

## Locum Employment Agreement

### Explanatory Notes

The following notes relate to the Locum Individual Employment Agreement, which has been prepared for use by NZMA members. This sample agreement has been developed with the expectation that it will be used for short term locum appointments.

It is important to note that this agreement is one of employment. Locums can also be engaged as *independent contractors*, rather than as employees. The main difference between the two types of relationships is that an independent contractor will have much greater discretion and freedom from workplace restrictions and controls than would be customary with an employee. An independent contractor would usually be obliged to charge the principal GST, and will be responsible for his/her own tax. An employee will be subject to the PAYE tax regime and industrial legislation such as the Employment Relations Act 2000 (ERA), the Holidays Act 2003, the Parental Leave and Employment Protection Act 1987 etc which only extends to employees (but not to independent contractors).

This NZMA locum employment agreement will not be suitable where the locum is to be engaged as an independent contractor. The NZMA has a locum independent contractor agreement available for use by its members if the locum is to be an independent contractor. More information on the two relationships can be found on the NZMA resource titled “Independent Contractor or Employee”. Please contact your solicitor if you are uncertain as to which agreement is most appropriate in your circumstances.

#### **Offers of Employment and Negotiating an IEA under the ERA**

Employers must be prepared to consider changes requested by prospective employees to the terms of the agreement that they have offered. As in any negotiation, there will be trade-offs, no-go areas and limits. To avoid potential claims of a “take it or leave it” attitude, which does not comply with the Act’s concept of “good faith”, employers must demonstrate through their behaviour and words that the employee’s requested changes are being seriously considered. Employers should be thinking through the implications of requests and providing explanations on their decision, particularly where a change is rejected. The NZMA has a member resource explaining obligations and entitlements under the Act which also discusses “good faith” and is available to members upon request.

The NZMA recommends that any offer of employment be made conditional upon the parties concluding and signing an agreement, and a reasonable timeframe as to when the offer of employment will expire should be provided. The offer can then be withdrawn if there has been no acceptance and a satisfactory agreement cannot be reached. This condition should be both advised of verbally and written into the letter of offer which should accompany the proposed agreement. A sample letter of offer is attached ([Appendix A](#)). Do not ask an employee to sign the agreement immediately. It is crucial to ensure that you have advised the prospective employee and allowed them the time to seek independent advice before signing the agreement.

Several of the clauses in the agreement will now be briefly discussed. Any further explanation of these or any of the other terms should be sought by contacting the NZMA or from your solicitor.

### **Period of the Agreement (Clause 1)**

The period of the agreement should be specified in the individual employment agreement. If the locum is being engaged to cover for a period of leave, then the period of employment will be known with reasonable accuracy, although at least a day or two either side of the employer's absence may need to be allowed to enable the locum to become familiar with the practice and to debrief the practitioner. This would be in effect a fixed term agreement as it is due to expire at a specified date or period. A fixed term agreement is allowed under the ERA where it expires at such a date, specialised event, or conclusion of a specified project.

Before an employer and employee agree that employment will end in such a way, the employer must advise the employee of when or how employment will end and the reasons for employment ending.

If a fixed term agreement is contemplated, we recommend that employers include a clause in the employment agreement saying why a fixed term is needed, how and when the employer will end it, and why the employment is ending in that way.

### **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)**

Agreements must include a description of the employee's work and where the work is to be performed. It is highly desirable that a job description be developed for this purpose and attached to the agreement. A job description ensures that job and performance expectations are clearly defined.

#### **Hours and Days of Work (Clause 4)**

An indication of the arrangements relating to the time the employee is to work must be included in an agreement.

#### **On Call Requirements (Clause 5)**

In completing the on call duty requirements section, reference should be made to any arrangements that are to apply while the locum is on call, even though he/she is not working

at the surgery. Examples are the on call hours, how he/she is to be contacted (eg. by pager), and whether he/she is to have access to the practice's car.

#### **Working Relationships (Clause 6)**

Here, any lines of responsibility that the locum is to have should be specified. Unless the employer doctor is a sole practitioner, it will usually be advisable for one of the other partners in the practice to be assigned responsibility for the locum.

#### **Locum Remuneration (Clause 8)**

The locum might be paid by a fixed salary, or a proportion of fees, or a combination of both. Any expenses should also be referred to under this heading.

Either clause 8 or clause 8A should be struck out, depending on the nature of the payment arrangements between the practice and the locum. If the arrangements in clause 8 (as distinct from 8A) are retained, then care needs to be taken to avoid any ambiguity when specifying the rate or rates of fees to be listed in subclause (a) of the clause. For example, if the locum is to be paid on a sessional basis, it will be inappropriate for a weekly rate to also be specified.

If the arrangements in clause 8A are to apply, then the practice will need to decide whether a guaranteed minimum payment is to be made. If so, the appropriate minimum payment should be inserted in para (1) of clause 8A(a). If not, then that paragraph should be struck out. It will then simply be the percentage rate in para (2) of clause 8A(a) that will apply.

