



## Smooth sailing this summer

### Avoid common mistakes when employing summer staff

With summer fast approaching, many businesses will be hiring temporary staff to meet their needs over the busy summer months. Taking on temporary staff can throw up some tricky issues. Employers often are uncertain about what employment agreement is appropriate for temporary staff and how their holiday entitlements should be met. We explore the pros and cons of different kinds of agreements for temporary employees and provide guidance on their annual leave and holiday pay entitlements.

In general, there are two types of employment agreements that can be used for temporary employees:

- Fixed-term employment agreements, and
- Casual employment agreements.

### Fixed-term agreement

A fixed-term employment agreement expressly states that your worker's employment will end either on a specific date or on completion of a particular project. Fixed-term agreements also specify your employee's hours and days of work over this period. The Employment Relations Act 2000

prohibits employers from using fixed-term employment agreements unless there are 'genuine reasons based on reasonable grounds' for requiring the agreement to end in this way and these reasons must be recorded in the employment agreement. Using a fixed-term agreement as a trial for new employees is also expressly prohibited by the Act.

Annual leave entitlements in fixed-term agreements are straightforward. For a fixed-term agreement for a period of less than 12 months, your employee can be paid annual leave on a pay-as-you-go basis; they receive 8% of their gross earnings for that pay period in addition to their wages. The 8% annual leave payment must be separately identified on their payslip.

Fixed-term agreements are appropriate if you have a clear understanding of your staffing needs over the summer months and can confidently specify a date from which your employee will no longer be needed, ie: the expiry date.

Where you can run into trouble is when you allow the fixed-term agreement to roll over beyond the expiry date. By allowing the employment relationship to continue beyond the expiry date, you run the risk that your employee is deemed to have become a *permanent* employee and therefore their employment cannot lawfully be terminated without justification. To avoid this, you should either strictly adhere

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NORRIS  
WARD  
MCKINNON

## Mia and her business in summer

Mia owns and operates a restaurant. It gets very busy on Friday and Saturday nights between 1 December and 1 February. Mia also knows that customer numbers fluctuate significantly on Sundays to Thursdays over this period.

As Mia is confident that she needs additional staff every Friday and Saturday, she employs two waiters on fixed-term employment agreements which specify their hours and days of work as 3pm–11pm Friday and

Saturday, starting on 1 December and expiring on 1 February.

As business fluctuates from Sunday to Thursday, Mia knows she can offer additional hours of work to the two fixed-term waiters but understands they are not obliged to accept any additional hours offered. To reduce the risk of being short-staffed during the week, Mia employs a third waiter with a casual employment agreement whom she can call upon to help meet the fluctuating needs of the business.

to the expiry date or ask your employee to enter into a new employment agreement for a further fixed term.

## Casual employment agreements

Casual employment agreements provide no guaranteed hours of work, no regular pattern of work and state that your employee has no ongoing expectation of work. Casual employees may be offered work from time-to-time but are under no obligation to accept such offers. Casual employment agreements are favoured by employers with fluctuating and unpredictable business needs.

In addition to the convenience and flexibility casual agreements give to employers, the holiday pay entitlements are relatively easy to calculate. Similar to fixed-term agreements, casual employees are paid their annual leave on a pay-as-you-go basis.

You can get caught out with casual employment agreements if you begin to treat casual staff as permanent employees. You may have such regular and predictable work available that you forget to *offer* the work and your employee begins to turn up to work with the reasonable expectation that work is, and will continue to be, available. You must be very conscious of how you allocate work to your casual employees to ensure you don't inadvertently create a permanent employment relationship.

## Holidays and annual leave

Public holidays can cause headaches for employers who hire temporary workers over the summer. An employee who works on a public holiday is entitled to be paid time-and-a-half regardless of what kind of employment agreement they have. Employers can, however, get tripped up in understanding where:

- They don't pay their employee for a public holiday that person *did not work* and they were entitled to be paid for that day, or
- They don't give their employee who *did work* on a public holiday an alternative day off and they were entitled to that day off.

Any employee who does not work on a public holiday is entitled to be paid for that day if that holiday falls on a day which would otherwise be a working day for that employee. If, for example, Waitangi Day falls on a Monday, you must assess whether that Monday is a working day for each of your employees.

