Employment Law Post Covid-19

How can we employ innovatively?

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Post Covid-19 requires a fresh approach to employment law and making it work for your business.

This article covers:

- New employees - variable recruitment practices:
  - casual and fixed term employment arrangements
  - labour hire arrangements
- Temporary variation consultation: achieving flexibility with existing employees
- Transformative technology: the good faith requirement to communicate and consult with employees
- A note on minimum guaranteed hours

Taking a fresh approach allows your business to potentially reduce costs and have greater flexibility while considering the associated risks with these approaches.

Many of our members have enquired about employing more "casuals" instead of offering permanent employment and as a means of navigating an ongoing environment of uncertainty. Employing casuals correctly can allow the employer and employee some flexibility, however it is important to understand the definition of a casual and what other options may be available too.

New employees: variable recruitment practices

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 vary between casual employees, fixed term employees and permanent (part-time and full-time) employees.

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 ended, per the employment agreement.

By contrast, it is worth exploring the use of casual employees, fixed-term employees, or labour hire arrangements that do not have an on-going expectation to employment due to the present market uncertainty and potential flexibility it offers employers. These options are not without legal risk though.

Casual and fixed term employment arrangements

a. Casual Employment

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

Some hospitality businesses do legitimately have a choice 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 on a busy night, at a function, or to fill in for a sick employee.

A casual employee can accept or reject each 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. We would recommend that a casual employment agreement is signed for the first engagement and prior to the individual starting any form of work for the business. The engagement sheet attached to our Restaurant Association Casual Employment Agreement template should be completed for each period of engagement to ensure correct record keeping, and prior to the employee starting any work.

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, however, they would be entitled to payment of time and a half for any public holiday worked.

They will not become entitled to four weeks' annual holiday, but the employer must pay 8% of the employee's gross earnings at the completion of each pay period in recognition of their entitlement to annual leave (this is known as 'pay as you go'). It is important that this amount is clearly shown 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, this does not amount to truly intermittent and irregular employment, and 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 2000, and as such, have access to the personal grievance and disputes provisions that Act has.

An innovative approach for an employer is to create a large pool of employees that it can call on truly intermittently and irregularly, if it is clear after every brief period of engagement that the employee has no on-going expectation to work for you again. So, it is best not to say things like "we will see you in a few weeks' time." Bearing in mind that the true casual employee can turn down any work offered and may choose to take on a more permanent role elsewhere at any time. It is worth considering the investment that you are also potentially making in a casual employee with any training supplied and whether that person would be more valuable to you as a permanent employee.

b. Fixed Term Employment

A fixed term agreement is an employment agreement that is offered for a specific period. 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 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 (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 unless they are on a working holiday scheme visa and unable to accept permanent employment.

Fixed term employment ends at the completion of the fixed term, and this is not a dismissal or a redundancy situation. The employer must tell 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 the fixed term employment ends on that date and not some other date. 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. There is an exception for holiday pay to be paid on a 'pay as you go' basis at 8% of the employee's gross earnings if the employee's employment will last less than a year. It is important that this amount is clearly shown as a separate payment on their pay slip.

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.

Other examples where a fixed term arrangement may be permissible within the hospitality industry might be where it is for a promotional period of a particular brand or product i.e. a new cuisine or product launch, within a winery where the harvesting season runs for a certain period of time with specified start and end dates, where particular skills are required for a start-up business, an administration project, or special event, such as a festival.

c. A side note: independent 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, supplying cafeteria services or cleaning services.

Contractors should be supplying a supplementary service, as opposed to one that is integral to the business.

There has been a large amount of litigation over whether an individual contractor under a contract for services is 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.

Labour hire arrangements

Labour-hire arrangements could be another possibility. However, the recent Employment Relations (Triangular Employment) Amendment Act 2019 ensures that the controlling entity, along with the employer (the business hiring the labour), will also have responsibility for the welfare of workers under their control.

Triangular employment is where someone is employed by one employer (the agency) but is working under the direction or control of another business or organisation (the controlling third party employer) for their work. This is common under a labour for hire model or employment via a recruitment agency.

Essentially, since June 2020, employees in a 'triangular employment' situation have been able to apply to the Employment Relations Authority (ERA) to add a third party (the employer hiring the labour) to a personal grievance - if it's alleged that the third party employer has caused or contributed to any mistreatment of the employee.

In the hospitality sector, in particular, we may see increasing use of Labour Hire arrangements as the sector changes and adapts. Care is needed for labour arrangements across multiple businesses with the same owner, as each permanent employee must have a designated primary place of work shown on their employment agreements.

Type of minimum wage	Per hour	8-hour day	40-hour week	80-hourfortnight
Adult	$18.90	$151.20	$756.00	$1512.00
Starting-out	$15.12	$120.96	$604.80	$1209.60
Training	$15.12	$120.96	$604.80	$1209.60

Recruitment – refocussing the lens

Currently, our recruitment lens is refocussed on employing non-immigrant workers, individuals from other sectors made redundant with transferrable skills, and graduates together with training-based employment with varying wage rates.

