



Do all your Employees have Employment Agreements?

And do they comply?

A recent report from Statistics New Zealand suggests that nearly 1 in 10 employees do not have a written employment agreement. Of those who do have written employment agreements, it's probably fair to say that a proportion of those are not up-to-date. Recent changes to employment law also mean some previously compliant agreements may need revising.

Whether you are an employer or an employee, you should check your employment agreement and make sure it complies with the minimum requirements. If it doesn't, employees may be missing out on entitlements, and employers could be exposing themselves to increased penalties and claims from employees. Directors and senior business managers can now also be held personally accountable.

Minimum requirements

The Employment Relations Act 2000 (ERA) requires that every employee must have an employment agreement and that agreement must be in writing whether it is for a permanent,

fixed term or casual position. The agreement must include the following:

- » Names of the employee and employer
- » A description of the work to be performed by the employee
- » An indication of where the employee will perform the work
- » Any agreed hours of work or, if no hours are agreed, an indication of the arrangements relating to the times the employee is to work
- » The wages or salary payable to the employee, and
- » A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days within which a personal grievance must be raised.

Employers must retain a copy of the employment agreement.

Within the ERA, there are further specific requirements in relation to certain types of clauses. For example, if the agreement includes a trial period clause, there are specific requirements which must be met if it is to be relied on to end employment within 90 days.

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Recent changes

The Employment Standards Bill was enacted earlier this year, with effect from 1 April 2016. It introduced a suite of changes to employment law including some which mean existing employment agreements will need updating. It also toughened the penalties for employers who do not comply with their obligations.

Some of these changes are summarised below. Please see us if you require a more detailed explanation of the changes and what they may mean for you.

Parental leave

Parental leave eligibility was extended to 'primary carers' who can include grandparents, aunts and uncles. Those employees on casual and fixed term agreements are also eligible.

Leave entitlements have been extended, and there is now also the option of agreeing to 'keeping in touch' arrangements. These are where employees can return to work on a limited basis for up to 40 hours (total) during their leave without losing their leave entitlements. This allows employees to keep up-to-date with any training or changes in the workplace, and to maintain their social and professional bonds.

Zero-hour contracts

'Zero-hour contracts' is a colloquial term for employment contracts which require an employee to be available for work, but don't offer any guaranteed hours or compensate the employee for being on-call. Zero-hour contracts are now prohibited.

Where an employer and employee agree the hours that are to be worked, this must be recorded in the employment agreement. Where particular hours are not agreed, the agreement needs to give an indication of the hours.

Employers who want to be able to require employees to be available for extra work must include an 'availability' provision in the employment agreement. This must set out minimum guaranteed hours of work, and any period which the employee is required to be available above the guaranteed hours. Employment agreements cannot contain an availability provision unless the employer has genuine reasons for requiring it and the employee is reasonably compensated for making themselves available.

If the employment agreement doesn't comply with these requirements, the employee cannot be required to work more than the agreed hours and cannot be treated adversely if they refuse to do this.

Deductions from wages

Currently, employers need the express consent of their employee to deduct any amounts from wages (other than PAYE, etc). Employment agreements commonly contain an agreement to this effect so that the employer does not need to obtain consent every time a deduction needs to be made.

Now, even if the employment agreement contains such a clause, an employer must still consult with their employee before making a deduction. There is also a prohibition on making unreasonable deductions from wages, even if the employee consents to them. An example of an unreasonable deduction might be in relation to theft of the employer's property by a customer where the employee had no control over it.

Secondary employment

Employment agreements often contain limitations on an employee's ability to undertake work for other people. These clauses are now subject to a number of limitations.

It's only permissible to include such a clause if the employer has genuine reasons based on reasonable grounds, and those reasons are stated in the employment agreement. Genuine reasons can include:

- » Protecting commercially sensitive information or intellectual property rights, or the employer's reputation, or
- » Preventing a conflict of interest that cannot be managed without such a restriction.

A secondary employment clause can only prohibit or restrict other work to the extent necessary having regard to the reasons set out in the agreement.

For agreements that were entered into before 1 April 2016, employers have until 1 April 2017 to remove or amend clauses in existing agreements which don't comply.

It's important to get it right

The Employment Standards Bill also made other changes which emphasise the importance of employment agreements:

- » Record keeping requirements have been clarified
- » Penalties have increased
- » Employers can be publically named if they fail to meet minimum employment standards, and
- » People other than the employer (for example, directors and senior managers) can be held liable.

Failing to meet minimum standards can result in penalties and infringement notices being issued. It can also have a significant effect, for example, on an employer's ability to dismiss an employee.

Check your agreements

This is a good time for all employers and employees to check their employment agreements to ensure they comply with the minimum standards set out above. Employers may also have policies which may need updating.

If your employment agreement doesn't comply with the new legislation, talk to your employee or employer about amending it to bring it up-to-date. We have experts who can assist. *



Letting your Holiday House

Make sure you know the rules

It's becoming increasingly popular for many New Zealanders to let their holiday houses, or their main home, to short-term visitors. You may be facilitating this yourself, or you could be using a provider such as Airbnb or BookaBach that connects homeowners and visitors.

Whether you are currently letting your property for short-term visitor accommodation, or are considering doing so, we recommend that you give some thought to the following matters.

Council requirements

Your local council regulates short-term visitor accommodation activities, so it's important to check its requirements; these can differ from council to council.

For smaller-scale or infrequent activities, you may only need to notify your local council of your activities.

If you are letting your house on a frequent basis, it's more likely that resource consent will be required.

Do note that making your home available to family and/or friends at no charge, and letting your property long-term, are not activities regulated by your local council.

Contractual matters

If you engage a provider such as Airbnb to connect you with visitors, you should carefully check the terms of your contract. You need to be clear on your rights and obligations, as well as those of your provider.

Bank approval

Your bank may have a security interest in your property. If so, the terms of your mortgage documentation will specify certain activities for which the consent of the bank will be required. One of these potential activities may include the letting of your property for short-term visitor accommodation.

We strongly recommend that you check with your bank as to whether it's happy with the letting of your property in such a manner. It's unlikely that your bank will take issue with such a proposal, but it's prudent to keep it informed.

Insurance

It's always good practice to notify your insurer of your visitor accommodation activities. This will ensure that your insurance policy can be adjusted whilst your property is being let.

Health and safety

If you engage other people to look after the maintenance of your holiday house, it's likely that your holiday house will need to comply with the Health and Safety at Work Act 2015. As someone who is responsible for a 'workplace' you must take all practicable steps to ensure that no workplace hazard causes harm to 'workers' such as gardeners, cleaners and tradespeople.

This legislation is complex, and it's likely you will need some help with understanding your obligations and responsibilities.

It's also important for you identify those parts of your property that may pose a possible hazard to your visitors (such as swimming pools, fireplaces and balconies).

By taking practical steps to address any potential hazards, you can ensure that your visitors have a safe and enjoyable stay.

Tax

There are likely to be tax implications if you're letting out your house. We recommend that you contact your accountant/financial adviser to discuss your tax situation.

The short-term letting of private homes as visitor accommodation can benefit both homeowners and visitors alike. It is, however, important that as homeowners you are aware of, and take steps in respect of, the types of obligations we have highlighted above. If you're unsure, please get in touch with us well before your first visitors arrive. ✨

Why is There Name Suppression in Court?

The issue of name suppression is a vexed one. It is human nature to be curious. Most of us prick up our ears when hearing that someone has been granted name suppression. This article explores the principles behind name suppression and why some people are granted this, and why others are refused.

New Zealand has a long-established principle that our legal system is one of open justice; the general public is entitled to know the identity of those who come before the courts. There are, of course, exceptions; there are many valid reasons why name suppression should be considered. However, in recent years permanent name suppression has become increasingly difficult to obtain.