If your employee *does* work on a public holiday and that holiday falls on a working day, your employee is entitled to time-and-a-half and an alternative holiday. An alternative holiday means a paid day off work on a day which would be a working day for your employee.

A great deal turns on the *definition* of 'otherwise working day' and the Holidays Act 2003 is unhelpful. The Act, however, provides some *guidance* when determining 'an otherwise working day', including an employee's employment agreement and work patterns.

For full-time employees with regular days of work, this assessment will usually be straightforward as their normal days of work are specified in their employment agreements and they have an established pattern of work those days.

Where this assessment can become difficult is for employees whose days of work vary over the summer months. For example, part-time employees may regularly pick up extra shifts and casual employees may work a variety of days. While these people's employment agreements may not specify that they work on Mondays, nevertheless they may have developed a pattern of working on Mondays, thereby entitling them to an alternative day off. When assessing your employee's pattern of work, a rule of thumb we often give clients is to review your employee's previous six weeks of work. If they have worked a Monday on at least five of those weeks, this would strongly suggest your employee has a pattern of working on a Monday.

## Be prepared

With summer almost upon us, make sure you're prepared with employment agreements that are appropriate for your seasonal needs. Happy summer trading! ✨

# Enjoy our waterways – but think water safety!

Jonty Mills, CEO, Water Safety New Zealand

We are truly blessed to live in the Land of the Long White Cloud. This beautiful country of ours is, however, also the land of water. Wherever you are, you are never far from water. We are world-famous for our stunning waterways – our lakes, rivers and beaches. But, it's also important to always remember that water can be dangerous and unpredictable.

Whenever you are near a waterway – going for a swim, collecting seafood, or paddling or boating – it is vital that you think about water safety.

Swimming is the deadliest recreational activity. Too many people underestimate the risks, and overestimate their ability, when it comes to swimming.

## Too many drownings

Drowning is the leading cause of recreational death, and the third highest cause of accidental death, in New Zealand. In 2018, there were 66 preventable drowning fatalities. The five year average (2014–18) is 79 deaths.

In 2018, the vast majority of drownings were from accidental immersions – people ending up in situations in the water when they never intended to.

New Zealand's drowning rate per 100,000 of population is twice that of Australia and four times that of the UK. Too many people drown in this country every year. Most fatalities are caused by a bad decision. We need everyone to remember the water safety code:

### Know before you go – the basic Water Safety Code

The Water Safety Code consists of four simple rules to remember each time you venture near the water. It serves as a great starting point for planning a safe aquatic adventure.

#### Be prepared

- Learn water safety skills.
- Set rules for safe play in the water.
- Always use safe and correct equipment, and know the weather and water conditions before you get in.

#### Watch out for yourself and others

- Always pay close attention to children you are supervising when in or near water.
- Swim with others and in areas where lifeguards are present.

#### Be aware of the dangers

- Enter shallow and unknown water feet first and obey all safety signs and warning flags.
- DO NOT enter water after drinking alcohol.

#### Know your limits

- Challenge yourself within your physical limits and experience.
- Learn safe ways of rescuing others without putting yourself in danger.



Many drownings happen when people are alone on, or near, the water. Always ask yourself – what will I do if something goes wrong? Will anyone be able to help me? Always take a buddy, make sure you have the correct safety equipment and understand the risks involved.

## Lifejackets are vital

When you're out boating, always wear a well-fitted lifejacket. Check the weather forecast. Take two waterproof forms of communication such as a VHF radio and a distress beacon. If you're the skipper, you're legally responsible for those on board. Double-check all your gear is in good working order.

Even if you're a strong swimmer, wear a lifejacket when you are fishing from rocks or collecting seafood – even if it's in waist-deep water. If you get caught in a rip or are hit by a rogue wave, a lifejacket will keep you afloat and help you conserve energy until you are rescued.

Stand up paddle boarding has become popular – always wear a lifejacket. Also, it's important to use the correct leash for the conditions. An ankle leash, for example, is dangerous when you're in moving water.