Immigration policy focus: hiring New Zealanders

Looking to the future, recruitment needs of your business may require an adjustment given Immigration New Zealand's (INZ) policy focus is presently based on hiring New Zealand citizens and permanent residents.

We acknowledge our sector may need further initiatives introduced to encourage local labour flow into hospitality at all levels. Due to widespread redundancies, we are starting to see potential employees from different sectors with applicable and transferable skills show interest in employment opportunities in other industries. This is an opportunity to show the fulfilling, vibrant, wonderful employment opportunities our sector offers, including a chance to involve more New Zealanders in the hospitality industry.

Given these factors, we suspect there may be a growing pool of candidates that you may wish to consider moving forward, such as graduates unable to find work in their study specialisation and individuals moving from other sectors with transferrable skills. Due to the changing workforce, employing broadly and differently may help with existing recruitment challenges.

Varying wage rates

To reduce wage costs, it is worth considering hiring individuals falling within certain categories and/or supplying a programme of training-based employment. It is worth refreshing on hiring employees on a starting-out wage, or training wage, if they meet the criteria.

Current Wage Rates

The current minimum wage rates (before tax), as at 1 April 2020 are listed on the table above and apply to employees aged 16 years or over:

Starting-Out Workers

- Employees aged 16 or 17 years who have not yet completed six months of continuous employment with their current employer.
- Employees aged 18 or 19 years old who have been paid a specified Ministry of Social Development benefit for six months or more, and who have not yet completed six months continuous employment with any employer since they started being paid a benefit. Once they have completed six months continuous employment with a single employer, they will no longer be a starting-out worker, and must be paid at least the adult minimum wage rate.
- Employees aged 16 to 19 years old who are required by their employment agreement to undertake industry training for at least 40 credits a year to become qualified.

If an employee is supervising or training other workers, then the starting-out minimum wage does not apply, and they must be paid at least the adult minimum wage.

Training Minimum Wage

- This applies to employees aged 20 or over who are required by their employment agreements to undertake at least 60 credits a year of a recognised industry training programme to become qualified.

Temporary variation consultation: ensuring flexibility with existing employees

Due to the continuing economic impacts of COVID-19 and any restrictions or changes to any applicable Alert levels, employers are seeking increased flexibility from their employees, in terms of hours and pay, with a view to putting off having to implement wider-scale (and permanent) redundancies.

However, this does not allow Employers to avoid their obligations to pay normal wages or salary and supply agreed minimum hours.

A process of a **proposed temporary variation** may be an option for you to consider in the interests of making best efforts to keep employees, and ensuring business viability, over a defined period.

Factors to consider are the immediate impact to your business due to Covid-19, what you should do about your employees in relation to each alert level and whether operating is a workable possibility at varying levels. This could include negotiating some agreed temporary changes about how employees go about their work, how much work there is, and how much your employees will be paid for it.

Please click here to read this **Temporary Variation Guide** and refer to the templates included in the second half of this Guide

A full restructure may also be a last resort possibility, if you are proposing potential disestablishment of roles, or organisational change, by way of redeploying employees to other roles that are materially different from the current roles within the business. Please click here for more information on this.

A note on Minimum guaranteed hours

Any agreed hours of work must be in the employment agreement. This includes agreement on any or all of the following:

- the number of hours
- the start and finish times
- or the days of the week the employee will work.

When offering employment to your employees it is important that the employee clearly understands what they

are being offered as a minimum number of hours work per week. The employer must supply these hours. The employee is under no obligation to agree to work more hours beyond what is agreed to. While there are significant pressures on businesses to manage staff costs, it is tempting to have a small number of minimum guaranteed hours contained in an employment agreement. However, you also wish to keep competent staff, and with this approach, there is a risk that they may go elsewhere where there is a higher number of guaranteed hours.

Additionally, over time, there may be an established period of work where an employee who has been continually working more than their guaranteed hours, may be able to claim that this is now their regular work pattern when it comes to any proposed variation.

Transformative technology: the good faith requirement to communicate and consult with employees

Where employees are not at work due to a lockdown period, while a business is closed for a period, or the more unlikely scenario in hospitality, where an employee is working from home, it is more important than ever to continue to communicate and consult with your employees. Even when employees are at work, technology does help meet the requirement of good faith to communicate and supplies a paper trail of discussions. Meeting an employee in person is preferable in particular employment processes such as disciplinary, restructuring, performance management and medical capability and potentially others but, it is not always possible to do so (it requires good reason to not meet with an employee in person for example due to a government ordered lockdown). However, outside of these employment processes there may be other matters that you want to communicate to your employees and technology gives you an extra tool to make sure you can fulfil your obligations to your employees.

There are many platforms available, to name a few, Microsoft Teams, Zoom and Facebook Workplace.

These platforms can help to get work done and ensure proper communications during a lockdown, but also continue to ensure employees are staying healthy and safe during any future lockdowns or events that may happen. You may also wish to implement their use for when they are at work to stream line their use and normalise interactions with it.

These are challenging times. A level of innovation may be possible in the way that you approach hiring your staff and working with your current employees. However, all the principles of good faith and employment law will still apply. Members are encouraged to call our Helpline on 0800 737 827 to discuss any of the topics discussed in this article.