

Individual Employment Agreement

Explanatory Notes

Preamble

Under the Employment Relations Act 2000 (ERA) every employee employed after 1 October 2000 is required to have a written employment agreement, containing at least certain key terms and conditions. Where the work is not covered by a Collective Employment Agreement (CEA), or where the employee is not a union member, the agreement will be an Individual Employment Agreement (IEA)

The NZMA has developed a sample IEA which may be changed to suit the needs of members, e.g. all reference to “employee” may be replaced with “you” or the “applicant’s name”.

Care needs to be taken if changes are contemplated. No change should be made where that would result in less than the statutory minima being provided, or the removal of compliance issues as per the ERA.

The ERA includes a number of requirements for employment agreements but does not specify a particular format. These requirements are explained below and have been incorporated into the sample agreement.

IEA's must not contain anything that is contrary to law or inconsistent with the Act. Neither party is permitted to contract out of the ERA or any of the other Acts that may apply to the employment relationship.

Offers of Employment, Negotiating an IEA and "Good faith".

Employers must be prepared to consider and respond to changes requested by prospective employees to the terms of the IEA that they have offered. As in any negotiation, there will be trade-offs, no-go areas and limits but remember, if you cannot agree on terms for an agreement you do not have to proceed with the offer of the position if that offer was made conditional upon agreeing terms of employment.

Negotiations must be carried out in "good faith" – being active, constructive, responsive and communicative. An employer must demonstrate through their behaviour and words that any change requested by the employee has been seriously considered to avoid a potential claim of a breach of good faith. Think through the implications and provide an explanation for the decision where a requested change is rejected.

The NZMA has member resources explaining obligations and entitlements under the Act and on the “good faith” concept. They are available to members on request.

We recommend that any offer of employment is made conditional upon the parties concluding and signing an agreement. A reasonable timeframe as to when the offer of employment will expire should be provided. If a satisfactory agreement cannot be reached despite meaningful negotiation, the offer can then be withdrawn.

This should be both advised of verbally and written into a letter of offer that accompanies the proposed IEA. A sample letter of offer is attached ([Appendix A](#)).

The employee is entitled to seek independent advice before signing the IEA and should be allowed reasonable time to do this. Do not ask an employee to sign the agreement immediately.

INTERPRETATION OF IEA MEMBER RESOURCE

Most of the clauses in the sample IEA are self-explanatory. Comment is included below to explain the law and the reasons for particular provisions. Members are welcome to call the NZMA Member Advisory Service for further advice.

Names of Parties

The ERA requires the agreement to record the name of the employee and the employer. The employer's name should be the legal employer of the employee, not a trading name.

Trial Period (Clause 2)

Sample One

From 6 May 2019, only an employer with 19 or fewer employees (at the beginning of the day on which the employment agreement is entered into) may employ a new employee on a trial period for the first 90 calendar days of their employment. Employees employed under a trial period cannot take a claim of unjustified dismissal against the employer if they are dismissed in this time.

To legally implement a trial period for a new employee, the following rules must be met:

- The employee must agree to the trial period.
- The trial period must be in writing and signed by the employee before they commence employment.
- The trial period must not be inconsistent with the terms and conditions of any applicable collective agreement.
- A trial period cannot be offered to an employee who has worked for the employer in the past.

If the employee has a trial period in their employment agreement, they are not able to take a personal grievance for unjustified dismissal if notice of dismissal is given during this period, even though actual dismissal may not be effective until after the period ends. This does not however prevent the employee for taking a personal grievance for discrimination, harassment, disadvantage, or a claim for unpaid wages or holiday pay. The Department of Labour's Mediation Service is still available to these employees during this trial period.

The trial period must be included in the individual employment agreement (IEA). When providing an IEA to a prospective employee, the employer must be prepared to consider and respond to changes requested by prospective employees to the terms of the IEA that they have offered. The employer cannot proceed with the inclusion of the trial period if the employee does not agree with it. However you do not have to proceed with the offer of the position if that offer was made conditional upon agreeing terms of employment.

The employee is entitled to seek independent advice before agreeing to the trial period and signing the IEA, and should be allowed reasonable time to do this. Do not ask an employee to sign the agreement immediately.

