadequate

#### if the employee admits the allegations but tells you of some mitigating circumstances, consider these when determining how you are going to deal with the situation

#### if the matter involves misconduct and the employee has admitted wrong doing, it may be possible for you to decide on any disciplinary sanction at the end of the meeting. If the matter is more complicated, requiring further consideration, or if a possible outcome is dismissal, then it would be sensible to adjourn the meeting to enable you to consider the matter further

#### after the meeting, you should send the employee a copy of the notes that were taken of the meeting and ask the employee to let you know by return if they have any comments on the content of the note.

### If, after having considered the employee’s explanation further, you are satisfied that the allegations are substantiated and that the employee’s actions amount to misconduct, it may be appropriate to issue the employee with a written warning. In these circumstances, you should write to the employee to confirm the written warning. You may also wish to consider whether to place a limit on the time that any such warning will remain active on the employee’s file. Let the employee know that a copy of the warning letter will be placed on their personal file. If you decide to issue the employee with a final written warning, you should make clear in the letter which confirms the warning that similar conduct in future could result in the employee’s dismissal.

### If, after considering the employee’s explanation further, you are satisfied that the allegations are substantiated that the employee’s actions amount to serious misconduct, and that the employee’s actions are serious enough to warrant their dismissal, you should advise the employee of the preliminary view that you have reached. Where dismissal is a likely outcome, you should offer the employee a final opportunity to comment on that preliminary view before you proceed to confirm any decision to dismiss the employee. The employee should be given a reasonable opportunity to provide such comment in writing, or in person if they prefer. If the employee wishes to attend a further meeting with you, they should be given an opportunity to have a representative or support person with them at the meeting. Again, you should ask another person to attend the meeting to take a note of any matters discussed.

### Particular matters which you might wish to consider before concluding that dismissal is the appropriate outcome can include whether it might be possible to redeploy the employee to another part of the business as an alternative to dismissal. Of course, whether this is a possibility will depend very much on the facts of the individual case.

### If, having considered the employees further submissions, you conclude that there is no alternative to dismissal, you should confirm this outcome to the employee, including whether the dismissal is to be on notice or without notice (summary dismissal).

### A letter of termination must be given to the employee when dismissed (sample documents are provided in the management forms section of this Manual). It is important that this is **not** prepared before the conclusion of the disciplinary meeting. To do so would show that you have preconceived ideas about the outcome of the interview and are not serious about considering any explanations that the employee could offer.

## Dismissing an employee because their position is redundant

An employee’s position will be redundant if it becomes surplus to requirements. This can happen in circumstances including:

### the job is replaced by technology

### the business is restructured and the job no longer exists or

### you can no longer afford to retain the employee due to economic circumstances.

Redundancy is not related to the performance or behaviour of individual employees. It will also not be a genuine redundancy if you simply think that the employee does not really fit in with your office. You will need to show that no one will be doing the job that the employee is doing. Even if your business has been restructured and you genuinely no longer require certain employees, you will still need to ensure that the process used to implement the redundancy is fair. Primarily, this involves putting to the employee a proposal to disestablish their role, explaining the reasons for that proposal, and providing them with any information relevant to the decision (such as financial information if redundancy is proposed because you cannot afford to retain the employee). The employee should then be formally consulted on the proposal, and their feedback taken into account before any decision is made to disestablish their roles. You do not need to reach agreement with the employee, but you do need to genuinely consider their feedback in good faith. The employee is entitled to seek legal advice and to be represented through this process if they wish. If the decision is to go ahead with the proposal to disestablish the employee’s role, you will also need to consider whether there are any redeployment opportunities for the employee within your Practice.

Under the current law relating to good faith duties, where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee’s employment, the employee is entitled to access information about the proposed decision which is relevant to the continuation of their employment and an opportunity to comment on that information before the decision is made. This applies both to the proposed decision to restructure, and also in relation to any subsequent decisions about redeployment. However, the Practice will not be required to provide access to confidential information, if providing it would involve the unwarranted disclosure of the affairs of an identifiable individual (other than the affected employee) or where it is necessary to protect the commercial position of an employer from being unreasonably prejudiced. However, unless there is an express or implied mutual understanding of secrecy in relation to that information, the Practice may well have to disclose information about other employees or its commercial information. In summary, the disclosure obligations are broad and commercial sensitivities around disclosure may not be enough of a good reason on their own, if an employee offers to agree to keep information confidential. If a situation arises where an employee is requesting information which you consider may be confidential and/or commercially sensitive (for example, the assessments made of other employees for selection purposes, or the CVs of other persons seeking employment to a redeployment opportunity), you should seek specific legal advice.