If you're returning to scuba diving after a lay-off, get a medical check from your GP. Always double-check your equipment is in full working order. Take a buddy and use dive flags.

## Swimming common sense

Before you jump into a river or waterhole always check for hidden objects. Read any warning signs and get local knowledge. Never assume it's safe. Although waterfalls may look inviting, they are dangerous. Both rivers and waterfalls can have strong currents and undertows, and they are unpredictable. If in doubt, stay out.

At the beach always swim between the flags. While our beaches are beautiful there are rips and undertows and you can easily get into trouble even in knee-deep water. Learn water safety skills so you know what to do if you get caught in a rip.

If you have small children with you around water remember to keep them safe – they need **constant active adult supervision at all times**. Keep them within arm's reach. It only takes a minute for a child to drown.

We want everyone to enjoy New Zealand's beautiful waterways – but safely. If you're taking part in an activity in, on or near the water this summer think about water safety at all times. It could save your life and the lives of your loved ones. ✨

For more water safety information, head to [www.watersafety.org.nz](http://www.watersafety.org.nz)

Paddle boarders will find this useful [www.nzsup.org](http://www.nzsup.org)



***"Focus is now on punishing reckless or risky behaviour that results in fire."***

## Rural fires

### Changes to legislation bring huge implications

The rural fires of last summer are a reminder of the risk of fire to our communities. The cause of the blaze in the Nelson region, one of New Zealand's largest plantation fires, was attributed to a spark caused when farm equipment hit a stone. This leads to the question – who is liable for the cost of fighting a rural fire?

Many rural people are unaware that when the Fire and Emergency New Zealand Act 2017 (FENZ Act) came into force on 1 July 2017, it significantly moved the fire goalposts. Responsibility changed from what was known as 'strict liability' for causing a rural fire to 'criminalising risky or reckless behaviour' which results in a fire. It sounds minor, but the implications of this change are huge.

### Some background

A new organisation, Fire and Emergency New Zealand (FENZ), established by the FENZ Act, now has the responsibility to battle fires all over New Zealand, in both rural and urban areas.

FENZ arose from a merger of the New Zealand Fire Service, the National Rural Fire Authority and Rural Fire Authorities. This merger acknowledged the expanded roles that firefighters now perform in addition to attending fires. Firefighters also attend vehicle accidents, assist with search and rescue missions, and attend hazardous substance incidents. FENZ is funded through the fire levy that is collected through insurance premiums.

The principal objectives of FENZ are to reduce the incidence of unwanted fires and the associated risk to life and property, to protect and preserve life, and to limit the damage from fire to life, property and the environment.

### Major changes focus on reckless or risky behaviour

The new FENZ Act introduced a totally new approach as to how responsibility for starting fires is handled. There is a move away from *compensation* to a focus on *punishing reckless or risky behaviour that results in fire*.

The legislation has established a framework of serious criminal offences, infringement offences and a range of further offences which fall between the two. The purpose of the FENZ Act is for penalties to act as a deterrent to such behaviour. The regime acknowledges and punishes the acts outlined above as reckless or risky.

Until mid-2017, firefighting costs could be recovered from the person responsible. Once the act of lighting the fire was proven, 'strict liability' resulted and, as a result, compensation was payable to the New Zealand Fire Service for associated fire-fighting costs.

The new legislation has removed this concept of strict liability and cost recovery. Now cost recovery in the form of compensation must be pursued through the common law and the courts.

### Significant penalties

The FENZ Act has introduced a maximum penalty for serious criminal offences of up to two years in prison, and/or fines of up to \$300,000 for an individual or \$600,000 in other cases. Serious criminal offences are those which result from an accused 'knowingly or recklessly' through their actions causing or allowing a fire to get out of control and spread, or leaving a burning or smouldering substance in open air in such a way that increases the likelihood of harm or damage arising from the start or spread of fire<sup>1</sup>.

A defence against a serious criminal offence is available to a person who, as soon as is practical, notifies FENZ of the fire situation.