You are not legally required to follow a fair process if you are considering dismissing the employee during their trial period. This means you do not need to advise the employee in advance that you are considering dismissal, nor are you required to give reasons for the dismissal.

Case law has highlighted 2 key points in relation to 90 day no fault trial periods.

Firstly, the trial period must be correctly drafted (see wording below), in writing, and signed by the employee prior to starting work. In a recent case, a trial period was found invalid because the employment agreement was signed on the second day of work, and had therefore the employee was not able to be employed on a trial period as they had worked for the employer prior to signing the agreement.

Secondly, whilst the employer is not required to follow the usual processes, the employer must act in good faith towards the employee. At a minimum, this means telling them why they have been dismissed. The employer must also provide the notice specified in the employment agreement.

Sample Two

If your employee does not agree to this no-recourse trial period, or you chose not to use it, you may still wish to include a trial period in the IEA. However, you would be required to follow a fair process if you decide to terminate their employment, as they would legally be able to make a claim for unjustified dismissal against the employer. If the employee on trial is failing to meet job standards, employers must have followed a fair process that provided the employee with the opportunity to improve before dismissal can apply. A process which the employee regards as broadly fair is likely to reduce the odds of a personal grievance on the grounds of disadvantage. A resource has been developed for members on managing performance, and can be requested via the Member Advisory Service.

Work Duties and Location (Clause 3)

IEAs must include a description of the employee's work and where the work is to be performed. We recommend that you develop a job description for this purpose and attach it to the IEA. A job description ensures that job and performance expectations are clearly defined.

Remuneration (Clause 4)

Under the ERA IEAs must have included wages or salary payable to the employee. The payment arrangements stipulated in Clause 4.1 may need to be adjusted to reflect individual arrangements.

Clause 4.2 places an obligation on an employer to conduct an annual review. This is a highly desirable component to any employment relationship and should include an evaluation of job performance, the employee's behaviour and their potential for development. Feedback on an employee's performance should also be given on a regular and more informal basis.

Hours and Days of Work (Clause 5)

An indication of the arrangements relating to the time the employee is to work must be included in an IEA. Provision is made for rostered or fixed hours as appropriate.

CI 5.2 provides an option for dealing with additional hours worked in excess of the stipulated/agreed ordinary hours. Time in lieu is an appropriate entitlement in recognition of those hours or an overtime rate may be negotiated and agreed to. It is not compulsory to provide this entitlement but an incentive is often necessary to encourage employees to work extra hours, particularly if you require the employee to work after hours in an emergency or similar situation.

Availability Provision

If an employer wishes to have the ability to require an employee to perform additional hours of work above their agreed minimum hours, the employment agreement must include an "availability provision" which meets the requirements of the ERA. In particular:

- the employer must have genuine reasons based on reasonable grounds to include a clause requiring an employee to be available for additional hours
- the number of additional hours that the employee is required to be available must be stated in the clause (the employer must have genuine reasons based on reasonable grounds for the number stated), and
- the employee must be paid reasonable compensation for making themselves available for those additional hours (irrespective of whether those hours are actually worked).

An employee is entitled to turn down or refuse to work any hours which are not guaranteed to them in their employment agreement, or which do not fall within an availability provision which meets the requirements set out above.

You will need to make adjustments to this part of the IEA as appropriate.

Leave Provisions (Clause 6)Annual Leave, Sick Leave, Bereavement Leave and Public Holidays

The sample IEA reflects the minimum leave entitlements provided in the Holidays Act 2003. More favourable leave entitlements can be offered as part of the negotiation process and/or approved in advance of the entitlement date.

Many employers find enhanced leave entitlements a cost-effective way of making the employment offer more appealing.

A member resource on the Holidays Act 2003 is available through the NZMA Member Advisory Service. It includes the legal pay calculations needed for calculating pay during periods of leave.

Parental Leave

The IEA simply records the legal entitlement. Contact the NZMA Member Advisory Service for more information if you receive an application for parental leave and are unsure of both parties' rights. A member resource and standard templates have been developed to ensure you do comply with this piece of legislation.

Health and Safety (Clause 7)

This is also a standard provision to have in an IEA. The Member Advisory Service has developed guidelines on this Act to ensure our members' compliance. It will be sent to you upon request.

Information on Services Available for the Resolution of Employment Relation Problems (Clause 11)

All employment agreements must have a plain language explanation of the services available for the resolution of employment relationship problems, including reference to a 90-day period for raising a personal grievance. A suitable format is attached as Schedule B of the sample IEA.

Employment relationship problems include a personal grievance, a dispute about the interpretation, application or operation of any employment agreement, and any other problem relating to or arising out of an employment relationship. It does not include any problem with fixing new terms and conditions of employment.

Redundancy (Clause 12) The Act requires that employers act in good faith when dealing with matters like redundancy. This means that any affected employee is entitled to be informed about any proposed change that will affect their employment and given the opportunity for comment and input before a final decision is made. This sample clause does not allow for any redundancy compensation, but you may wish to include such a provision.

If you are considering making a position redundant we recommend that you contact the Member Advisory Service for a copy of our member resource on this matter.

Business Sale, Transfer and Contracting Out (Clause 13)

The Act requires every employment agreement to contain an 'employee protection provision' which includes a process employers must follow in negotiating with a new employer about certain types of restructuring, the matters to be negotiated with the new employer and the process to be followed in determining redundancy entitlements.

The clause provided is very basic, and is intended to be applied together with the agreement's redundancy provisions (clause 12). It can be made more specific depending on the inclination of individual employers. Contact the Member Advisory Service if you are contemplating making any changes to these provisions.

Notice/Termination Period (Clause 16)

The notice period stipulated in this IEA is two weeks. This can be changed to reflect the needs of yourself, the prospective employee and your business.

Please remember that employers must always have a good cause to terminate an employee's employment but employees are entitled to terminate the relationship at their discretion.

Note - Clause 14.2 (c) can only occur upon giving fourteen days' written notice as per the Holidays Act

Vulnerable Children Act 2014 (Clause 17)

This clause allows employers to conduct a safety check, under the Vulnerable Children Act 2014, for employees who will have contact with children. Refer the NZMA advisory on the Vulnerable Children Act 2014.

Employee Representations (Clause 18)

This clause has been added as a safeguard for employer members where employees may have failed to disclose true and accurate information. It is a tricky area to enforce. Members who find themselves in this situation should seek legal advice before taking such action.

Miscellaneous (Clause 19)

This allows the employer to list any documentation that the employer may wish the employee to comply with, but not to incorporate into the agreement. This can include house rules and policy or procedure manuals.

Acknowledgement (Clause 21)

This clause has also been included as a safeguard to help mitigate the risk of employees making accusations about being induced to enter into the final agreement.

Updated May 2019

APPENDIX A

Sample letter to a prospective employee when there is no relevant collective agreement.

Date

[name]

[address]

Dear [name]

Offer of Employment

I confirm that I am offering you the position of ... starting on ... (*date*) at ... (*time*).

This offer is conditional upon us reaching agreement on the proposed terms of employment as outlined in the attached draft agreement. Please confirm acceptance of the offer as soon as possible.

You are entitled to seek independent advice on the proposed agreement and may wish to discuss it with your family, a union, a lawyer, or someone else you can trust. If you want information on your employment rights you can contact the Ministry of Business, Innovation and Employment's free Infoline on phone 0800 20 90 20 or visit their website at www.dol.govt.nz.

If you wish to clarify anything in the proposal or discuss the terms offered please ring me as soon as possible.

If you accept the proposed terms, please ring me to confirm this before ... (*time*) on ... (*date*). Also, please bring the agreement with you on your first day. We will sign two copies of the agreement so that each of us has a copy.

I look forward to working with you.

Yours sincerely

[Employer]

APPENDIX B

Sample second letter to a prospective employee following further negotiations.

Date

[name]

[address]

Dear [name]

POSITION

Enclosed are the final terms and conditions of the employment offer. Changes reflect our discussions and subsequent agreements.

As advised in my first letter, you are entitled to take independent advice before accepting this employment offer.

This offer will remain open until ... [date]. If we have not heard back from you by this date the offer will be withdrawn.

If there is anything further you wish to clarify in the proposal, please ring me to discuss.

If you accept the proposed terms, please ring me to confirm this before ... (*time*) on ... (*date*).

Please bring the agreement with you on your first day. We will sign two copies of the agreement so that each of us has a copy.

I look forward to working with you.

Yours sincerely

[Employer]