Grounds for name suppression

Name suppression guidelines are contained in the Criminal Procedure Act 2011. There are various grounds the courts will consider before ordering name suppression. The courts can suppress the identity of the defendant if publication is likely to:

- » Cause extreme hardship to the defendant or a person connected with the defendant
- » Cause suspicion on another person that may cause undue hardship
- » Cause undue hardship to any victim of the offence
- » Create a real risk of prejudice to a fair trial
- » Endanger the safety of any person
- » Lead to the identification of another person whose name is suppressed
- » Prejudice the maintenance of the law, or
- » Prejudice the security or defence of New Zealand.

Interim name suppression is relatively straightforward to obtain. If an arguable case can be made based on one of the factors above, interim name suppression will be granted by the court. An order for permanent name suppression is more difficult.

Permanent name suppression

In a 2014 case,¹ the High Court noted the starting point; that proceedings are held in open court and the media can report on those proceedings.

To override this starting point, someone applying for name suppression must meet one of the criteria listed above.

The test for extreme hardship is not an easy test to meet. In a 2015 case² the Court of Appeal considered a challenge to earlier decisions in respect of name suppression. Mrs Robertson had pleaded guilty and been sentenced in respect of three charges of theft by a person in a special relationship. The victims were a surf lifesaving club, a parent-teacher association and Mrs Robertson's mother.

Name suppression was sought on the grounds that publication would cause extreme hardship to Mrs Robertson, her family and her employer. Medical evidence was submitted to the court.

The lower courts decided there was not sufficient evidence to depart from the usual principle of open justice. Mrs Robertson sought leave to appeal to the Court of Appeal; her application was declined. It was held that 'extreme hardship' required a very high level of hardship. It must be something beyond the usual hardship and embarrassment associated with publication of court proceedings.

Protecting a victim's identity

Name suppression is also regularly granted to protect the identity of victims. In the case of certain types of sexual offending, name suppression of the offender will be automatic in order to protect the victim.

The High Court in Christchurch considered an interesting case in 2015.³ In 1994, Mr X was convicted of sexual offending against two sisters. The names of the offender and the victims were automatically suppressed. The suppression orders remained in force for more than 20 years. In 2015, however, the victims went to the High Court to have name suppression lifted and their names made public. They subsequently sought to have the offender's name identified. They argued his identity was only suppressed back in 1994 to protect them.

The High Court declined to lift the suppression order, stating that 20 years had passed and Mr X had not reoffended. The court considered there would be extreme hardship to Mr X if name suppression was removed.

This case raised an interesting point. The law allows for name suppression to be ordered to protect victims. However, if the victims don't support the suppression, should the suppression be allowed? This is a difficult question.

A fair trial

Another issue that often comes up in name suppression cases is the right to a fair trial. This is a fundamental principle of our legal system. If a name is in the public arena then potential jurors could be influenced by publicity about a case. In these situations, interim name suppression is likely to be granted until there is a verdict.

In short, when charged and summonsed to appear in court, anyone has the option to seek name suppression; however, it is not an easy process. It is only in certain circumstances that the courts will deviate from the principle of open justice. *

1 *Beacon Media Group v Waititi* [2014] NZHC 281

2 *Robertson v New Zealand Police* [2015] NZCA 7

3 *Forsyth v District Court* [2015] NZHC 2567

Holiday Care Disputes Involving Children

Using the Family Dispute Resolution process

In 2014, the government amended the law governing parenting disputes between separated parents. The changes included a requirement, in non-urgent cases, for parents to complete an out-of-court Family Dispute Resolution process (FDR) before they can go to court. As we head into the summer break, how does this regime apply to 'semi-urgent' cases dealing with parenting disputes around Christmas holiday care arrangements?

With Christmas coming up, separated parents inevitably start looking at dividing the time to be spent with their children over the holiday period. Depending on how well (or poorly) those parents can communicate with each other, this can be an area fraught with difficulty. Family lawyers are often asked for assistance. What happens if the dispute is still unresolved? What can the parents do?