Where a restructure results in minor changes to a role, and the role remains substantially similar to the employee’s existing role, the employee is generally entitled to be reconfirmed into that role. Where an employee’s existing role has been disestablished and a significantly different role created, the employee will generally be entitled to be redeployed to the new role, if they are capable of performing it, even if this is at a higher or lower level of authority or pay scale. This means that they are generally entitled to preference over any external candidate, or internal non-affected candidate (even if such a candidate would be better suited to the role). In addition, if there are other vacant positions available for them at the Practice that they would be capable of performing, you should offer them those positions (this may need to be through a contestable process if other roles are also proposed to be disestablished). An employee is not obliged to accept any redeployment opportunity if that new role is materially different from their current role.

If there are no other positions available, you should prepare a letter to the employee, explaining why their position has been made redundant and telling them when their employment will cease. In most cases you will be entitled to choose whether you give a certain period of notice, or make a payment in lieu of that notice period (if the employment agreement allows – the template letters of appoint do).

An employee may also be entitled to redundancy compensation if there is a contractual entitlement or if there is an established custom or practice of making redundancy compensation payments to employees (the template letters of appointment do not provide for redundancy compensation to be payable, but you should also consider any policies you may have in place regarding redundancy procedures. If in doubt as to the redundancy compensation payment (if any) to be made and/or the process which should be followed, you should seek specific legal advice.

A sample letter advising an employee of redundancy can be found in the management forms section of this Manual. It is important that this is **not** prepared before the conclusion of any consultation process. To do so would show that you have preconceived ideas about the outcome of the restructuring and are not serious about considering any alternative suggestions that the employee could offer.

## Payments and practical steps to be taken on dismissal

Once you have decided to dismiss an employee, whatever the reason for this, you should provide the employee with written notification that their employment will be terminated. You should also make arrangements for the employee to return any property of the Practice in any form which is in their possession upon termination.

There are sample letters of termination included in the management forms section of this Manual.

You will need to ensure that the employee has been given the appropriate amount of notice of their dismissal, or payment in lieu of that notice period, and that their final pay (including accrued annual holiday pay) is calculated and forwarded to them as soon as possible after their employment ending.

## Notice period

You should ensure that an employee who is dismissed is either given at least their contractual period of notice or, where provided for in the letter of appointment or individual employment agreement, pay in lieu of that notice period.

In the absence of an agreed notice period, an employee may claim ‘reasonable notice’ at common law. To determine what is reasonable notice in the circumstances, factors such as the following are relevant:

### length of time for which the employee is employed

### nature of the employment

### status

### seniority and salary of the position

### employee’s age

### employee’s qualifications and experience

### degree of job mobility

### what the employee gave up to come to the present employer.

The requirement to provide notice or pay in lieu of notice does not apply, however, in cases where an employee has been dismissed summarily for serious misconduct.

## Payment of other entitlements

In addition to notice, an Employer must pay an employee’s outstanding entitlements as soon as possible following their employment coming to an end. This is still the case, even if an employee has been guilty of such serious misconduct that you have made the decision to dismiss them without notice.

You should never prepare an employee’s final pay before you have your final meeting with the employee. You should give the employee an opportunity to answer any allegations against them and should never attend a final meeting with a pre-conception about whether it will be necessary to dismiss the employee or not. Letters of termination and termination pay to employees can be prepared after your discussions with the employee are complete, if you do decide to proceed with the dismissal.

## Ensuring that you have evidence to support your actions

When dealing with problems that may arise with your employees, you should keep in mind that it may be necessary later on to be able to establish what has happened, if an employee raises a personal grievance on the basis that they have been unjustifiably dismissed.

