

employment types - permanent, casual & fixed term

There are many different types of employment relationships that may exist between an employer and employee. Employers should take the time to understand them and the entitlements of different types of employees, as these do vary. This guide outlines some of the key differences between the different employment types.

PLEASE NOTE

Restaurant Association members are strongly advised to seek guidance from the employment team on 0800 737 827.

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There are many different types of employment relationships that may exist between an employer and employee. Employers should take the time to understand them and the entitlements of employees, as these do vary between casual employees, fixed term employees and permanent (part-time and full-time) employees.

This guide outlines some of the key differences between the different employment types.

Permanent (part-time and full-time) employment

Permanent employees are the most common type of employee. Permanent employees have a genuine on-going expectation of employment and employment will continue until the employee resigns or the employment relationship is terminated in accordance with the employment agreement. They may be hourly wage earners, or on a salary, full-time or part-time.

There is no legal definition of full time and part time employment, but 30 - 40 hours per week is usually considered full time employment.

Permanent employees who meet certain criteria qualify for employment entitlements such as parental leave, sick leave and bereavement leave. There may be small differences in entitlements between full-time or part-time employees because of their work patterns, but in general these are the same for both types.

Employment entitlements for permanent employees include:

- **Annual leave:**

On each anniversary of their employment start date an employee is entitled to annual leave. The minimum entitlement is four weeks of paid annual holidays. For example, an employee who works three days per week will become entitled to 12

days annual holidays after 12 months continuous employment (three days per week, $3 \times 4 = 12$).

- **Sick leave:**

There is a minimum sick leave entitlement of five days per year (after continuous employment of 6 months). For part-time employees this entitlement is NOT pro-rated.

- **Bereavement Leave:**

Permanent employees receive a bereavement leave entitlement of up to 3 days for a bereavement of a close family member, or 1 day for any other person for which the employer recognises that the employee has suffered a bereavement.

Bereavement leave is not pro-rated for part-time employees, rather bereavement leave is available to all permanent employees (after continuous employment of 6 months) and upon each bereavement.

As outlined above, part-time employees are entitled to all of the employment benefits available to full-time staff – including alternative holidays (days in lieu) as a result of working on a public holiday which falls on an otherwise working day, parental leave, sick and bereavement leave. Part-time employees are also entitled to access the personal grievance and disputes provisions that the Employment Relations Act contains.

Note that new employees who are subject to a trial period are still considered to be permanent employees – i.e. the trial period does not make them fixed term employees.

Fixed term employment

A fixed term agreement is an employment agreement that is offered for a specific period of time. Section 66 of the Employment Relations Act 2000 allows an employer and employee to agree to employment ending: at the close of a specified date or period; on the occurrence of a specified event; or at the conclusion of a specified project.

When entering into a fixed term arrangement, the employer must have genuine reasons based on reasonable grounds for the fixed term. A common reason is to cover the

absence of a permanent employee for an extended period of time (such as parental leave). It is important to note that a fixed term agreement cannot be used for a trial period in order to establish the suitability of an employee for permanent employment, nor is it a genuine reason for an employee to be on a fixed term arrangement because their work visa will expire on a particular date.

Fixed term employment comes to an end at the completion of the fixed term, and this does not constitute a dismissal or a redundancy situation. The employer must advise the employee of when or how employment will end, and the reason it will end that way. This must be recorded in the employment agreement.

If the fixed term ends on a date, the end date needs to be identifiable and linked to the reason for the fixed term – that is, there needs to be a genuine reason why the fixed term employment ends on that particular date and not some other date. In reality the reasons for a fixed term are often more likely to end because of an event or project rather than on a particular date.

Depending upon the length of the fixed term, employees may become entitled to be paid for public holidays not worked (if they fall on an otherwise working day), sick and bereavement leave, and annual leave. Sick leave and bereavement leave entitlements will arise after six months' continuous employment (or at least an average of 10 hours per week over six months and no less than one hour a week or 40 hours per month over six months).

The consequences of not having a genuine reason for a fixed term agreement, or a fixed term clause in the employment agreement that is not compliant, is that an employee may elect to treat the fixed term as being of no effect. This means that the agreement would then become a permanent employment agreement (for an indefinite duration) but the validity of the agreement is not otherwise affected.

Fixed term employees can access the personal grievance and disputes procedures contained in the Employment Relations Act.

Casual employment

Casual employment can be defined as where an employee is employed when, and if, needed, and where there is no particular expectation of continuing employment.

Some hospitality businesses do legitimately have a selection of casual employees, although there is often confusion over the differences between part-time employees and casuals. Casuals usually form part of a group of employees upon which the employer can call, on an "as and when required" basis – for instance to help out on a busy night, to assist at a function, or to fill in for a sick employee.

A casual employee can accept or reject the offer of employment. If an employee accepts an offer, each time the employee works it will be a separate engagement and a separate fixed period of employment.

As true casuals have no ordinary working days, and their employment is not continuous, they typically have no entitlement to service-related benefits such as sick leave, bereavement leave or parental leave, or to any additional payment (alternative holiday / day in lieu) for working on public holidays.

They will not become entitled to four weeks' annual holiday, but the employer is required to pay 8% of the employee's gross earnings at the completion of each work engagement in recognition of their entitlement to annual leave (this is known as 'pay as you go'). It is important that this amount is clearly indicated as a separate payment on their pay slip.

Casual employment must be closely reviewed and monitored. Where 'casual' employees are being used regularly each week, or on certain days of the week, it is likely that their status has changed to be a permanent part-time worker. If that is the case, employers need to be aware that their entitlement to holidays and leave will also have changed. This can cause payment and entitlement problems, so it is important to take advice before engaging casual labour.

Casual employees are still defined as employees for the purposes of the Employment Relations Act and as such have access to the personal grievance and disputes provisions that Act contains.

Contractors

Contractors are NOT employees, and do not fall within the definition of the Employment Relations Act. Therefore, they are not entitled to benefits provided for under the Holidays Act, Parental Leave and Employment Protection Act, Minimum Wage Act etc.

Contractors are often used for short-term, stand-alone projects, such as painting buildings, providing cafeteria services or cleaning services. As a general rule contractors should be providing an ancillary service, as opposed to one that is integral to the particular business.

If it is difficult to assess whether someone is an employee or a contractor, some of the things to look at include:

- Is there any written agreement or correspondence that shows your intention?
- Who makes the tax payments to the Inland Revenue Department?
- Who provides the equipment?
- Who controls how and when the work is done?
- Who has the power to hire other people to do the work?

There has been a large amount of litigation over whether an individual contractor under a contract for services is, in reality, an employee and the Restaurant Association would consider that it is unlikely many hospitality businesses would legitimately have a need for this type of relationship for their permanent workers.

If you have any questions about your employees, or which type they should be, please give us a call.