Before 2014, the Care of Children Act 2004 gave parents the ability to apply to court to settle disputes about care arrangements. There were essentially no prerequisites under that regime. There was no requirement that you first attend mediation, or otherwise attempt to resolve the dispute yourselves. If you had a qualifying dispute, you could apply.

How FDR works

The changes were introduced to encourage parents to resolve their own disputes away from court. As a result, the current FDR regime was introduced. FDR comprises a two-step process. The first step is for both parents to attend a Parenting Through Separation programme (PTS), which is followed by the second step – mediation.

A dispute over the Christmas holidays won't normally qualify as urgent, which means that FDR is required. The problem is the FDR process takes time. While the delays no doubt differ from region to region, there are anecdotal reports of FDR taking up to six months to complete, or possibly longer. As well, that process doesn't guarantee a resolution. Court proceedings may then be needed, which brings further delays.

Christmas adds pressure

What does this mean for our Christmas scenario? If a dispute arises in, say, October or November, as they invariably do, there's unlikely to be a resolution before the holidays begin.

By Christmas Eve, the parents may only have completed PTS and may still be waiting for a mediation to be scheduled. With no resolution, the result might be that those children do not get to see a parent (and vice versa) for that holiday period.

Arguably the pre-2014 system was better equipped at dealing with semi-urgent disputes such as this. A parent could apply to the court at the first sign of a dispute. That parent could ask that the other parent be given a shortened timeframe within which to respond – say three days. It was then possible to ask a judge to allocate an urgent hearing, thereby enabling the dispute to be resolved in time. While this was not guaranteed all of the time, it was possible.

Plan ahead now

The message for separated parents is to plan ahead. If you don't already have an enforceable Parenting or Custody Order in place, and disputes are likely to arise, engage the FDR process sooner rather than later. Better still, reach agreement with the other parent and have that agreement made into a Parenting Order by the court.

If you wait until a dispute does arise, it's probably too late to get it resolved before Christmas and to let your children enjoy the break seeing both parents. *

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Welsh McCarthy – Hawera
Wilkinson Rodgers – Dunedin
Woodward Chrisp – Gisborne

Postscript

Knowing your credit score

When you're applying for a mortgage, wanting a loan for a car, to rent a flat or you're applying for a credit card there's one item that will rank in your favour – having a good credit history.

But how do you know how you score for creditworthiness?

A new website was launched a few months ago that helps you calculate your credit score. Your score is designed to help indicate to lenders the statistical likelihood of you failing to meet regular payments such as a loan.

The website won't give a credit rating; that's different from a credit score. A credit rating is more complex as lenders need to know a great deal more about your income, assets and so on.

Owned by Dun & Bradstreet, Creditsimple will give you a starter to help you assess your creditworthiness. It also gives you tips and financial advice tools – all for free.

To know more, go to www.creditsimple.co.nz *

New pool fencing law comes into force on 1 January 2017

In late October the government passed a number of changes that will affect swimming pool fencing. The new measures are contained in the Building (Pools) Amendment Bill. The new laws take effect from 1 January 2017.

The main changes are:

- » A compulsory nationwide requirement that all swimming pools will need to be inspected and certified every three years
- » Retailers and manufacturers of swimming pools and spa pools must inform purchasers of their legal obligations for child safety
- » New enforcement tools will be introduced such as notices to fix and also the issue of infringement notices
- » Spa pools and hot tubs will no longer be required to be fenced. They will comply with the new law if access is restricted by having a lockable, child-resistant cover and are at least 760mm above ground
- » The new law also explicitly excludes garden and drainage ponds from having to meet swimming pool fencing requirements
- » It will no longer be required for a pool to be fenced on all four sides if the access of children is adequately excluded. A cliff face or infinity pool feature where children cannot get access will meet the law. It also allows new technologies to be used to ensure gates and doors prevent access, and
- » The new measures also enable, as for lifts and other safety requirements, inspections and certification to be carried out by approved, independently-qualified pool inspectors rather than just council officers. *

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