You should get into the habit of making diary notes whenever an issue comes up that concerns an employee’s performance. If it is necessary for you to have a more formal meeting with the employee, take notes which are as detailed as possible, or tape the meeting with the employee’s consent, and provide the employee with a copy of those notes. If possible, you should ask the employee to sign the notes in acknowledgment that they accurately reflect what was discussed at the meeting. In some cases, however, insisting that the employee sign the notes may only inflame the situation and in this case you should simply keep your original notes or tape recording that provided the basis for the typed notes and file them away in case you need them later.

There is no magic in the documents which you should create - just keep in mind that you will need a record of what has happened and that you should be keeping the employee well informed about the processes that are being used.

# RESIGNATION OF EMPLOYEE

## Introduction to resignations

An employee who resigns is required to give the minimum notice period outlined in their letter of appointment or individual employment agreement.

If an employee gives notice of resignation which is longer than the notice period stipulated in their letter of appointment or applicable industrial instrument, you are entitled to terminate their employment earlier than the final date of work given to you by the employee. In order to do this, you would need to tell the employee that you have accepted their resignation, but will not be requiring their services after a specified date. When choosing the earlier date from which you wish their employment to come to an end, you must ensure that you have met the minimum notice requirements in their letter of appointment. However, you should be aware that, in these circumstances, you will be terminating their employment rather than the employee bringing their employment to an end due to their resignation. Therefore, where an employee has given notice to resign, unless there is a strong business reason to counter-serve notice to terminate their employment, it is generally preferable to allow the employee’s resignation to take effect at the end of the (longer) notice period they have given.

If you do not wish the employee to actually work for the notice period, perhaps because you think that they may be disruptive or unproductive now that they have resigned, you could inform the employee that you will be making a payment to them in lieu of notice and that, accordingly, their employment will come to an end on the last day that they actually work with the Practice. You can only make payment in lieu of notice if the employment agreement allows, or otherwise if the employee agrees to accept a payment in lieu. The template letters of appointment contain provisions allowing the practice to make a payment in lieu of notice.

An exit interview should be conducted with any employees who resign to ensure that they are parting company with the Practice on an amicable basis and to determine their reasons for leaving.

Steps should be taken to ensure the employee returns all of the Practice’s property in any form in their possession, communicates any passwords and destroys or hands back copies of any documents relating to the Practice, its business, and/or its clients.

## What if the employee withdraws a resignation?

If an employee resigns and the employer has not yet accepted that resignation, the employee is entitled to withdraw the resignation and continue in employment. If, however, an employer has already accepted the resignation, it is not generally allowable for an employee to then attempt to withdraw their resignation without the employer’s specific agreement for them to do so.

An exception to this is that if an employee has resigned in the heat of the moment, then an employer may be expected to allow the employee a reasonable opportunity to withdraw the resignation after they have cooled off.

## What is a constructive dismissal?

If an employee has been placed in a situation where he or she feels that there is no alternative but to resign, then the resignation in this case may not be considered to be a true resignation but, in substance, may be considered to be equivalent to a dismissal by the employer.

There are three main types of constructive dismissal:

### an employer gives an employee a choice between resigning or being dismissed

### an employer has followed a course of conduct with the intent of causing an employee to resign or

### a breach of duty by the employer causes an employee to resign.

In cases such as this, an employee may raise a personal grievance for unjustified dismissal, on the basis that they did not freely resign but were dismissed by being forced to resign.

# REFERENCES

## Statements of service

As references have the potential to expose employers to liability, any references issued on the Practice letterhead should be approved by the Staff Partner.

All staff should, upon cessation of employment or otherwise on request by the employee, be issued with a [statement of service](#Statement_of_Service) setting out:

### the name of the employee

### the period of the employee’s employment with the Practice

### the position held by the employee at the time of termination

### the address of the location at which the employee performed their duties

### a general statement of the type of duties performed by the employee shortly before termination.

If the Practice is prepared to act as a referee then the Staff Partner should be specified as the relevant contact person.

## Personal references

Partners, professional staff and office managers are entitled to provide personal written references but not on the Practice letterhead and not as a representative of the Practice. Likewise, they may act as referees provided they make it clear to the former employee and anybody who contacts them in respect of the former employee that they are doing so in their personal capacity and not as a representative of the Practice.