### Ultimately people must be responsible

Regardless of the threat of criminal charges, punitive fines or the award of compensation for damage or loss, nothing can provide compensation for the loss of life and/or significant damage to property when proactive and thoughtful planning and care could reduce risk significantly. Liability remains with the people responsible. The introduction of criminal and infringement offences has raised the bar on personal accountability for people's actions when handling fires \*

1 Sections 60 & 61; Fire and Emergency New Zealand Act 2017

# Trusts Act 2019

## Comes into force early 2021

The Trusts Act 2019 will come into effect on 30 January 2021. Much of the Act updates or restates existing law. However, there are a number of changes about which trustees and people with trusts should be aware.

## Trustees' duties

The Act contains 'mandatory' and 'default' duties for trustees. Mandatory duties cannot be modified or excluded by the trust deed so all trustees will have to observe them.

Mandatory duties are:

- Knowing the terms of the trust
- Acting in accordance with the terms of the trust
- Acting honestly and in good faith
- Dealing with the trust property, and acting for the benefit of the beneficiaries, in accordance with the terms of the trust, and
- Exercising trustees' powers for a proper purpose.

Default duties are duties which trustees must abide by unless the trust deed says otherwise. These include a general duty of care, a requirement to invest prudently, a prohibition on trustees acting in their own interests, a duty to act unanimously and duties not to profit or benefit.

Default duties can be modified or excluded by the trust deed. For example, the trustees might not be required to invest prudently, and therefore may be allowed to lend money to a beneficiary on an interest-free basis. It may also be helpful for trustees to make decisions by majority vote, or for a trustee who is also a beneficiary to be able to take part in trustee decisions despite their conflict of interest.

## Documentation

Trustees will also have new requirements relating to trust documentation. Every trustee must keep copies of the trust deed and any variations. They must either keep their own copies of 'core trust documents' as defined by the Act, or ensure that at least one of their co-trustees holds the core trust documents and will make them available on request. If a trustee is not confident in their fellow trustees' recordkeeping, they will have to keep these documents personally.

## Trust information

The legislation provides that 'basic trust information', including the names and contact details of the trustees, changes of trustees, and a beneficiary's right to request further trust information, must be made available to beneficiaries in most circumstances. The Act presumes that if a beneficiary requests further trust information, including a copy of the trust deed, it must be provided within a reasonable period of time.

Trustees can decide not to disclose basic trust information or to decline a request for further information. There is a process set out in the Act that considers a range of factors such as the age and circumstances of the beneficiary, the nature of their interest in the trust and the context of their request for information. Trustees will have to carefully consider any decision not to disclose information, and trusts generally will not be able to be run in secrecy.

If you are a trustee, involved with a trust, or are thinking of establishing a trust, please don't hesitate to contact us about how the new Trusts Act will affect you. \*

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## Changes ahead in relationship property laws

The Law Commission has proposed some significant changes to the way relationship property is dealt with by separating couples.

Since the Property (Relationships) Act 1976 was enacted and with major changes in 2002, the structure of families has changed considerably. New legislation needs to take this into account.

After a three-year review, the Commission's key recommendations include:

- Changing how the family home is shared after a relationship breakdown
- Giving a court greater powers to divide property held by a trust
- Introducing Family Income Sharing Arrangements (FISA) to help offset differences in income and earning potential between partners, and
- Giving children's interests more priority in relationship property matters.

It is early days yet as the proposed legislation is still to be drafted. We will keep you informed as this progresses. \*

## Proposed reform for incorporated societies legislation

The Incorporated Societies Act 1908 is set to change in the not-too-distant future. Following the Law Commission's recommendations in 2013, earlier this year a Cabinet paper confirmed that the legislation relating to incorporated societies will be completely overhauled. The new legislation is not expected to be politically controversial.

All incorporated societies should consider getting up to speed with the anticipated changes. If you intend altering your constitution in the near future, consider delaying that process until the new legislation and requirements are confirmed. Any incorporated society that must review its constitution before the reforms are passed into law should incorporate the anticipated changes into their new constitution. \*

## Merry Christmas and Happy New Year

We wish you all a very Merry Christmas and a happy 2020. Please stay safe this summer, watch the road, keep out of the sun and, if you're on the water, read Jonty Mills' column on page 3 for some water-wise safety tips.

*Meri Kirihimete me te Hape Nū la. \**



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