Clause 8 and 8A are example clauses, alternative arrangements can be agreed on.

#### **Locum's Responsibilities (Clause 10)**

The list of responsibilities can, of course, be changed or added to, to suit individual circumstances.

#### **Annual Leave (Clause 11)**

A locum engaged as an employee will be entitled to a minimum of 4 weeks annual leave per year under the Holidays Act 2003. Even where a locum is employed for only a short period he/she will be entitled to paid annual leave proportionate to the period of the employment. If leave has not been taken as at the date of termination of the engagement, the employer must pay the locum an amount corresponding to the untaken leave.

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.

#### **Sick & Bereavement Leave (Clause 12 & 13)**

The sample Locum 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.

For a short term locum who will be employed for less than 6 months, these clauses may have no relevance at all, and could therefore be struck out.

#### **Restraint of Trade (Clause 14)**

This clause is designed to prevent unfair competition after the expiry of the agreement. It reflects the fact that the locum will have access to information about the employer's patients and practice, and that it would usually be unfair for a locum to be able to turn that information to his/her personal advantage by establishing a rival practice or joining another local practice and treating the employment's patients.

Sometimes instead of a restraint of trade clause like that in the sample agreement, the restraint will be based on a geographical limitation. For instance, it might be expressed to prevent the locum from setting up practice within a particular town, or within a defined radius from the employing practice. Such clauses are not always enforceable. Much depends on how reasonable they are in the particular circumstances. Because the circumstances of medical practices differ, any practice which prefers to opt for such a clause would be best advised to consult its own solicitor with a view to getting a "tailor-made" clause for its agreements.

#### **Vulnerable Children Act 2014 (Clause 16)**

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.

#### **Business Sale, Transfer and Contracting Out (Clause 17)**

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, 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.

#### **Information on Services Available for the Resolution of Employment Relation Problems (Clause 18)**

Employers are required to 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 written into all employment agreements.

An employment relationship problem includes 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, but does not include any problem with fixing new terms and conditions of employment. Employment agreements may include such terms and conditions as the employer and employee think fit.

A sample of a plain language explanation of services available for problem resolution has been written and attached as Schedule A to the Agreement. If required employers can also develop further internal processes within their business which employees and employers would be required to follow where an employment problem arises.

### **General**

The clauses in the sample agreement are not immutable. They can, and should, be changed to meet the particular needs of the practice. For example, the clauses which provide for monthly payments can easily be changed to refer to fortnightly payments, if that better suits the parties. However, some minimum legal rights cannot be contracted out of by the parties, such as annual leave and special leave, employment relationship problems procedure, etc.

For ease of reference, practices should also consider including a list of useful telephone numbers as an annex to the agreement. These could include the telephone numbers and addresses of the practice partners, the practice manager, the chemist and preferred specialists.

### **Application to non-locum medical practitioners**

Locums are generally regarded as temporary engagements. This agreement may be suitable for use for non-locum medical practitioners, and if such use is intended then comments such as those in clause 1 referring to expectations of permanent employment should be deleted. The NZMA Member Advisory Service also has a sample General Practitioner individual employment agreement available to members on request.

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## **Need more help?**

**Contact the NZMA:**

**Phone** | 0800 65 61 61

**Email** | Robyn Fell: [robyn@nzma.org.nz](mailto:robyn@nzma.org.nz)

## APPENDIX A

### Example of a letter from an employer to a prospective employee when there is no relevant collective agreement.

Date

[name]  
[address]

Dear [name]

#### POSITION

I confirm that I am offering you the above job starting [date] at [time] conditional upon us reaching agreement on the proposed terms of employment as outlined in the attached draft agreement. Confirmation of acceptance must be received by [date].

You are entitled to discuss this proposal with your family, a union, a lawyer, or someone else you can trust. If you want some 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](http://www.dol.govt.nz).

If you disagree with, do not understand, or wish to clarify anything in the proposal, please ring me to discuss.

If you are happy with the proposal, please ring me to confirm. Can you please do this by 3:00 p.m. on [date]. Also, can you please bring the agreement with you on your first day. We will each need to sign two copies of the agreement so that each of us can keep a copy.

I look forward to working with you.

Yours sincerely

[Employer]

## **APPENDIX B**

### **Example of a second letter from an employer 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.

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

You are entitled to discuss this proposal with your family, a union, a lawyer, or someone else you can trust. If you want some information on your employment rights, you can contact the Employment Relations Service's free information and advice service, Employment Relations Infoline (phone: 0800 800 863, website: [www.ers.dol.govt.nz](http://www.ers.dol.govt.nz)).

If you disagree with, do not understand, or wish to clarify anything in the proposal, please ring me to discuss.

If you are happy with the proposals, please ring me to confirm. Also, can you please bring the agreement with you on your first day. We will each need to sign two copies of the agreement so that each of us can keep a copy.

I look forward to working with you.

Yours sincerely

[Employer]