**MANAGEMENT**

**FORMS**

# Management forms

## Employment application form

**EMPLOYMENT APPLICATION FORM**

Surname:

First name:

Address:

Telephone No.: \_\_\_\_\_\_\_\_\_\_\_\_\_\_(Work)\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (Home)\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(Mobile)

Qualifications:

(List formal qualifications relevant to this position and attach academic transcript)

Employment history:

Other relevant experience or skills:

Are you legally entitled to work in New Zealand? 🞏 Yes 🞏 No

You will be required to bring your passport with you on your first day of work as evidence of your legal entitlement to work in New Zealand.

What languages, other than English, do you speak, read or write:

Do you have any disability or medical condition that would affect your ability to do this job? (Please give details)

Names, addresses, telephone numbers or two referees from whom confidential reports may be obtained:

**Person 1**

Name:

Address:

Phone No:

Position:

**Person 2**

Name:

Address:

Phone No:

Position:

## Letter to job applicant to comply with NPP1 and NPP2

***[We recommend that if recruiters pass on resumes to your Practice, that they be required to issue similar letters on collection of the relevant resume]***

**[PRACTICE LETTERHEAD]**

**[Date]**

**[Name and address of applicant]**

Dear **[Applicant’s name]**

**RE: Confirmation of Receipt of Application**

Thank you for your Application for Employment.

…

Our privacy policy, available at **[insert details]**, sets out the ways in which we use, disclose and handle your personal information, and describes the ways in which you may access personal information we collect from you. If the information you have provided to us is incomplete or inaccurate in any way, we may not be able to process your Application For Employment.

To assist us in processing your application, we may use the information you have provided to contact previous employers. Please contact us if you do not wish for contact to be made with any of your previous employers.

Yours sincerely

**Staff Partner**

## Reference checklist

**REFERENCE CHECKLIST**

Applicant’s name:

Position:

**Checklist**

**Reference #1**:

(a) Referee’s Name:

(b) Referee’s Position:

(c) Referee’s contact details:

(d) Date contacted:

(e) Comments:

**Reference #2**:

(a) Referee’s Name:

(b) Referee’s Position:

(c) Referee’s contact details:

(d) Date contacted:

(e) Comments:

**Reference #3**:

(a) Referee’s Name:

(b) Referee’s Position:

(c) Referee’s contact details:

(d) Date contacted:

(e) Comments:

**Example questions to ask referee**

1. What duties did the applicant perform whilst employed with your organisation?

2. Was the applicant honest and reliable?

3. What in your opinion are the applicant’s best qualities/skills?

4. Why did the applicant leave your employment?

5. If you were in a position to, would you re-employ the applicant?

6. If you were able to, would you be prepared to provide the applicant with a written reference?

## Staff induction checklist

**STAFF INDUCTION CHECKLIST**

Employee’s name:

Position:

Date commencing employment:

**Checklist**

**Forms to collect from the employee**

1. Certified Copy of qualifications  Yes  No

2. Duplicate letter of appointment/individual employment agreement signed Yes  No

**Forms that need to be given to new employee to complete**

1. Bank Account Details Form  Yes  No

2. Staff Emergency Contact Details  Yes  No

3. Employment Declaration  Yes  No

4. KiwiSaver employee information pack (KS3)  Yes  No

**Staff Orientation**

1. Tour through workplace  Yes  No

2. Introduction to all staff  Yes  No

3. Provide copy of Staff Manual  Yes  No

4. Outline content of:

(a) Fire Drill/Emergency Evacuation Policy  Yes  No

(b) Anti-Discrimination Policy  Yes  No

(c) Sexual Harassment Policy  Yes  No

(d) Work Health and Safety Policy  Yes  No

(e) Email/Internet Policy  Yes  No

(f) Discrimination and Harassment Complaints Procedure  Yes  No

(g) Grievance Procedure  Yes  No

Date:

Staff Partner’s Signature:

Note: This checklist is to be kept on the personnel file of the employee.

