

Trial periods

Information and sample clauses

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.

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 Trial Period

The employee agrees to enter into a trial period pursuant to section 67A of the Employment Relations Act 2000 (and its amendments) as per the following:

- (a) The trial period shall be for ___ days [insert number of days - 90 days or less] and will start at the beginning of the employee's employment;*
- (b) During the trial period the employer may dismiss the employee; and*
- (c) If the employer does dismiss the employee, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*

The employee has been advised of their right to seek independent advice about the implications of this provision prior to agreeing to this trial provision.

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.

Sample Trial Period

- (a) Employment is subject to a trial period of _____. The purpose of that period is to assess the employee's suitability for the position and to provide an opportunity for induction and initial training.*
- (b) The employer will review the employee's progress throughout the trial period and discuss any concerns or shortcomings with the employee. Additional support will be given if necessary, but if in the course of the trial period in the employer's opinion the employee is not making adequate progress or is not suitable for the position (and formal warnings have been given), the employer may terminate the employment on notice as stated below.*
- (c) At the conclusion of the trial period and at the employer's discretion the employer will assess performance to date and will either:
 - (i) Confirm the employee in the position; or*
 - (ii) Extend the trial period for a set period to provide a further opportunity to address shortcomings and/or meet the standards required; or*
 - (iii) Give the employee the opportunity to try an alternative position with or without a further trial period; or**

- (iv) *Where the employee has failed to meet the standard required, having been given sufficient opportunity to address shortcomings, terminate the employment on notice as per the employment agreement.*

Primary Health Care Multi Employer Collective Agreement

The Primary Health Care Multi Employer Collective Agreement (PHC MECA), now allows employers to use trial periods when employing new staff that fall under the coverage of the MECA. Clause 6 of the MECA states:

A new employee may be employed on a trial period in accordance with section 67(a) of the Employment Relations Act 2000. Any trial period requires agreement between the new employee and the employer. Where a trial period is proposed, it shall be specified in the employee's letter of offer, which letter shall also advise the employee of the right to seek independent advice about the implications of this provision prior to agreeing to this trial period.

A sample 'Letter of Offer' as mentioned in this clause is attached as Appendix A. As stated earlier, the employee must agree to the inclusion of the trial period, so whether the trial period is used, is up to negotiation between parties.

Updated May 2019

Need more help?

Contact the NZMA:

Phone | 0800 65 61 61

Email | Robyn Fell: robyn@nzma.org.nz

APPENDIX A — Sample Letter of Offer

(Date)

(Prospective employee's name)

(Address)

(Address)

(Address)

Dear ...

We are pleased to offer you the position of [title], at [practice name and address], commencing on [date].

Select one of the following options:

.....

For practices who are a part to the MECA and are employing NZNO Members:

As you have advised that you are a member of the New Zealand Nurses Organisation (NZNO), you will be employed under the terms and conditions of the Primary Health Care Multi Employer Collective Agreement (PHC MECA). A copy of this agreement is enclosed. Please free to discuss this agreement with the NZNO if you wish. If you accept this offer of employment, you will be bound by the terms and conditions of the PHC MECA.

Your hours of work will be

Your pay rate will be

(Outline any other terms and conditions that are not covered in the MECA)

.....

Or

For practices who are a part to the MECA and are employing non NZNO Members:

This practice is a party to the Primary Health Care Multi Employer Collective Agreement. A copy of that agreement is enclosed. For the first 30 days of your employment, you will be employed under the terms and conditions of the MECA. At that point you can decide whether you wish to join the NZNO and remain on the MECA or whether you wish to move to an Individual Employment Agreement (IEA) which we will need to negotiate. Please note that you are entitled to discuss this offer and to seek advice on the enclosed agreement with your family, a lawyer or someone else you trust.

Your hours of work will be

Your pay rate will be

(Outline any other terms and conditions that are not covered in the MECA)

.....

For practices who are not a party to the MECA or for employees who are not in the coverage clause of the MECA – e.g Practice Managers, Nurse Care Assistants

You will be employed under an Individual Employment Agreement (IEA), two copies of which are enclosed. This offer is conditional upon us reaching agreement on the proposed terms of employment as outlined in the IEA. Please note that you are entitled to discuss this offer and to seek advice on the enclosed proposed agreement with your family, a lawyer or someone else you trust.

The practice is a party to the Primary Health Care Multi Employer Collective Agreement. A copy of that agreement is also enclosed. As you are not a New Zealand Nurses Organisation member (the union) you are not covered by the agreement. If at any time you chose to join the union, you will automatically become covered by that agreement.



We would like your employment to be conditional on a 90 day trial period pursuant to section 67A of the Employment Relations Act 2000 as per the following: *(can only be used for employers with 19 or fewer employees)*.

- (a) The trial period shall be for 90 days and will start at the beginning of the employee's employment;
- (b) During the trial period the employer may dismiss the employee; and
- (c) If the employer does dismiss the employee, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

You may also wish to seek independent advice about the implications of the trial period provision prior to agreeing to it. You can discuss this with your family, a union, a lawyer, or someone else you can trust. If you would like information on your employment rights you can contact the Employment Relations Service's free Infoline on phone 0800 800 863 or visit their website at www.ers.dol.govt.nz.

If you are happy with the proposed terms and wish to accept this offer of employment, please sign the duplicate copy of this letter, *[along with a copy of the IEA] [include this wording only for non union members]* and return it / them by *[date to be inserted – but make sure this is prior to the commencement date inserted above]*. In the event we have not heard from you by that date, this offer will be automatically withdrawn on that date. If you wish to clarify anything in the proposal or discuss the terms offered please contact me as soon as possible.

We look forward to working with you.

Yours sincerely

XXXXXXXXXXXXX
(Your Name)
(Title)

I accept the terms and conditions of employment outlined in this letter of offer:

Signed:
(Employee's name)

Dated: