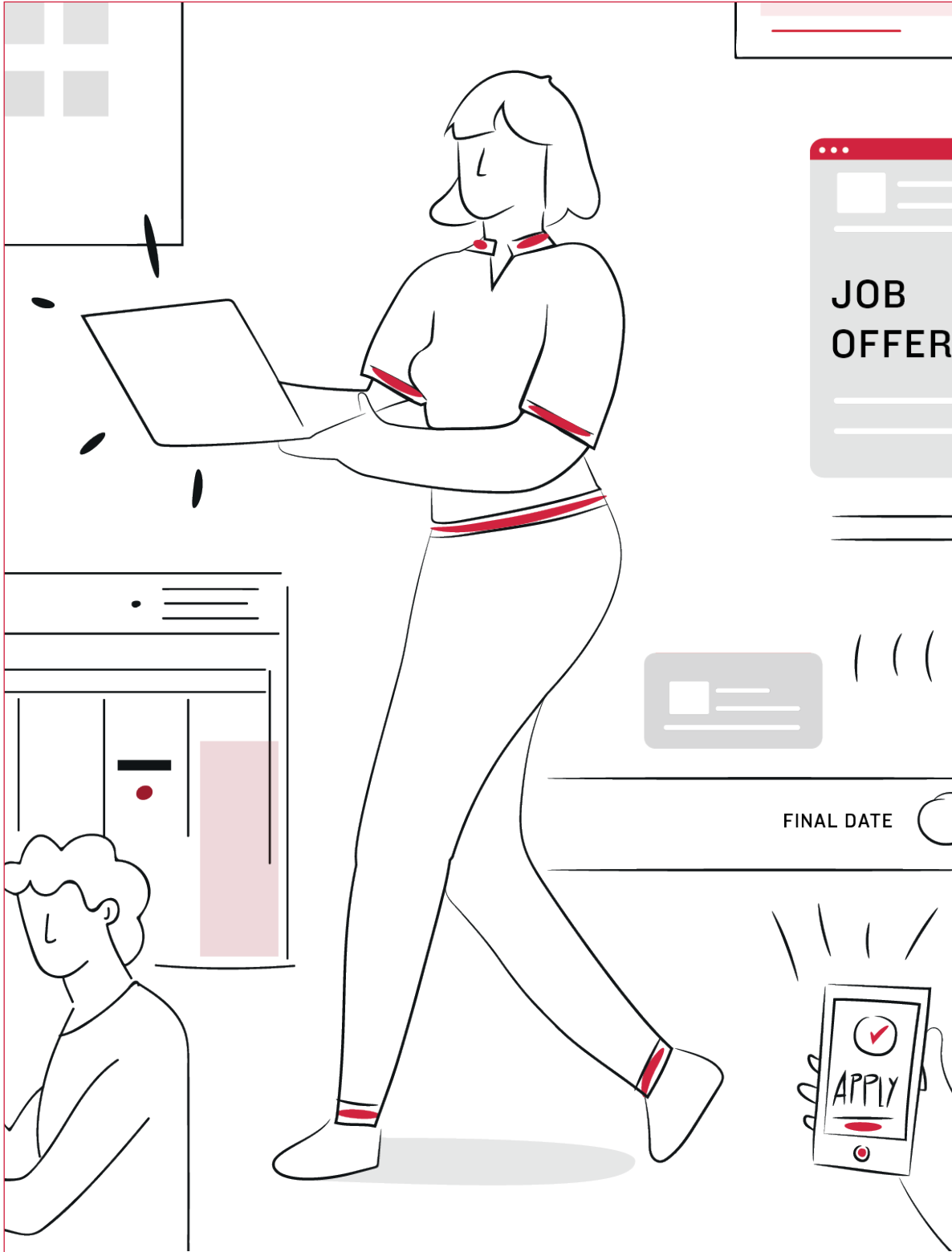


# Employing People

Compliance tool





—  
**Sport**

**New**

**Zealand**

**Employing**

**People**

**Compliance**

**Tool**



<b>1.0</b>	<b>Designing Jobs</b>	<b>09</b>
<b>2.0</b>	<b>Hiring People</b>	<b>17</b>
2.1	Recruitment Process	19
2.2	Privacy Obligations	20
2.3	Pre-employment Checks and Tests	24
2.4	Offers	26
2.5	Employment Agreement Requirements	29
2.6	Bargaining for Employment Agreements/Terms	32
<b>3.0</b>	<b>Starting People</b>	<b>35</b>
3.1	Trial and Probationary Periods	37
3.2	Induction	41
3.3	Employment Records	42
<b>4.0</b>	<b>Minimum Employee Entitlements</b>	<b>47</b>
4.1	Minimum Wage, KiwiSaver and Breaks	49
4.2	Annual Holidays	51
4.3	Other Types of Leave	52
<b>5.0</b>	<b>Creating a Performance Culture</b>	<b>57</b>
5.1	Compliance with Agreements/Policy	59
5.2	Managing Concerns	59
5.3	Formal Performance Management	60

# Contents —

<b>6.0</b>	<b>Managing Employment Risks</b>	<b>63</b>
<b>6.1</b>	Fair Process	65
<b>6.2</b>	Investigating Concerns	68
<b>6.3</b>	Disciplinary Action	70
<b>6.4</b>	Miscellaneous Risks	74
<b>7.0</b>	<b>Managing Changes</b>	<b>83</b>
<b>7.1</b>	Updating Job Descriptions	85
<b>7.2</b>	Flexible Working Requests	87
<b>7.3</b>	Restructuring and Redundancy	89
<b>7.4</b>	Sale or Transfer of Business	93
<b>8.0</b>	<b>Ending Employment</b>	<b>97</b>
<b>8.1</b>	Termination of Employment	99
<b>8.2</b>	Arrangements after Notice is Given	102
<b>8.3</b>	Final Pay	104
<b>9.0</b>	<b>Links/Resources</b>	<b>109</b>



**Employing  
People  
Compliance  
Tool**

# Introduction

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**The ‘Employing People Compliance Tool’ is provided by Sport New Zealand for use by sports and recreation sector organisations to check they are complying with minimum legislative requirements when conducting their employment relationships and activities.**

There are eight compliance chapters that cover the ‘life’ of the employment relationship – from starting to recruit for a role to ending an employee’s employment with the organisation. The chapters allow organisations to ‘self-check’ that they are complying with relevant legislation, and provide them with information and resources to help them comply if they are not doing so.

It is recommended that organisations use this tool to:  
**Refer** to the relevant chapter/s for checking compliance and getting information when completing an employment activity (e.g. recruiting and onboarding a new employee or managing poor performance)  
**Conduct** regular compliance audits of their employment procedures, processes and documents.

The ‘Employing People Compliance Tool’ is dated September 2018. It is provided for general information purposes only and not as legal advice. Organisations should seek their own independent expert advice when in doubt over any employment and/or compliance matters.

National and regional sports and recreation organisations are able to call the Sport NZ Legal Helpdesk on 0800 283 529 for 15 minutes of free legal advice on a range of issues including disciplinary matters, health and safety, employment agreements, restructuring, and interpreting employment legislation. To register for this free service, see: <https://sportnz.org.nz/managing-sport/search-for-a-resource/tools-and-resources/legal-helpdesk>





# Chapter One

# Designing Jobs

**When designing jobs you need to think about what your organisation needs in terms of the role and the type of working arrangement. This tool is focused on employment relationships, which could be for full-time or part-time work, and could be for permanent, fixed-term or casual employment.**

There are different requirements for different types of relationships and arrangements, and there can be legal consequences if you get it wrong. We outline some of the specific considerations for fixed-term and casual employees (including aspects that need to be included in employment agreements) so you can consider these implications upfront. We also briefly look at the job description in terms of outlining what the job will involve.

**Other helpful references:**

[HR policies and employee handbooks<sup>1</sup>](#)

[Hours of work and flexi-time policy<sup>1</sup>](#)

[Advisory: Contractors<sup>2</sup>](#)

---

## NATURE OF RELATIONSHIP

### Is the real nature of the relationship an employment relationship?

#### If “NO”: AT RISK

You must assess whether you need an employee, an independent contractor or a volunteer. There are different requirements for each type of arrangement, and each has different implications, for example tax and Holidays Act entitlements, and obligations around termination. You should then ensure that the agreement you use properly reflects that arrangement. If in doubt, you should seek advice upfront, including through the Sport NZ Legal Helpdesk.

**A volunteer** is a person who does work without payment or reward (or expectation of payment or reward) for that work. A volunteer is not an employee, and is not entitled to employee entitlements. If your organisation uses volunteers, make sure they are not being paid for their work or receiving (or expecting) a form of reward (a small ‘thank you’ gift as an acknowledgement may be acceptable). If they are, there is a risk that the person is an employee, with the resulting obligations and compliance requirements around minimum entitlements that flow on from that.

**A contractor** is a person who is in business for themselves, and that you engage to carry out specified services. Similar to volunteers, independent contractors are not employees and are not entitled to the same minimum entitlements. However, while you might engage someone as a contractor, if the true nature of the relationship is that of employment (despite the ‘labels’ used or the form of the agreement between the parties) you can still be liable for employment obligations and entitlements.

You may have a genuine need to engage individuals as independent contractors and volunteers, but you must ensure the written agreement and the way the relationship operates in practice reflect that arrangement. If they do not, you may be at risk.



This compliance tool applies to **employees only**. For information about volunteers, see [volunteers](#)<sup>3</sup>



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For information about **contractors** versus employees, see [contractor versus employee](#).<sup>4</sup> See also the [Advisory: Contractors vs employees](#)<sup>5</sup> for further information.

---

## TYPE OF EMPLOYEE

**Have you chosen the correct type of employment relationship to fit the situation (eg, permanent, fixed-term or casual, full-time, part-time, variable hours etc)?**

**If “NO”: AT RISK**

There are different types of employment arrangements, for instance permanent, full-time, part-time, variable hours, fixed-term or casual. It's important that you work out what your organisation needs, discuss the arrangements with the employee before signing the agreement, and make sure that the agreements accurately reflects the arrangement discussed. If it does not, you may be at risk.

There are also some legislative requirements that arise from different types of arrangement, outlined further below.

---

## FIXED-TERM EMPLOYEE

**Is there a genuine reason based on reasonable grounds for the fixed-term employment?**

**If “NO”: AT RISK**

You must have a genuine reason based on reasonable grounds for a fixed-term employment arrangement, such as covering a period of parental leave, or assisting with a specific project. Trialling someone for suitability is not a genuine reason for a fixed term. The employment agreement must record the reason, as well as the timing and way in which the fixed-term agreement will end (there must be a clear link between the reason and the period of the fixed term; that is, we need someone for six months because that's how long the project is expected to run). Failing to comply with these requirements may result

in the employee being a permanent employee with ongoing employment and holidays and leave obligations, or in an unjustified dismissal situation if employment has been terminated.

There are also specific legislative requirements for fixed-term positions for parental leave cover. In these situations, before employing someone to provide cover, you must inform them in writing (eg, in the employment agreement) that their role is temporary owing to the fixed-term cover for parental leave, and that the employee may, in some circumstances, return to work earlier than the anticipated end date of the leave.

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**Does the fixed-term employment agreement deal with early termination for cause (including redundancy), and reflect specific holidays and leave entitlements based on the period of the fixed term?**

**If “NO”: AT RISK**

Employment agreements should make it clear that you can terminate prior to the expiry of the fixed term for cause (eg, serious misconduct, poor performance, redundancy etc) Failing to be clear about this, for example around redundancy, could mean you are liable to pay out the remainder of the fixed-term period in an early termination situation. You should also consider and reflect any appropriate arrangements for holidays and leave based on the period of the fixed term. Under the Holidays Act 2003, employees only become entitled to sick leave and bereavement leave after six months' employment, and annual holiday entitlements only accrue after 12 months' continuous employment. For fixed terms of less than one year, employers may pay out annual holidays at 8 percent at the end of employment, or may agree in the employment agreement to pay annual holidays on a 'pay as you go' basis and pay at least 8 percent on top of the employee's pay each pay cycle.

---

## CASUAL EMPLOYEES

**Is the casual employee working on an ‘as and when required’ basis and do holidays and leave arrangements reflect the casual relationship?**

### If “NO”: AT RISK

A casual employee is an employee that works on an ‘as and when required’ basis, and has no guaranteed hours of work or ongoing expectation of work beyond a specific engagement. For example, you may hire someone to help out occasionally at sporting tournaments, with each offer of work for a tournament being a separate ‘engagement’. A true casual relationship means you have no obligation to offer work, and if you offer, they can accept or decline it. A casual employment agreement should reflect this, and the parties must be careful to ensure that the work does not become regular, or, if it does, to reassess and re-document the relationship appropriately (eg, over time, someone can morph from a casual into a permanent employee with variable hours). Failing to comply with these requirements may result in the person being deemed a permanent employee, with resulting implications for ongoing employment and holidays and leave entitlements.

Casual employees do not generally have entitlements to sick leave or bereavement leave unless they have worked a minimum number of hours over at least a six-month period. Employers can also meet annual holiday entitlements for casuals where the work is so intermittent or irregular that it is not possible to provide public holidays by providing in the employment agreement to pay annual holidays on a ‘pay as you go’ basis and paying at least 8 percent on top of the employee’s pay for each engagement.

### Helpful references

[Types of employee](#)<sup>6</sup>

[Fixed-term employees](#)<sup>6</sup>

[Casual employees](#)<sup>6</sup>

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## JOB DESCRIPTION

**Does the job description clearly and in detail describe the key duties and responsibilities of the job?**

If “NO”: AT RISK

Providing candidates with a clear indication of what the job involves upfront can help ensure there are no misunderstandings, and can help attract relevant candidates with the right skills and with aligned expectations about what the job is (and whether they can do it.)

Employment agreements must include a description of the work to be performed. Both parties need to understand and agree on the duties and responsibilities of the job as part of the offer of employment. These will form the baseline for performance expectations, and will be a useful point of reference if there are any concerns about the parameters of an employee’s position. (We also recommend that employment agreements provide an ability for the employer to make reasonable changes to a job description.)

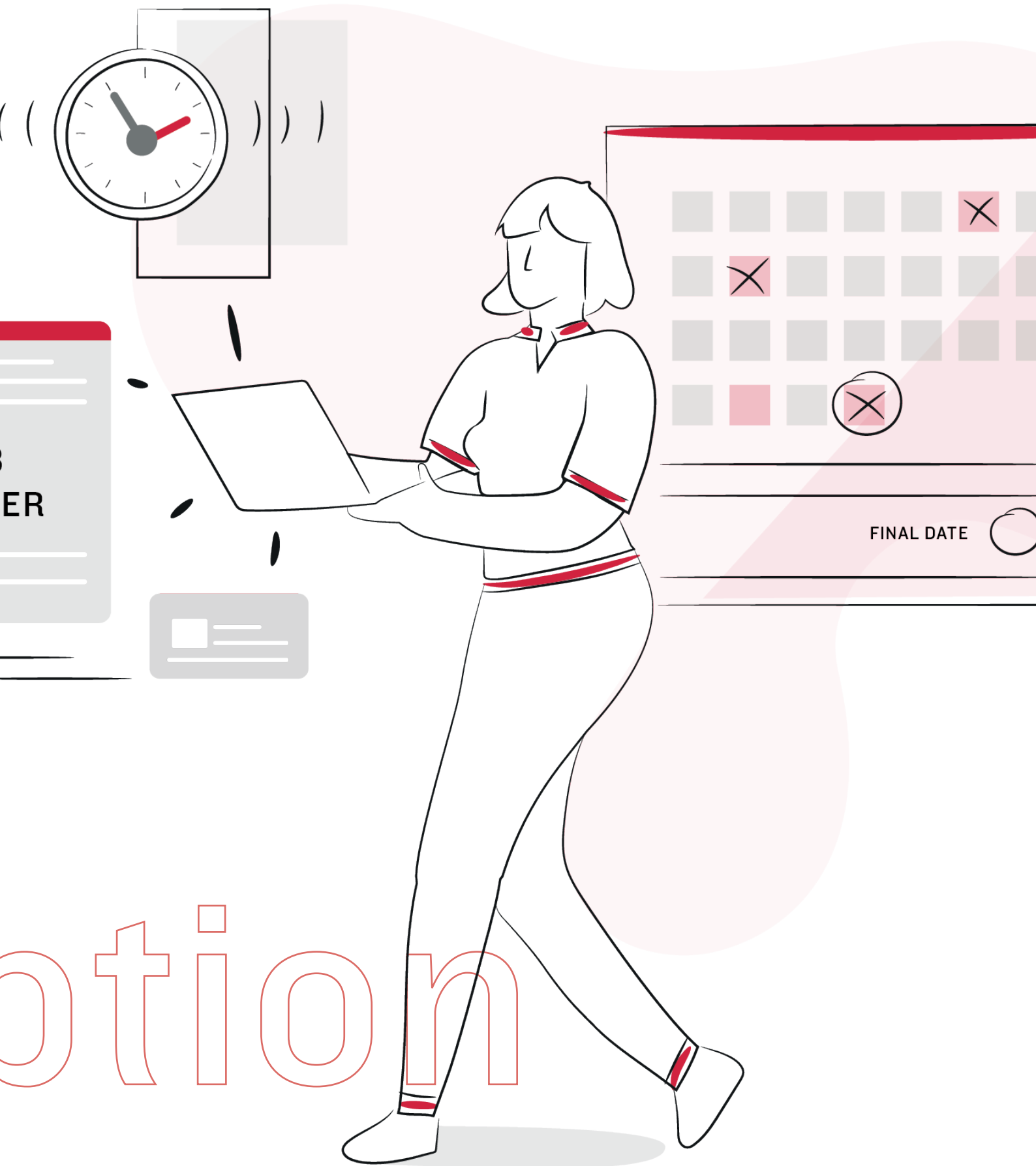
For information about designing jobs, see [describing the job](#).<sup>7</sup>

# Offer

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# description





otion





# Chapter Two

# Hiring People

## IN THIS SECTION

### [2.1](#)

Recruitment Process

### [2.2](#)

Privacy Obligations (for applicants, and employees more generally)

### [2.3](#)

Pre-employment Checks and Tests

### [2.4](#)

Offers

### [2.5](#)

Employment Agreement Requirements

### [2.6](#)

Bargaining for Employment Agreements/Terms

Finding and selecting great people is a significant contributor to organisational success. A thorough recruitment process (including appropriate checks) and documenting expectations in your employment agreements set the tone for a positive employment relationship, and help avoid or mitigate issues that could become employment risks later on.

#### Other helpful references:

[HR policies & employee handbooks<sup>1</sup>](#)

Recruitment and induction policy

Code of Conduct

[Hours of work and flexi-time policy<sup>1</sup>](#)

For more information on these, see [HR policies and employee handbooks<sup>1</sup>](#).

**Employers are largely free from legal constraints in deciding how they recruit, including around any job ads, application forms, interviews and selection processes they use. However, employers must ensure that they protect the privacy and confidentiality of applicants, and do not discriminate on any of the prohibited grounds of discrimination. This section looks at the recruitment process and discrimination. The next section looks at privacy obligations.**

**Is the recruitment process (including job ads, application forms, interview questions etc) free from any direct or indirect discrimination?**

**If “NO”: AT RISK**

It is unlawful for employers to discriminate against prospective employees either directly or indirectly. This means, for example, that the job description and any advertisements should describe the requirements of the job, but in a way that does not discriminate on one of the prohibited grounds of discrimination, like age, sex or religion. For example, in a job description or advertisement, you can't say that you require a “young coach”, but you can say that you need “a coach that relates well to young people and has a strong level of fitness” if that is required. Employers should also take care that nothing in application forms or interview questions may be seen as indicating potential unlawful discrimination (eg, don't ask, “When did you leave school?”).

Job applicants can raise issues about unlawful discrimination with the Human Rights Commission. There are some exceptions; for example, you can require a person to be of a certain age if being of a particular age or age group is a genuine qualification for any reason. (eg, safety, needing to hold a specific driver licence etc).

For information about discrimination, see [discrimination when hiring](#)<sup>8</sup> and [bullying, harassment and discrimination](#).<sup>9</sup>

For more information about certain exceptions to discrimination in employment, see [exceptions to unlawful discrimination](#).<sup>10</sup>

Your organisation is an ‘agency’ under the Privacy Act 1993, and must comply with various requirements in the Privacy Act including around collecting, storing, using and disclosing ‘personal information’ about job applicants and employees. Your organisation is also required to have a ‘Privacy Officer’, a person who knows about privacy and the organisation’s obligations, and who can deal with requests and complaints about privacy. Failure to comply with privacy obligations could lead to potential issues being raised as an employment issue, or going to the Privacy Commissioner and being pursued through the Human Rights Review Tribunal (if there is a breach resulting in significant harm).

**This chapter outlines an employer’s main obligations at a high level. These obligations apply to applicants during recruitment, and during employment more generally. For further information, see [your obligations](#).<sup>11</sup> The Privacy Commissioner has also published useful guidance for employers about [privacy at work](#).<sup>12</sup>**

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### COLLECTION

Do you only ask applicants for personal information that is relevant to determining their suitability for the job?

#### If “NO”: AT RISK

Under the Privacy Act you should only collect information if it is necessary for a lawful purpose connected with your organisation’s function or activity. For information from the Privacy Commissioner, see [purpose for collection of personal information](#).<sup>13</sup>

Do you tell applicants and employees what personal information you collect, why, what it will be used for, who has access to it, the name and address of the organisation(s) collecting and holding it, the consequences of not providing it, and their rights to access and correct it?

#### If “NO”: AT RISK

Often organisations may provide a Privacy Statement to applicants and employees outlining this information (this is sometimes included in the job application form). For further information from the Privacy Commissioner, see [purpose for collection of personal information](#).<sup>13</sup>

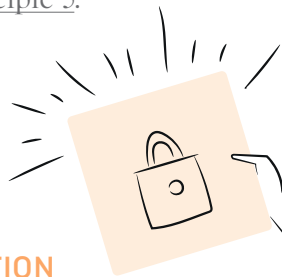
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## SECURITY

**Do you keep applicants' and employees' personal information safe and secure?**

**If "NO": AT RISK**

For information on the **storage and security** of personal information from the Privacy Commissioner, see [principle 5](#).<sup>14</sup>



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## RETENTION

**Do you keep applicants' and employees' information for no longer than necessary?**

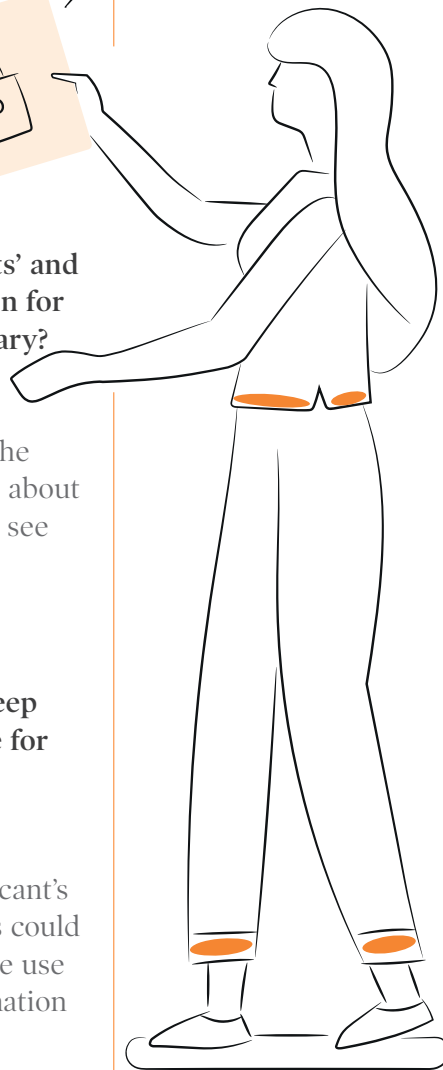
**If "NO": AT RISK**

For information from the Privacy Commissioner about **retaining information**, see [principle 9](#).<sup>15</sup>

**Do you let applicants know if you want to keep the information on file for future positions?**

**If "NO": AT RISK**

Failing to have an applicant's authorisation to do this could create issues around the use and retention of information under the Privacy Act. You might seek this authorisation upfront in a job application form or in other correspondence with an applicant.



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## ACCESS

**Do you allow applicants and employees to access and correct their personal information on request?**

**If "NO": AT RISK**

For information from the Privacy Commissioner about **access to information**, see [principle 6](#).<sup>16</sup>

For information from the Privacy Commissioner about **correcting information**, see [principle 7](#).<sup>17</sup>

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## USE AND DISCLOSURE

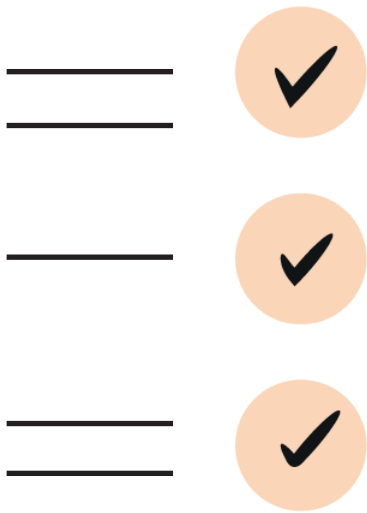
**Do you only use and disclose applicants' and employees' personal information for the purposes it was obtained and other lawful purposes?**

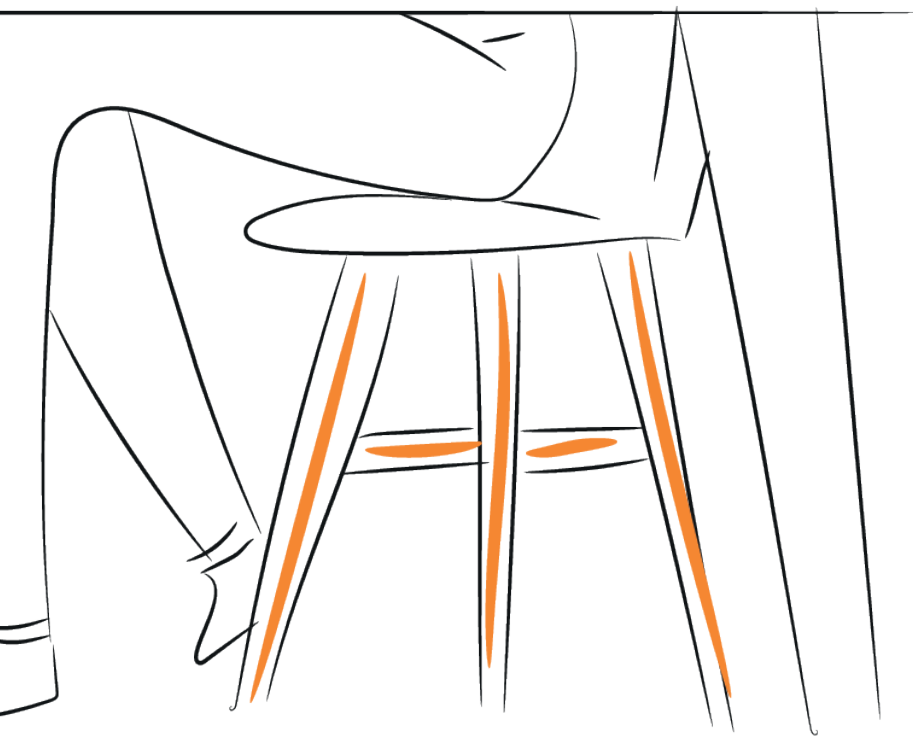
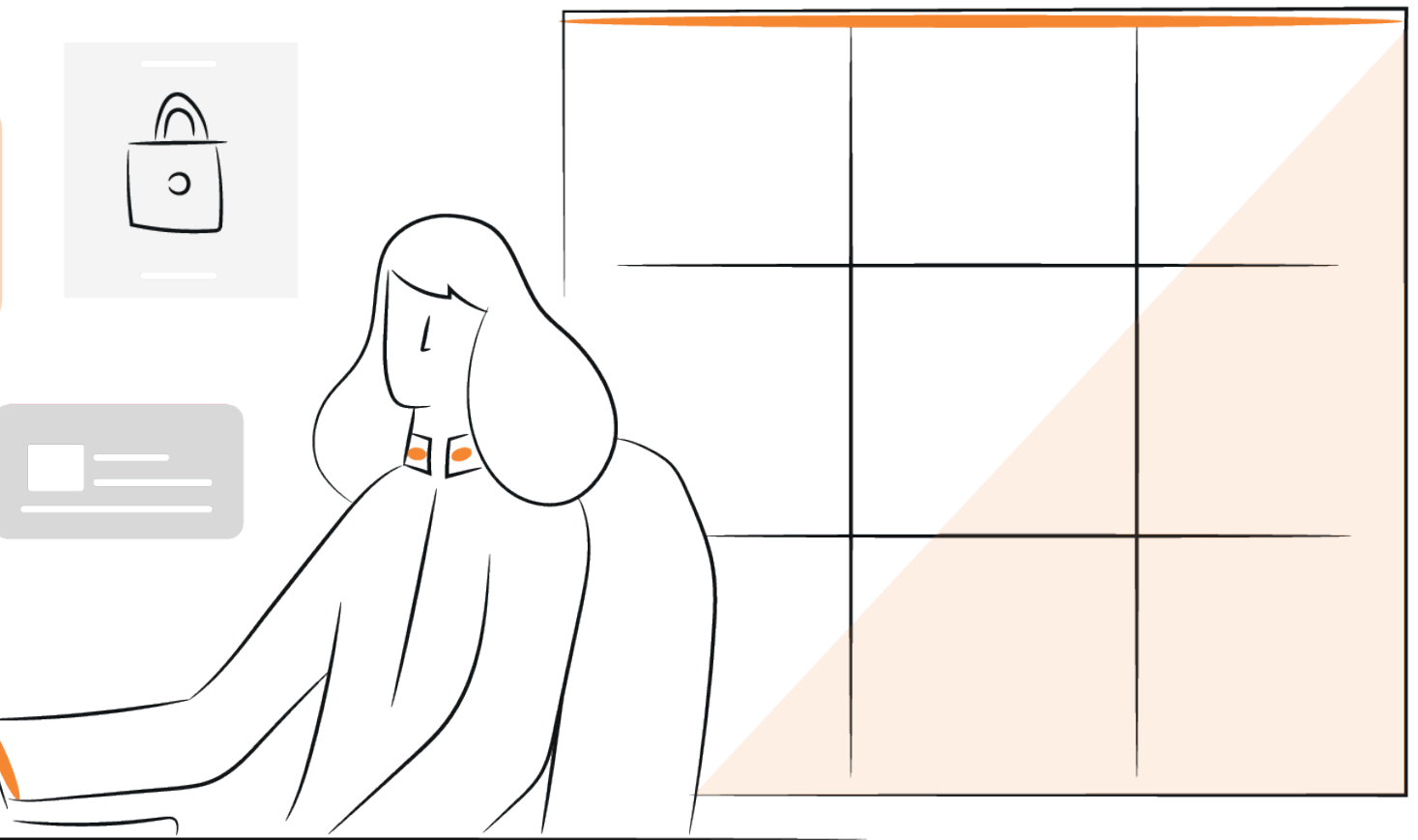
**If "NO": AT RISK**

For information from the Privacy Commissioner about **use of information**, see [principle 10](#).<sup>18</sup>

For information from the Privacy Commissioner about **disclosure**, see [principle 11](#).<sup>19</sup>

# OBLIGATIONS





## Pre-employment Checks and Tests

This section outlines some common pre-employment checks and tests. You may also have other checks and tests you want to complete relevant to the particular role (eg, qualification or skills checks, or that a candidate holds a particular classification of driver licence).

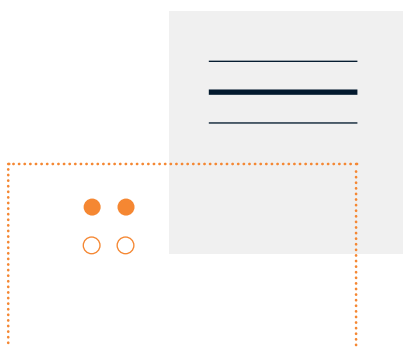
### CHECKS AND TESTS GENERALLY

Are any checks or tests you require relevant to the job and do you get signed authorisation from applicants to complete these checks?

#### If “NO”: AT RISK

Under the Privacy Act you should only collect information that you need, and this generally needs to be information from the applicant, or from others with the applicant’s agreement.

For more information about privacy at work for employers, see [privacy at work](#)<sup>12</sup>.



### LEGAL RIGHT TO WORK IN NZ

Do you check that all prospective employees are allowed to do the job in New Zealand, and get a copy of their NZ citizenship, residence or work visa documentation?

#### If “NO”: AT RISK

For more information, see [right to work in NZ](#).<sup>20</sup> See also information from [Immigration New Zealand](#),<sup>21</sup> including links to check an applicant’s visa status.

### CRIMINAL RECORD CHECKS

You can ask about an applicant’s criminal convictions but you can’t require them to disclose convictions covered by the Criminal Records (Clean Slate) Act 2004 (the Clean Slate Act). To check their criminal record, do you obtain their consent and get them to complete the required forms?

#### If “NO”: AT RISK

You can ask an applicant about their criminal record, but the Clean Slate Act provides certain convictions that they don’t have to disclose (generally minor convictions more than seven years ago). For more information about what the Clean Slate Act covers, see [clean slate scheme](#).<sup>22</sup> If you want to check an applicant’s criminal record, you need their agreement and for them to complete the required forms. Generally, checking is done through the Ministry of Justice, but in some cases additional vetting can be done through the Police. For more information, see [criminal record checks](#).<sup>23</sup>

For more information about criminal record checks, see the Privacy Commissioner’s resource [Privacy at work - A guide to the Privacy Act for employers and employees \(page 9\)](#).<sup>12</sup>



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## VULNERABLE CHILDREN SAFETY CHECKS

**If you are a ‘specified organisation’ and are employing ‘children’s workers’, do you complete the required safety checks (confirming identity, considering other required information and completing a risk assessment) before employment commences?**

### If “NO”: AT RISK

For more information about Vulnerable Children Act 2014 requirements, see [safety checking](#).<sup>24</sup>

For information about Police vetting, including the relevant forms, see [police clearances & vetting](#).<sup>25</sup>

If in doubt about whether or how these requirements apply to you, we recommend seeking advice, including through the Sport NZ Legal Helpdesk.

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## REFERENCE CHECKS

**Do you obtain on applicant’s consent (preferably in writing) before contacting their referees and do you confirm whether the referee is giving the reference in confidence?**

### If “NO”: AT RISK

Under the Privacy Act you need the applicant’s consent before contacting a prior employer. Applicants should give written consent about who you can contact as a referee. If you want to contact someone else, you should discuss this with the applicant and get their agreement. You should also confirm with a referee whether they are speaking to you in confidence; otherwise you may need to provide information about what the referee says to

the applicant if they make a request under the Privacy Act.

For more information about references, see [selecting and appointing](#).<sup>26</sup>

For more information see the [Privacy Commissioner’s resource Privacy at work - A guide to the Privacy Act for employers and employees](#)<sup>12</sup> (including information about references on pages 11-12).

See also this article from the Privacy Commissioner about **reference checking (on page 4)**.<sup>27</sup>

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## DRUG AND ALCOHOL TESTING

**If you do pre-employment testing for drugs or alcohol, is that necessary for your workplace or the role, and are you clear with applicants about the testing?**

### If “NO”: AT RISK

Some employers may choose to undertake pre-employment testing, for example, as part of a zero tolerance policy and to show that they are serious about managing alcohol and drug risks in the workplace. As testing is invasive, it needs to be conducted fairly and discreetly, and results dealt with appropriately, including in compliance with privacy requirements. For more information, see [drugs, alcohol and work](#).<sup>28</sup>

For more information about drug and alcohol testing generally, see the Privacy Commissioner’s resource [Privacy at work - A guide to the Privacy Act for employers and employees](#)(pages 37-39).<sup>12</sup>

See also 6.4 **Managing Employment Risks – Miscellaneous Risks**.

---

## CREDIT CHECKS

**Do you only perform a credit check if it is necessary, the position involves significant financial risk and you get the applicant's agreement?**

### If "NO": AT RISK

You can only request a credit check if it is necessary and the position involves 'significant financial risk' (eg, dealing with accounts), and you get the applicant's agreement to the check. (Normally any credit checks would be completed towards the end of a recruitment process with short-listed candidates or the preferred candidate only.)

Certain legal requirements also apply to the organisations providing credit check results. For more information, see [credit checks](#).<sup>29</sup>

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## 2.4

### Offers

**Any offer of employment should be clear about whether the offer (and any subsequent employment) is subject to any conditions, including any pre-employment checks or tests. Offers should generally explain how they can be accepted, and provide a deadline on which they expire if not accepted prior.**

**In general contract law, it can be sufficient for there to be a verbal offer and acceptance. Once an employee has accepted an offer, it cannot be 'withdrawn' and the person becomes an 'employee' under the Employment Relations Act 2000 (being a "person intending to work"). Normal employment obligations apply from that point, including the duty of good faith, and fair process requirements if, for example, anything changes before the person starts work (eg, one of the checks comes back with an unsatisfactory result).**



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## CLEAR OFFERS

**Do your offers make it clear how they can be accepted, and provide a deadline on which the offer will lapse if not accepted prior?**

### If “NO”: AT RISK

Failing to provide this information can lead to an uncertain situation, for example, about what the status is if an offer is not accepted within a reasonable period.

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## CONDITIONAL OFFERS/EMPLOYMENT

**Do you complete any checks or tests before offering employment?**

**If “NO”: Do you state that any offer may be withdrawn or subsequent employment terminated (following a fair process) if the results of any checks or tests are unsatisfactory?**

### If “NO”: AT RISK

As above, once a person accepts an offer they are an employee, and must be treated as an employee even if they have not yet started work. That means that, if you subsequently receive an unsatisfactory result on a check or test, you will need to discuss the situation with the employee. We recommend employers state in a letter of offer that an unsatisfactory check or test result can be grounds for dismissal without notice. If you propose to end the employment, you must have sufficient cause to do so and follow a fair process.

See 6.1 Managing Employment Risks – Fair Process and Chapter 8 Ending Employment.

**Do you state that any offer may be withdrawn or subsequent employment terminated (following fair process) if the applicant has not been honest with you, has omitted relevant information or has been misleading during the recruitment process?**

### If “NO”: Consider this situation carefully.

As above, once a person accepts an offer they are an employee and must be treated as an employee even if they have not yet started work. That means that, if you subsequently discover they have been dishonest or failed to provide you with relevant information, you will need to discuss the situation with the employee. We recommend employers state in the letter of offer (or an application form signed by the applicant) that failing to be honest or provide relevant information, or being misleading, can be grounds for dismissal without notice.

**If you propose to end the employment as a result, you must have sufficient cause to do so and follow a fair process.**

## Employment Agreement Requirements

**Organisations must have written employment agreements with all employees. This tool focuses on individual employment agreements (IEAs) and their minimum requirements. If you have a collective employment agreement (CEA) (ie, an agreement with a union that covers some of your employees), separate considerations will apply – see starting employment.**

Employment agreements set out the parties' expectations and the essential terms and conditions for employment. They should contain all agreed terms and must comply with certain requirements. Well written employment agreements set the tone for your organisation and its employment relationships. They provide information to employees and help you manage employment risks. You can use the Employment Agreement Builder tool on the Ministry of Business, Innovation and Employment (MBIE) website to generate an individual employment agreement, or seek legal advice, including through the Sport NZ Legal Helpdesk.

This chapter outlines minimum requirements generally, and provides more information about minimum requirements relating to hours arrangements, fixed-term and casual arrangements.

## MINIMUM REQUIREMENTS IN EMPLOYMENT AGREEMENTS

Does your employment agreement template reflect all the minimum requirements?

If "NO": AT RISK

Employment agreements must contain certain clauses, including (but not limited to):

- 01 The parties' names
- 02 A description of the duties (see **Designing Jobs**)
- 03 Any agreed hours of work (or an indication of the arrangements relating to the times of work)
- 04 An indication of where the employee is to perform the work;
- 05 A description of the dispute resolution process for resolving employment relationship problems.

Under the Holidays Act, employers also have to provide information about holidays and leave entitlements (and can do this through the employment agreement). The agreement must state if employees are required to work on public holidays, and that they will be paid at least time and a half for work on public holidays.

Employment agreements cannot contain anything that is inconsistent with the law.

Depending on the type of employment arrangement (eg, casual, fixed-term), there are other specific requirements – see **chapter 1 Designing Jobs**. Failing to comply with these requirements may result in breaches of relevant legislation, compliance costs and, in serious cases, penalties.

## Certain legislative requirements also need to be met in agreements where there are:

### Trial periods

You have a trial or probationary period arrangement (see 3.1 Starting People – Trial and Probationary Periods).

### Working outside agreed hours

You require an employee to be available to work outside of their agreed hours (an ‘availability provision’ – this may include ‘on-call work’ – see below).

### Shift work

An employee works shift work and you want an ability to cancel all or part of a shift.

### Secondary employment

You want to place limits on an employee undertaking secondary employment (see 6.4 Managing Employment Risks – Miscellaneous Risks).

For a full list of clauses that must be contained in an individual employment agreement, see [things an agreement must contain](#).<sup>30</sup>

For help creating an employment agreement that fits your particular needs and meets minimum requirements, see MBIE’s [Employment Agreement Builder](#).<sup>31</sup> If in doubt, we recommend that you seek employment law advice, including through the Sport NZ Legal Helpdesk.

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## HOURS OF WORK

**Does the employment agreement fix the maximum number of hours to be worked at 40 hours per week or fewer, over five days?**

If “NO”: AT RISK

Employment agreements must fix the maximum number of hours to be worked by the employee at not more than 40 hours per week (not including overtime) unless the employer and employee agree otherwise. If the hours are not more than 40, the parties must also try to fix the daily hours so they are not worked on more than five days a week. If the parties agree to more than 40 hours per week (excluding overtime) they need to state a maximum number of hours per week.

For information on hours of work, see [hours of work](#).<sup>32</sup>

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**Does the employment agreement accurately reflect any agreed hours or arrangements around the employee’s hours of work?**

If “NO”: AT RISK

An employment agreement must contain any agreed hours of work or, if no hours of work are agreed, an indication of the arrangements relating to the times that the employee is to work. Agreed hours include any or all of the following:

- **The number** of guaranteed hours.
- **The days** of the week when work is performed.
- **The start and finish** times of work.
- **Any flexibility** around days and/or start and finish times.

This helps ensure that employees are appropriately paid for the work that they do. It also has implications if an employer wants to require an employee to work hours in addition to the agreed hours of work (see below). For information on hours of work, see [hours of work](#).<sup>32</sup>

---

## AVAILABILITY

**If you require an employee to be available to work outside of their agreed hours, does the agreement contain an availability provision?**

If “NO”: AT RISK

Employers cannot require employees to be available outside of their agreed hours stated in their employment agreement unless that is provided in the agreement, and they are compensated for that availability (as provided by the agreement). Compensation could be by way of an allowance for waged employees. For salaried employees, the agreement can provide that this compensation forms part of the remuneration. Failing to comply with these requirements could result in an employee being entitled to refuse to do extra work, or an employer being required to pay an employee extra for their availability (in addition to any pay for the additional hours worked).

These rules about availability provisions do not prevent an employer from offering additional work to an employee, provided the employee is free to choose whether or not to accept the work.

For information about availability provisions, see [hours of work law changes 2016](#).<sup>33</sup>

---

## FIXED-TERM OR CASUAL EMPLOYEES

Does your employment agreement reflect the nature of the fixed-term/casual arrangement, and associated holidays and leave entitlements?

If “NO”: AT RISK

See Chapter 1 Designing Jobs for more information on requirements.

---

## TRIAL PERIODS OR PROBATIONARY PERIODS

See 3.1 Starting People – Trial and Probationary Periods for requirements about what must be covered in the agreement (that needs to be signed before employment starts) when either of these applies.

---

### 2.6

Bargaining for Employment Agreements/Terms

**Organisations must bargain for employment agreements (and any variation to contractual terms and conditions) in good faith. This means (amongst other things) not doing anything to mislead or deceive, as well as meeting other fair process requirements.**

---

## GOOD FAITH

Do you bargain for employment agreements (or variations/additional terms) in good faith?

If “NO”: AT RISK

Good faith includes being active and constructive, responsive and communicative, and not doing anything to mislead or deceive the other party.

For more information about what ‘good faith’ means, see [good faith](#).<sup>34</sup>

---

## RECORDS

Do you provide a copy of the intended agreement (or variation) to the employee, and keep a copy on record?

If “NO”: AT RISK

Employers are required to provide a copy of the intended agreement and to keep a copy on record (even if it is not signed or agreed to). For more information, see [offering and negotiating employment agreements](#).<sup>35</sup>

---

## ISSUES

Do you consider and respond to any issues employees/prospective employees raise?

If “NO”: AT RISK

Failure to do this could have implications if an employer wants to enforce an agreement, and could result in a penalty against the employer in some situations.

For more information, see [offering and negotiating employment agreements](#).<sup>35</sup>



---

## INDEPENDENT ADVICE

Do you tell employees (and prospective employees) that they are entitled to seek independent advice about intended agreements, additional terms or variations, and give them a reasonable opportunity to do that?

### If “NO”: AT RISK

Failure to do this could have implications if an employer wants to enforce an agreement, and could result in a penalty against the employer in some situations.

For more information, see [offering and negotiating employment agreements](#).<sup>35</sup>





# Chapter Three

## Starting People

**IN THIS SECTION**

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**3.1**

Trial and Probationary Periods (including termination during these periods)

**3.2**

Induction

**3.3**

Employment Records

---

See also:

**2.2 Hiring People - Privacy Obligations and Chapter 4 Minimum Employee Entitlements**

**Employers need to comply with a number of statutory requirements, which have potential legal consequences if they are not met. When starting an employment relationship you can help manage risks by using trial and probationary periods, giving a good induction and keeping required and accurate records. A separate chapter outlines minimum employment entitlements that must be provided.**

**Other helpful references:**

Recruitment and induction policy

See [policies and employee handbooks<sup>1</sup>](#)

### 3.1 \_\_\_\_\_

#### Trial and Probationary Periods

**Employment legislation enables employers to use trial periods (if they employ fewer than 20 employees) and probationary periods to assess whether an employee can do the job and meet the employer’s requirements. However, to apply, the situation and the employment agreement must meet specific requirements, and the agreement should be signed before an employee starts work.**

**Trial periods** provide statutory protection against personal grievances for unjustified dismissal if a number of requirements are met. They can only be used for new employees, and can only be used for up to 90 days by employers with fewer than 20 employees.

**Probationary periods** are not limited to 90 days or new employees; for example, they could be used when an employee changes to another role in the organisation. They do not offer the same statutory protection from unjustified dismissal.

Failure to meet the necessary requirements will mean the employer cannot rely on the provision, and could result in an unjustified dismissal or disadvantage claim.

We recommend that you take advice in drafting the appropriate legal clauses (this may be through the Sport NZ Legal Helpdesk), operating trial or probationary periods and terminating employment under such a provision.

For information about trial periods, see [trial periods](#).<sup>36</sup>  
For information about probationary periods, see [probationary periods](#).<sup>37</sup>

---

## TRIAL PERIOD

**Is the person a new employee (ie, they have not worked for you before)?**

**If “NO”: AT RISK**

You cannot use a trial period if you have employed the person previously, or if the person has started work before you agree to and document a trial period, as they will not then be a new employee. You could look at using a probationary period in that situation.

---

**Is the trial period for a specified period of 90 days or less starting at the beginning of the employee’s employment?**

**If “NO”: AT RISK**

You cannot use a trial period if it is for longer than 90 days (or if you have more than 20 employees). You could look at using a probationary period if you need a longer assessment period.

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**Is there a trial period provision contained in the employment agreement that meets the necessary requirements?**

**If “NO”: AT RISK**

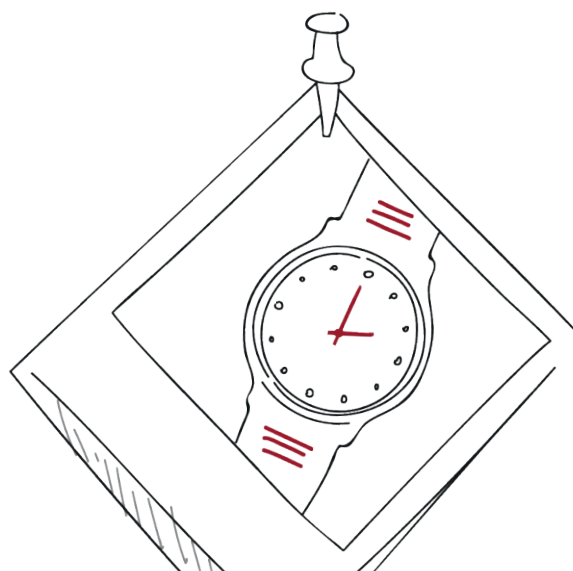
A provision that does not meet the necessary content requirements will not be valid and cannot be relied on to terminate the employment.

The requirements are that the provision states, or is to the effect that:

1. For a specified period not exceeding 90 days starting at the beginning of the employee’s employment, the employee is to serve a trial period;
2. During that period the employer may dismiss the employee;

3. If the employer does dismiss the employee, the employee will not be entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

You can use MBIE’s Employment Agreement Builder to draft a trial period provision. Trial period provisions (if valid) only provide protection against dismissal claims. However, employees on a trial period can still bring a personal grievance on grounds other than about their dismissal, for example, discrimination, sexual or racial harassment, pressure about union membership, unjustified disadvantage or breach of good faith.



---

**Has the employment agreement containing the provision above been signed before the employee starts work?**

**If “NO”: AT RISK**

Generally if an employee has not signed and returned the agreement containing the trial period before they start work it is likely to be invalid. (There are some limited cases where a trial period was held to be valid where the employee was aware of the trial period provision, it was compliant, and the employee effectively agreed to it before starting employment (even though they did not sign the agreement).)

---

## TERMINATION UNDER A TRIAL PERIOD

**Do you meet the above requirements for trial periods, comply with the agreement during the trial period and dismiss employees by giving the notice specified in the agreement before the end of the trial period?**

### If “NO”: AT RISK

To legally rely on the protections offered by a trial period clause, you need to meet these requirements; otherwise the termination will likely be unjustified and could result in legal liability (including for lost wages, compensation and potentially reinstatement).

If you meet the above requirements, then you can terminate during the trial period. You must give the notice provided in the agreement before the end of the trial period (even if the termination will take effect after the trial period ends ie, at the end of the notice period). Your employment agreement may enable you to then provide payment in lieu of the employee working out some or all of the notice period. If you fail to provide the right amount of notice, the trial period is invalid.

You do not have to provide a reason for terminating during a trial period, but it is good practice to do so, and you must do so if asked by the employee, in good faith. You and the employee should meet your other obligations on termination (including final pay, return of property etc). See **Chapter 8 Ending Employment** for more information.

If you do not give notice before the end of the trial period, the employee will no longer be on trial and their employment will continue. If you do terminate after the trial period is over, you will need to follow a fair process and have sufficient legal cause to terminate (see **Chapter 8 Ending Employment** for more information).

---

## PROBATIONARY PERIOD

**Is there a probationary provision in the employment agreement that explains that the employee will serve a stated period of probation after they start employment?**

### If “NO”: AT RISK

There is no valid probationary provision.

To be effective, a probationary period must be recorded in writing in the employment agreement. The clause should clearly state that there is a probationary period and how long it will last. They must be negotiated and used in good faith, and be for a reasonable period of time taking into account the relevant circumstances of the employer, the employee and the job.

If valid, a probationary period does not limit the rights and obligations of the employer or the employee. To terminate under a probationary period, the employer must have sufficient cause and follow a fair process.

---

## TERMINATION UNDER A PROBATIONARY PERIOD

**Do you meet the above requirements for a probationary period, follow a fair process and manage performance concerns appropriately during the period including providing feedback, support and an opportunity to improve? Do you have sufficient cause for terminating, follow a fair process and terminate on notice?**

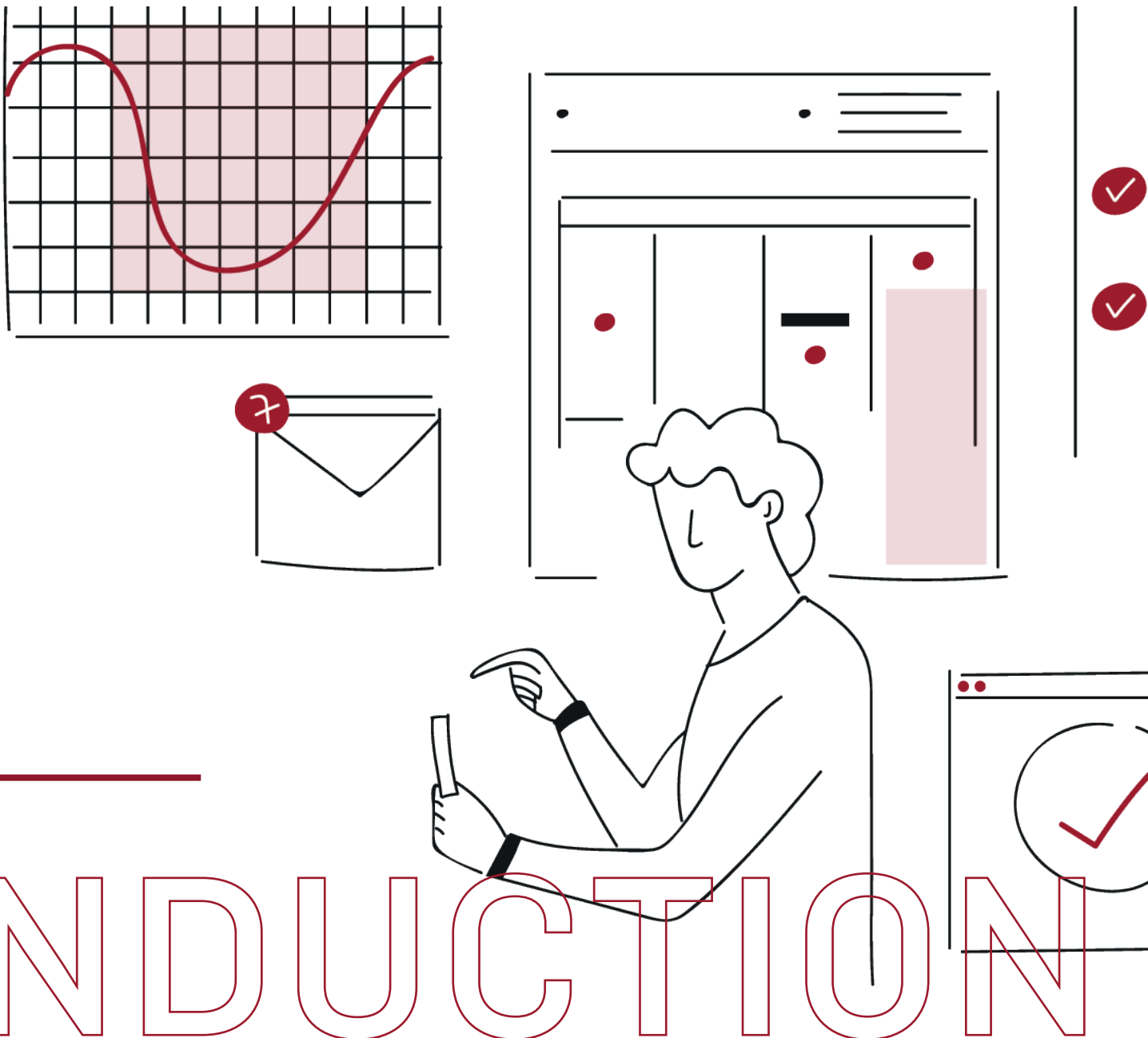
### If “NO”: AT RISK

See **6.1 Managing Employment Risks – Fair Process** and **Chapter 5 Creating a Performance Culture**. A probationary period is not a ‘get out of jail free’ card, and any performance concerns must be managed in the usual way.

A fair process includes, broadly, discussing performance concerns, setting clear expectations, providing support and training to help the employee reach the required level of performance, explaining that their job may be at risk if they don't, and providing a reasonable opportunity to improve during the probationary period.

At the end of the probationary period you can confirm the end of the probationary period, or dismiss on notice or extend the probationary period, provided you have good reason to do so, follow a fair process and comply with your employment agreement.

For more information, see [trial and probationary periods](#).<sup>38</sup>





**A good induction provides the new employee with relevant information and support, helps the employee settle in and become familiar with the organisation and their role, and sets up the parties for a productive and constructive employment relationship.**

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**Do you provide new employees (and employees changing roles) with a thorough induction that introduces them to the organisation and their role, identifies further training or support needed and helps them settle in?**

**If “NO”: AT RISK**

An induction might cover such things as the organisation’s history, values, culture, services provided, customers, staff and stakeholders, policies, practices and expected behaviour; an introduction to the workplace and workspace orientation; and information about the employee’s role, and the employee’s rights, responsibilities and benefits. For practical information about induction, see [induction](#).<sup>39</sup>

**Does your induction process include a full health and safety briefing and a workspace assessment?**

**If “NO”: AT RISK**

The health and safety briefing should include information about your evacuation plans, any hazards and risks, the processes for reporting and managing these, and how to be safe in the job and workplace. You need to ensure the employee has the necessary knowledge and experience to do the job without harming themselves or other people. Employees should be provided with any safety equipment or tools needed to do the job, and should be trained in how to use them properly.

Induction should consider the employee’s workspace, whether it’s properly set up and they have the necessary equipment and tools (and know how to use them) to perform their role safely. See also the ‘Health and safety’ module in Sport Compass (outside of the employment modules). For further information, see [induction](#).<sup>39</sup>

**Employers must keep accurate records of wages, time, leave and other information. There are minimum statutory requirements that must be complied with, and time periods for which different records must be kept. Proper records help you correctly calculate leave, pay and other entitlements, show compliance with legal requirements, avoid misunderstandings and manage employment risks. Employees can request to access their records. There can be penalties and other legal consequences from failing to keep or provide proper records.**

Record keeping systems may be manual or computerised or a combination. MBIE provides templates of different forms of records (see [keeping accurate records](#).<sup>40</sup>)

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## EMPLOYMENT AGREEMENTS AND TERMS

**Do you keep on file a signed copy of all employment agreements and variations, and any intended employment agreements and variations, and provide a copy to employees on request?**

**If “NO”: AT RISK**

These are statutory requirements. You must keep a signed copy of the employment agreement, or current signed terms and conditions (and employees must be given a copy if they ask for it). If you are bargaining for a new agreement or variation, you must also keep a copy of any intended agreement or variation on file, and must provide a copy to the employee (see 2.6 Hiring People – Bargaining for Employment Agreements/Terms).

---

## RECORDS

**Do you keep accurate wage, time, leave and other records as required, for the prescribed time periods?**

**If “NO”: AT RISK**

This could result in a penalty from the Employment Relations Authority or an infringement notice being issued by a Labour Inspector. It could also be difficult for you to demonstrate that you are otherwise meeting your statutory obligations as an employer, including in relation to pay, holidays and leave.

Employers must keep the following information about each employee:

- 01 Name  
Postal address  
Age (if under 20 years)  
Date they started working
- 02 If they're on an individual employment agreement or a collective agreement (with further requirements if under a collective agreement) and a copy of the agreement
- 03 The kind of work they are employed for
- 04 The number of hours worked each day in a pay period (including any additional hours) and the pay for those hours (and how they are calculated). If these are agreed and they work them as usual hours then a statement of those usual hours and pay will be enough. This can be recorded in:

the wages and time record	employment agreement	a roster, or any other document or record normally used during employment
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- 05 Details of any employment relations education leave taken

Employers need to record sufficient details about hours worked and leave accrued and taken to show that they are complying with minimum entitlements. This includes:

- 01 The wages paid in each pay period and how these have been calculated
- 02 The dates employees last became entitled to annual holidays, sick leave and bereavement leave and their current entitlement to annual holidays and sick leave
- 03 The dates of leave taken, including annual holidays, sick leave and bereavement, and payment received for each
- 04 Any annual leave cashed up as well as the date and amount paid for each entitlement year
- 05 The dates of, and payments for, any public holidays (including the number of hours worked)



- 06 ..... The cash value of any alternative holidays they gave up for payment
- 07 ..... The cash value of any board and lodgings provided
- 08 ..... The date when employment ended, and the amount of holiday pay they received at the end of employment
- 09 ..... A copy of employees' tax code declaration (IR330).

Employers should also keep records of:

- 01 ..... All wage deductions, such as PAYE, student loan deductions and superannuation contributions, and any agreements for wage deductions
- 02 ..... Requests to transfer public holidays (and whether or not these were agreed to)
- 03 ..... Requests to cash up annual holidays (and whether or not these were agreed to)
- 04 ..... Evidence of compliance with health and safety responsibilities
- 05 ..... Evidence of rest and meal breaks provided (or compensation for these)
- 06 ..... Copies of employees' personal contact details, such as their email addresses, and home phone and mobile numbers, if they want to provide these
- 07 ..... In case of emergency (ICE) contact details
- 08 ..... Employees' bank account details if this payment method has been agreed to
- 09 ..... Details of employees' work permits, if applicable.

Wages and time records, and holiday and leave records should be kept for seven years (even if the employee has left). (This covers periods provided for employment and tax purposes.)

For more information, see [keeping accurate records](#).<sup>40</sup>

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## ACCESSIBLE RECORDS

Are your wages and time, and holiday and leave records in an easily accessible form that employees and other authorised people can access on request?

If “NO”: AT RISK

Employees have a right to know what is recorded about them, and a right to access their records on request.

See [keeping accurate records](#)<sup>40</sup> and see also information from the IRD about [record keeping for businesses and employers](#).<sup>41</sup>

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Chapter  
Four

**Minimum  
Employee  
Entitlements**

IN THIS SECTION

---

4.1

Minimum Wage,  
KiwiSaver and Breaks

4.2

Annual Holidays

4.3

Other Types of Leave

Employees have minimum statutory entitlements set by law that you need to comply with. You may choose to provide enhanced or additional entitlements.

Other helpful references:

HR policies  
and employee  
handbooks<sup>1</sup>

Leave and holidays  
and time in lieu  
policy



## MINIMUM WAGE

**Do you pay adult employees (aged 16 and over) at least the minimum hourly wage (or a Starting-Out Wage or Training Minimum Wage if applicable) for every hour worked?**

**If “NO”: AT RISK**

Minimum wages are set by law. Legal risk can result from failing to comply, including from non-compliance in the past. It is also important to consider when time constitutes work. Travel for work, and time spent away (including overnight stays in certain circumstances) may also constitute ‘work’ that needs to be paid for at least at the minimum wage.

For current minimum wage rates, see [current minimum wage rates](#).<sup>42</sup> For general information about the minimum wage, see [minimum wage](#).<sup>43</sup>



**Do you provide KiwiSaver information to all new employees and automatically enrol all eligible new employees who are not already KiwiSaver members?**

**If “NO”: AT RISK**

See here for further information from the IRD about the employer’s role in relation to [KiwiSaver](#).<sup>44</sup>

For information about new employees, see [getting new employees started](#).<sup>45</sup>

**Do you deduct employee contributions and pay employer contributions at the correct rate where required?**

**If “NO”: AT RISK**

See [making deductions](#)<sup>46</sup> for further information from the IRD about employee deductions and employer contributions.

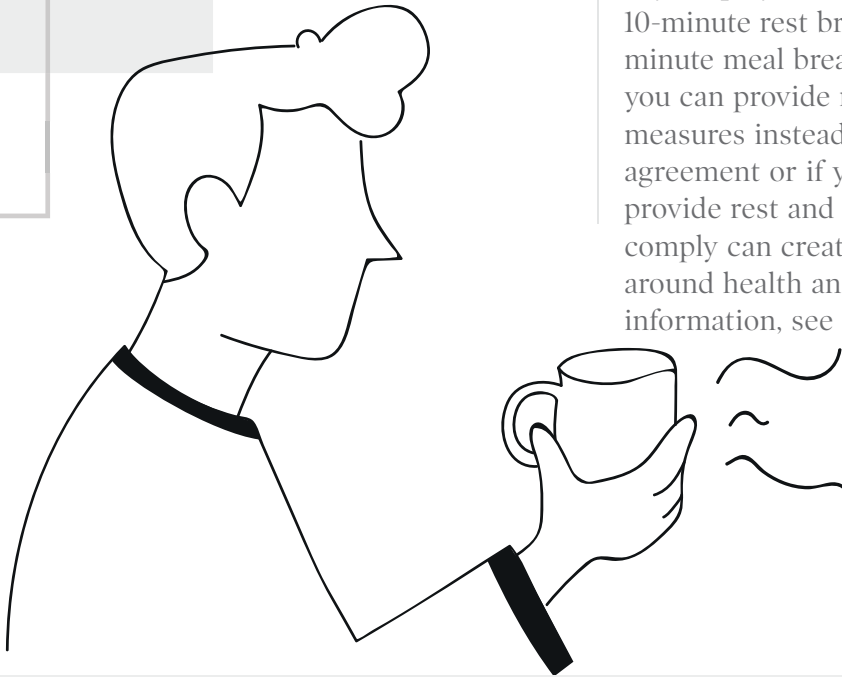
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## REST AND MEAL BREAKS

**Do you provide employees with reasonable paid rest breaks and paid or unpaid meal breaks?**

### **If “NO”: AT RISK**

For a ‘normal’ (7.5 or 8 hours) working day, employees are entitled to two paid 10-minute rest breaks and one unpaid 30-minute meal break. In some circumstances, you can provide reasonable compensatory measures instead of breaks either by agreement or if you cannot reasonably provide rest and meal breaks. Failing to comply can create legal risk, including around health and safety issues. For more information, see [rest and meal breaks](#).<sup>47</sup>



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## BREASTFEEDING BREAKS AND FACILITIES

**If you have an employee who is breastfeeding, do you provide appropriate facilities and unpaid breaks for breastfeeding/expressing milk where reasonable and practicable?**

### **If “NO”: AT RISK**

See [breastfeeding at work](#)<sup>48</sup> for more information about your obligations.