## Performance improvement process

**FORM FOR USE IN PERFORMANCE MEETING**

1. Date of meeting: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

2. Subject of meeting: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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3. Employee involved: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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4. Witness present: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

5. Employer’s performance concern: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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6. Employee’s response: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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7. Required performance standards to be met / time frame (if any specified) for improvement:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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Signed as a true and correct record of this meeting by:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Staff Partner

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Witness

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Employee

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

## Example letter to employee advising of potential redundancy

**[PRACTICE LETTERHEAD]**

**[Date]**

Dear

**Re: Operational Issues**

As you may be aware, **[insert practice name]** has recently been considering business costs and the possibility of a business restructure. **[insert reasons for review/proposed restructure – e.g.** ‘In the competitive **[insert industry]** market, it is important that we are in a position to contain the operational costs of the Practice whilst at the same time maintaining efficiency.’**]**

We have identified that the business is not operating as efficiently as possible and, as such, we are looking at restructuring **[the business or the insert name of business unit]** to ensure optimum efficiency is attained.

As a result of this, we need to consider reducing labour costs, including changing the focus of the Practice to ensure our survival in the market, including the option of cutting staff numbers to create greater efficiency gains.

[**insert specifics of the proposal e.g.** ‘we are proposing to disestablish three [insert title of] positions. We have calculated that this would result in savings to the Practice of approximately [**insert amount**]. We attach a copy of the financial analysis that we have undertaken which shows the current financial position of the Practice, and how we expect that financial position would improve if we proceeded with the restructuring proposal. This is commercially sensitive information and you are required to keep this information strictly confidential.]

We are proposing that staff be selected for redundancy on the basis of [**insert objective & measurable selection criteria e.g.** their qualifications, relevant skills, experience and profitability over the past 12 months]. We would like to discuss these issues with you and obtain from you any input you may have. Specifically, you will appreciate that your job may become redundant and we would like your comments on this issue, including any alternative ideas you may have. We would also like your input on the proposed selection criteria. We would prefer to do this in a timely way so that we can make decisions as to the best way forward.

Please let us know if you are available to discuss on **[insert day date and time and place]**. If you need more time to consider your input, please let us know. You are welcome to seek legal advice, and to bring a representative or support person with you to the meeting (and any other meetins during this process), should you wish. If you would like to provide any written feedback, either in advance of, or at that meeting, please feel free to do so.

We want to emphasise that no decision has yet been made and we look forward to obtaining your feedback. We will fully consider any such feedback before a final decision is made.

If you have any questions or if you require any further information to be able to provide your feedback, or require any other assistance, please let us know.

We look forward to meeting with you.

Yours faithfully

**Staff Partner**

## Example letter to employee advising of decision to proceed with redundancy

**[PRACTICE LETTERHEAD]**

**[Date]**

Dear **[Employee’s name]**

**Re: Operational Issues**

Further to our meeting **[insert date]**, we have now had the opportunity to consider your feedback on the restructuring proposal. We appreciate that a proposed organisational restructure is extremely difficult for any potentially affected party, and we greatly appreciate the professional, dignified and open manner in which you have approached this. We thank you again for your participation in the consultation process.

Regrettably, we have decided that it is necessary, taking into account the operational requirements of the business, the skills required, and the future of the Practice, to proceed with the proposal to disestablish your position.

While we have explored the availability of other positions within our organisation, we have not been able to identify any suitable vacancies into which you could be redeployed.

We therefore regret to inform you that you will be made redundant as of **[insert date and time (e.g. close of business) redundancy becomes effective].**

On your final day of employment you will be paid your salary up to that date. You will also be paid the amounts set out in the table below. **[#Amend as appropriate]**

|  |  |  |
| --- | --- | --- |
| Entitlement | Amount | Total |
| Annual leave | **[Number of weeks]** days/weeks | $**[Amount]** |
| Payment in lieu of notice | **[Number of weeks]** weeks | $**[Amount]** |
| **[Redundancy compensation]** | **[Number of weeks]** weeks | $**[Amount]** |
| **Total:** |  | $ |

The amounts above are, in each case, less applicable PAYE. **[#*Where no contractual entitlement to redundancy, but a payment has been made:*** The redundancy compensation payment is a discretionary payment which we would like to make in consideration of your valued service with the Practice.**]**

We will also provide you with a **[OPTIONAL** – personal reference**]** and Statement of Service.

If you would like to discuss this further, please contact me directly.

Yours faithfully

**Staff Partner**

## Example letter to employee with final termination details

**[PRACTICE LETTERHEAD]**

**[Date]**

Dear

**Re: Operational Issues**

Please find enclosed:

(a) a final record of wages;

(c) Statement of Service; and

(d) **[INSERT WHERE APPLICABLE - personal reference]**.

I sincerely thank you for your service and wish you the best of luck with future endeavours.

Yours faithfully

**Staff Partner**

## Example letter to employee terminating employment for misconduct

**[PRACTICE LETTERHEAD]**

**[Date]**

**[Name and address of employee]**

Dear **[Employee’s name]**

**RE: Employment with [Name of practice]**

As you are aware we have raised with you some very serious allegations about your recent conduct, namely:

1. **[List specific allegations made against the employee]**

2. **[List specific allegations made against the employee]**

3. **[List specific allegations made against the employee]**

In our disciplinary meeting with you and **[name of representative/support person]** on **[date/s]** those incidents were discussed in detail, and you [**admitted / denied**] the conduct, and gave the [**explanation / response**] that [**insert**]. We have now had the opportunity to carefully consider those [**explanations/ responses**].

Regrettably, we consider that you have failed to provide us with any reasonable explanation for your actions. Those incidents have caused us to lose trust and confidence in you as an employee, and we have concluded that they amount to serious misconduct. We regret to inform you that a decision has been made to terminate your employment [**summarily / on notice**] as a result of those incidents.

Your final day of work at the Practice will be [**today or insert date**].

[**Today or** **On your final day of work**] we will process and pay to you (to your usual bank account) your final pay less applicable PAYE, comprising all accrued entitlements due to you including salary up to your final day of work and accrued annual leave [**and accrued long service leave (delete if no entitlement)**] [**, together with ‘x’ weeks’ pay in lieu of notice (include only if terminated for misconduct on notice, not if terminating with immediate effect for serious misconduct)**].

If anything in this letter requires further explanation please contact me immediately.

We wish you the best in the future.

Yours sincerely

**Staff Partner**

## Example letter terminating employment for performance/conduct issues

**[PRACTICE LETTERHEAD]**

**[Date]**

**[Name and address of employee]**

Dear **[Employee’s name]**

**RE: Employment with [Name of practice]**

As you are aware we have been conducting a formal performance management process with you over the past **[timeframe to be inserted].** On **[insert dates]** you were given **[a first/second/final]** written warning[**/s**] in relation to your performance shortcomings**.** Unfortunately, after a further period of performance management no **[or]** inadequate improvement has been made to rectify the problems identified, namely:

1. **[List problems that led to the need for counselling sessions - be specific]**

2. **[List problems that led to the need for counselling sessions - be specific]**

3. **[List problems that led to the need for counselling sessions - be specific]**

We have considered your explanation and have taken this into account in deciding your future with the Practice. Regrettably we have come to the conclusion that these explanations are unsatisfactory and a decision has been made to terminate your employment.

In light of the above circumstances your employment with **[Name of practice]** will be terminated as at**[date]**  **[or]** effective immediately with payment in lieu of notice **[if the required notice is not given and the contract entitles you to make payment in lieu]**.

[**Today or** **On your final day of work**] we will process and pay to you (to your usual bank account) your final pay less applicable PAYE, comprising all accrued entitlements due to you including salary up to your final day of work and accrued annual leave [**and accrued long service leave (delete if no entitlement)**] [**, together with ‘x’ weeks’ pay in lieu of notice (include if dismissing immediately and contract entitles you to make payment in lieu)**].

[We will also provide you with a Statement of Service on request.]

If anything in this letter requires further explanation please contact me immediately.

We wish you the best in the future.

Yours sincerely

**Staff Partner**

## Example statement of service

**[PRACTICE LETTERHEAD]**

**STATEMENT OF SERVICE**

**[date]**

To Whom It May Concern

**[Name of employee]** of **[employee’s address]** was employed with **[name of practice]** from **[date of commencement of employment]** to **[date of termination of employment]** in the position of **[employee’s position title]** at our **[location practice where employee worked]** office.

Throughout **[employee’s name]** employment, **[he/she]** performed the following duties:

1. **[List employee’s main duties]**

2. **[List employee’s main duties]**

3. **[List employee’s main duties]**

4. **[List employee’s main duties]**

Yours faithfully

**Staff Partner**