**Employees have minimum statutory entitlements to annual holidays. You may choose to provide enhanced or additional entitlements.**

For more information, see [minimum leave and holidays entitlements](#).<sup>49</sup>

---

#### ANNUAL HOLIDAYS ENTITLEMENT

**Do you provide employees with at least four weeks' paid annual holidays after each 12 months of continuous service?**

**If “NO”: AT RISK**

For more information about annual holidays entitlements, see [annual holidays entitlements](#).<sup>50</sup>

In some limited circumstances, instead of accruing annual holidays you can pay an employee's annual holiday entitlement with their regular pay on a 'pay as you go' basis of at least 8 percent, provided certain requirements are met. This can apply where there is a fixed-term agreement of less than 12 months or where an employee works so intermittently or irregularly that it is impractical to provide four weeks' annual holidays. For more information, see [changing pay-as-you-go for fixed-term or work patterns](#).<sup>51</sup>

---

#### TAKING ANNUAL HOLIDAYS

**Do you reach agreement about when annual holidays are taken or, failing agreement, do you direct employees to take annual holidays by providing at least 14 days' notice?**

**If “NO”: AT RISK**

Employees should also be able to take at least two weeks of their annual holidays in one continuous period if they want to, and should be able to take their holidays within a year of accruing them. Untaken annual holidays continue to be accrued unless cashed up or paid out on termination. For more information, see [taking annual holidays](#).<sup>52</sup>

---

#### PAYMENT FOR ANNUAL HOLIDAYS

**When an employee takes annual holidays, do you pay them at the appropriate statutory rate for the agreed portion of their annual holidays entitlement?**

**If “NO”: AT RISK**

Employees must be paid at the greater of their 'ordinary weekly pay' or 'average weekly earnings' (these are defined terms under the legislation) for the agreed portion of their annual holidays entitlement. For help in calculating payments, see [calculating annual holiday payment rates](#).<sup>53</sup>

Payment should be made before the holiday unless there is agreement to pay in the pay cycle in which the holiday is taken. For more information, see [annual holidays](#).<sup>54</sup> See **Chapter 1 Designing Jobs** for circumstances around certain fixed-term and casual employment where you may be able to provide annual holidays on a 'pay as you go' basis with an employee's regular pay. See also [changing pay-as-you-go for fixed-term or work patterns](#).<sup>51</sup>

---

## ANNUAL CLOSEDOWN PERIODS

**Do you comply with the statutory requirements if you apply an annual closedown period under the Holidays Act (eg, a compulsory Christmas closedown)?**

### **If “NO”: AT RISK**

If your closedown is a compulsory customary closedown under the Holidays Act, there are certain requirements that apply including in relation to notice, what sort of leave applies, payment provisions and employee anniversary dates. For more information, see [annual closedowns](#).<sup>55</sup>

---

## REQUESTS TO CASH UP ANNUAL LEAVE

**Do you consider and respond in reasonable time to any written requests by an employee to ‘cash up’ up to one week of their annual holidays?**

### **If “NO”: AT RISK**

You do not have to consider a request if you have an applicable policy that you will not cash up annual holidays. Otherwise, you must consider and respond to any request within a reasonable time. You can accept or decline a request, and there are conditions and requirements that apply to cashing up annual holidays. You cannot require an employee to make a request.

For more information, see [cashing-up annual holidays](#).<sup>56</sup>

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## 4.3

### Other Types of Leave

**Employees have minimum statutory entitlements to holidays and leave. Some entitlements apply only to certain employees (eg, permanent, fixed-term, casual), or if certain conditions are met (eg, after a certain period of service). You may choose to provide enhanced or additional entitlements.**

**For more information, see [minimum leave and holidays entitlements](#).<sup>50</sup>**

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PROVIDING  
INFORMATION  
ABOUT HOLIDAYS  
AND LEAVE

**When entering an employment agreement, do you let employees know about their entitlements under the Holidays Act and where to get more information?**

**If “NO”: AT RISK**

The easiest way to do this is to include this information in the employment agreement itself. That includes letting employees know that they can get further information from you, their union (if applicable) or from MBIE ([www.employment.govt.nz](http://www.employment.govt.nz) or 0800 20 90 20).

---

PUBLIC HOLIDAYS

**Do you provide employees with a paid day off on public holidays if it would otherwise have been a work day for them? Or, where employees work on a public holiday, do you pay them at least time and a half, and provide a paid alternative holiday if applicable?**

**If “NO”: AT RISK**



All **employees** are entitled to a paid day off on a public holiday if it is a day they usually would work.



Employees **may be required** to work on a public holiday if stated in their employment agreement.



If an employee works on a public holiday, you **must pay time and a half (or more)**, and give them an alternative day off if it is a day they usually would work.



If an employee is on-call on a public holiday but not called into work, they may be entitled to an alternative day off on pay if the restriction from being on-call meant they have not practically received a whole holiday.

There is also the ability to transfer public holidays in some situations, and the legislation provides for certain public holidays that fall on a weekend day to be observed on a different day of the week (in some circumstances). For more information about public holiday entitlements, see [public holidays](#).<sup>57</sup>

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## BEREAVEMENT LEAVE

**Do you provide employees with paid bereavement leave (one or three days depending on their relationship with the deceased) after six months' continuous service?**

**If "NO": AT RISK**

See [bereavement leave](#).<sup>58</sup>

---

## SICK LEAVE

**Do you provide employees with at least five days' paid sick leave per year after six months' continuous service? (This can be used when they, their partners/spouses or dependants are sick or injured.)**

**If "NO": AT RISK**

See [sick leave](#).<sup>59</sup>

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## SICK LEAVE – MEDICAL CERTIFICATION

**Do you only ask for medical certification to support sick leave in qualifying circumstances, and do you meet the cost of that where required by law?**

**If "NO": AT RISK**

You can require an employee to provide proof of sickness or injury to support paid sick leave if:

**The sickness or injury** is for three or more consecutive days (at the employee's cost)

**If you otherwise require** (at the employer's cost). You must inform the employee as early as possible that proof is required

**You can also agree** that an employee will (at the employee's cost) provide proof on request for any sick leave in addition to their statutory entitlement of five days per year.

For more information, see [sick leave and ACC payments](#).<sup>60</sup>

---

## ACC INJURY OR ACCIDENT

**If an employee is off work as a result of a work-related accident or injury, do you pay them their first week's compensation at 80 percent of what they would have earned that week?**

**If "NO": AT RISK**

If an employee has a work-related accident or injury (covered by ACC), you must pay them their first week's compensation at 80 percent of what they would have earned. You can agree to top this up from 80 to 100 percent by using one day paid sick leave for five days off.

After the first week, if an employee receives weekly compensation from ACC, you cannot use paid sick leave or annual leave (unless you agree to top up their weekly compensation from 80 to 100 percent by using one day paid sick leave for each five days off).

If an employee has a non-work-related accident or injury and needs time off work, you can provide paid sick leave or let them take paid annual holidays by agreement for the first week.

For more information, see [sick leave and ACC payments](#).<sup>60</sup> See also the separate module on Health and Safety (outside the Employing People section) around return to work plans.

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## JURY SERVICE

**Do you give employees unpaid leave for jury service?**

**If “NO”: AT RISK**

At a minimum, employers must provide employees with unpaid time off for jury service. Some employers may agree to pay for some or all of this period. For more information, see [jury service](#).<sup>61</sup>

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## PARENTAL LEAVE

**Do you provide statutory entitlements to parental leave and other pregnancy-related leave to eligible employees under the legislation, and comply with applicable notice, process and timeframe requirements?**

**If “NO”: AT RISK**

The Parental Leave and Employment Protection Act 1987 provides a range of entitlements for employees having a baby, their partners, and people otherwise becoming the primary carer of a child (eg, in certain adoption situations). This includes unpaid special leave of up to 10 days during pregnancy, partner’s leave of up to two weeks, primary carer’s leave of up to 22 weeks, extended leave of up to 52 weeks (longer in some limited situations) and negotiated carer’s leave. Eligibility criteria apply and there is a range of other requirements including prescribed notices and timeframes. For more information, see [parental leave](#).<sup>62</sup>

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## DOMESTIC VIOLENCE LEAVE

**Do you provide domestic violence leave of up to 10 days per year for employees affected by domestic or family violence?**

**If “NO”: AT RISK**

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## DEFENCE FORCE VOLUNTEERS’ LEAVE

**Do you give employees unpaid leave for voluntary training or service for the Armed Forces, and follow the required process and timeframes if an employee applies for leave for service in a time of war, an emergency or a situation of national interest?**

**If “NO”: AT RISK**

See [defence force volunteers](#)<sup>63</sup> for more information.





Chapter  
Five

Creating a  
Performance  
Culture



## 5.1 —————

### Compliance with Agreements/Policy

## COMPLIANCE WITH AGREEMENTS/POLICY

**Do you comply with any provisions about performance in your employment agreement or policies? Have you made your performance expectations clear to employees?**

### If “NO”: AT RISK

You should comply with any relevant provisions about performance in your agreements or relevant policies. This might include commitments related to managing performance and developing employees, conducting regular performance reviews, and how you measure or reward performance at different levels (eg, incentive payments/ pay for performance etc).

You should set clear performance expectations with employees, so you can readily identify when performance falls short. Employers should also provide ongoing feedback to employees, both positive and negative. This can help prevent minor issues from growing into larger issues, and can prevent poor performance becoming generally accepted as the standard. Even without a requirement to do so, it is good practice to regularly review performance with employees. This can help you get the best out of your employees, respond to any questions or concerns, and address any training or skills gaps or development needs.

For more information, see [employee performance](#).<sup>64</sup>

## 5.2 —————

### Managing Concerns

## MANAGING CONCERNS

**If there are concerns about performance, do you raise them and manage them fairly and appropriately? Are you clear about how the performance fell short and what needs to be done to improve it, and do you provide appropriate support and a reasonable opportunity to improve?**

### If “NO”: AT RISK

If you fail to manage the situation appropriately, or in accordance with your agreement or policies, an employee may claim that they have been unjustifiably disadvantaged and that you have breached their employment agreement.

See also 6.1 Managing Employment Risks – Fair Process and 6.2 Managing Employment Risks – Investigating Concerns.

Employers have a duty of good faith, which includes being active and constructive, responsive and communicative.

Any issues should be raised and addressed with employees in good faith, and in accordance with any specific requirements in the employment agreement or policies.

Generally employers should identify the problem, discuss it with the employee, make their performance expectations clear, help the employee understand where their performance fell short, and provide the appropriate time and support for the employee to try to improve their performance to the desired level.

Feedback, mentoring, coaching or the use of a buddy might be appropriate (as low-level interventions). You might provide the employee with a letter of expectations or a caution (ie, if the issue is not resolved, then more formal action and possible disciplinary action could be taken). It is a good idea to keep a written record of any discussions you have with employees about performance. For information on informal intervention, see [informal intervention](#).<sup>65</sup>

For information on managing performance generally, see [managing performance issues](#).<sup>66</sup>



### 5.3 \_\_\_\_\_

## Formal Performance Management

### FORMAL PERFORMANCE MANAGEMENT

**If concerns about performance are serious or ongoing, have you followed a fair process, properly established what has occurred (see links below) and responded fairly and appropriately in undertaking formal performance management?**

#### **If “NO”: AT RISK**

Formal Performance Management should follow a fair process (see [6.1 Managing Employment Risks – Fair Process](#)), and should be considered only after you have established that poor performance has occurred that is sufficient to warrant formal action. (While this is not exactly like an investigation into misconduct, some of the

factors are relevant; see **6.2 Managing Employment Risks – Investigating Concerns.**) It may be as simple as discussing the situation with the employee and considering their feedback before determining that poor performance has occurred.

Generally you would consider managing performance concerns informally first, before starting a Formal Performance Management process (an exception might be where there has been a one-off serious issue of poor performance). You must comply with any requirements in the applicable employment agreement or policy.

Formal Performance Management will often involve a Performance Improvement Plan (PIP). A PIP should be discussed and (ideally) agreed with the employee. Employers should document the performance issue, performance expectations, support and training that the employer will provide, and how and when the expectations will be assessed. The purpose is to clarify expectations, and for both parties to work together so that the employee can meet those expectations. The employee should be given a reasonable opportunity to improve. What period is reasonable will depend on the circumstances, including the nature of the issue, the employee's role and the organisation. The employee should also be warned about what the consequences might be of failing to improve to the required level (eg, disciplinary action including possible termination for ongoing or serious issues of poor performance, a further PIP etc.) The employee's performance should be monitored and feedback provided regularly during the PIP period.

If the PIP is ineffective, or the performance fails to improve to the required level, you might consider extending the PIP, implementing a further PIP, and/or taking disciplinary action.

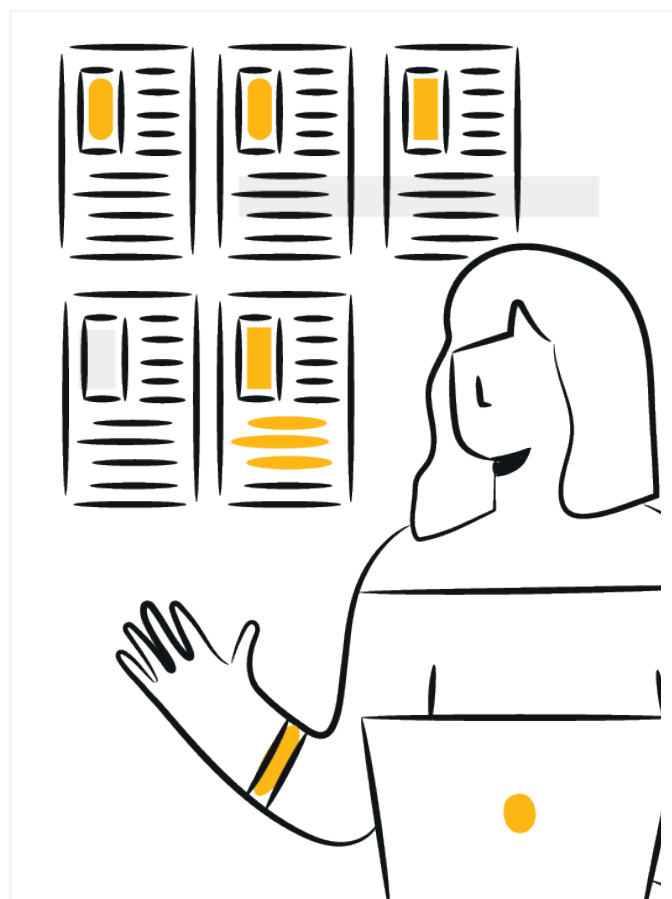
If the PIP is effective, it may be worthwhile continuing to monitor and review the performance for a further period to ensure that any performance improvements are sustained.

Failing to act reasonably in managing performance may result in the employee raising a personal grievance.

For information about performance management, see [managing performance issues](#)<sup>66</sup> and [formal intervention](#)<sup>67</sup> (including for a template PIP and step-by-step guide to using a PIP).

If you are considering taking disciplinary action for ongoing or serious issues of poor performance, see **Chapter 6 Managing Employment Risks** for further information.

For information about warnings for performance, see [formal intervention](#).<sup>67</sup>





Chapter  
Six

**Managing  
Employment  
Risks**

**IN THIS SECTION**

**6.1**

Fair Process

**6.2**

Investigating Concerns

**6.3**

Disciplinary Action

**6.4**

Miscellaneous Risks

See also:

[Preventing relationship problems](#)<sup>68</sup>

[Minimum employee entitlements](#)

A number of challenging situations can arise in employment that you may need to investigate, and which may result in termination or other types of disciplinary action. This chapter starts by looking at what a fair process and an investigation involve. These are central to managing a range of employment risks (and are cross-referenced throughout the Employing People modules). The chapter then goes on to consider disciplinary action, and ends with a section on other employment risks including bullying, harassment and discrimination; medical incapacity; drug and alcohol testing; protected disclosures; and issues around confidentiality, intellectual property and conflicts of interest.

Failure to act appropriately in managing these risks can harm the organisation and its employees, and can lead to employment risks including possible legal challenges and potential liability.

**Other helpful references:**

HR policies and employee handbooks<sup>1</sup>

Misconduct and disciplinary matters policy

Code of conduct policy

Performance appraisals policy



**It is crucial that employers follow a fair process before reaching a decision that impacts an employee. An employer must deal with the employee in good faith in any process. Failing to do so may give rise to a personal grievance for unjustified disadvantage or unjustified dismissal, and the employer may be liable for compensation, lost wages, costs, and reinstatement.**

For more information about fair process, see [fair process](#).<sup>69</sup>

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### **GOOD FAITH**

**Did you act in good faith during any employment process you undertook?**

#### **If “NO”: AT RISK**

You must act in good faith towards your employees, including in any employment process you undertake. This means not being misleading or deceptive. It also means being active and constructive in maintaining a productive employment relationship, where the parties are responsive and communicative. Where an employee’s job may be at risk, it means providing the employee with access to information that may be relevant to the decision, and an opportunity to comment on that, before the decision is made.

For more information about good faith, see [good faith](#).<sup>34</sup>

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## JUSTIFICATION

**Was the process that you followed justifiable?**

**If “NO”: AT RISK**

You must follow a fair process. The test for this is whether what you did (ie, any decision you made), and how you did it (ie, the process) were what a fair and reasonable employer could have done in all the circumstances at the time. This includes considering whether you:

- Sufficiently investigated the allegations or concerns
- Raised the concerns with the employee before taking action
- Gave the employee a reasonable opportunity to respond to the concerns before taking action
- Genuinely considered the employee’s explanation (if any) before taking action.

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## COMPLIANCE WITH AGREEMENTS AND POLICY

**Did you comply with any requirements (including about procedure) provided in the applicable employment agreement or relevant policy at all stages of the process?**

**If “NO”: AT RISK**

In carrying out a process, you must also follow any requirements in the relevant employment agreement or policy. For example, sometimes those documents might specify particular steps you need to take, or outline what sort of action might be appropriate in different circumstances.

Failing to comply with any contractual or policy requirements could affect the ultimate decision, and will generally make the process unjustifiable.

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## DECISION MAKER

**Was the decision maker impartial and did the employee have access to the ultimate decision maker?**

**If “NO”: AT RISK**

The decision maker must be impartial. This means that the decision maker should ideally be a person who was removed from the situation that gave rise to the allegations, and has no conflict of interest. You will need to think about who is the appropriate person and consider any relevant delegations and potential conflicts. Usually a decision maker will be a senior manager. The employee should have access to the decision maker, and should be able to talk to the decision maker about the allegations. If you have any queries about whether a decision maker is appropriate, we recommend seeking advice (this may be through the Sport NZ Legal Helpdesk).

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## SUPPORT/LEGAL REPRESENTATION

**Was the employee told about their right to have a representative or support person involved and given an opportunity to do that?**

**If “NO”: AT RISK**

An employee must be advised of their right to have a representative or support person involved in the disciplinary process (including any meetings). An employee must have a reasonable opportunity to arrange a representative or support person.

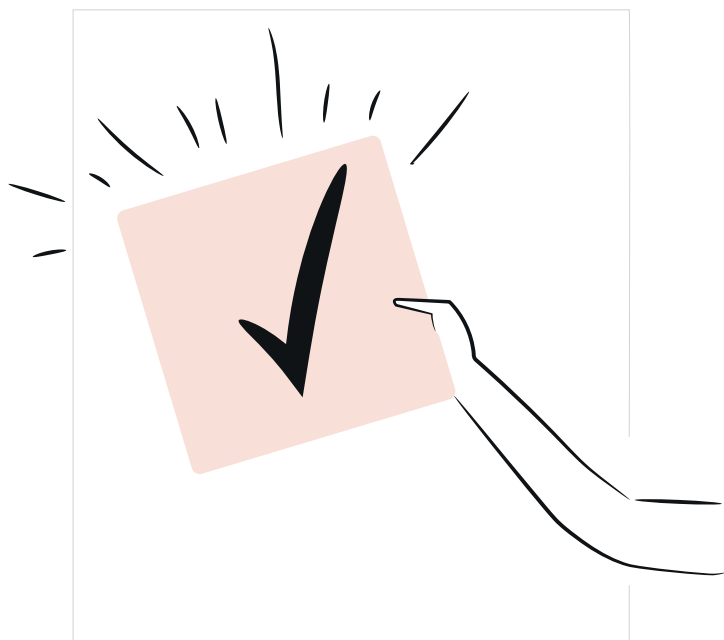
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## PROPOSED ACTION DISCUSSED

Did you discuss any proposed action with the employee and consider their views about that, and consider all the relevant information, before making a decision?

### If “NO”: AT RISK

Employers have a statutory obligation to provide information to an employee that is relevant to their continued employment, and consider their feedback and all relevant information, before making a decision. In the context of a disciplinary process, this means that you need to advise the employee of the proposed disciplinary action, and genuinely consider their feedback and all relevant information before making a decision. Considering all relevant information includes considering whether alternative outcomes (including other forms of disciplinary or non-disciplinary action) are appropriate. See [6.2 Managing Employment Risks - Investigating Concerns](#).



## CONFIDENTIALITY AND PRIVACY

Was the process conducted confidentially, and the information shared on a ‘need to know’ basis only, taking into account relevant privacy interests?

### If “NO”: AT RISK

Investigations should be conducted in a confidential manner, and conscious of the different privacy interests involved. For reasons of natural justice, the identity of any complainants and witnesses will generally need to be shared with the employee responding to allegations in a disciplinary situation. Information from an investigation will generally need to be shared on a ‘**need to know basis**’. For instance, senior management and HR/payroll may need to know the outcome for operational reasons, and the information in an investigation may need to be shared with others as part of testing the information and determining what occurred. If you have any queries about the level of information that can be shared and with whom, we recommend seeking advice (this may be through the Sport NZ Legal Helpdesk).

We also recommend advising the employee at the beginning of the process that the process is confidential, and that the employee should not talk to anyone (except of course their legal representative/support person) about the process (particularly any complainants). This can help manage potentially sensitive issues and protect the integrity of the process.



**When investigating an issue, for example an allegation of serious misconduct, performance concerns or a bullying and harassment complaint, you must carry out a fair investigation. There is no ‘one size fits all’ rule. The appropriate type of investigation will depend on the situation and the nature of the allegations or issues. For instance, in some cases, you may need to carry out preliminary enquiries before determining that an investigation is necessary. In some cases, it may be sufficient to discuss the situation with the employee concerned.**

**Where the allegations are serious, a comprehensive investigation process may be appropriate (this could include a terms of reference, meetings with relevant people, reviewing documents and other relevant evidence etc). An investigation of this nature may be carried out by the organisation, or it may be more appropriate to appoint an external investigator.**

The purpose of an investigation is to determine what has occurred on the balance of probabilities, that is, a finding that it is more likely than not that it occurred. Sometimes you may not be able to make findings on some or all of the allegations or issues, for example, where there are contradictory accounts of what occurred and nothing to support preferring one view over the other.

In some cases, for instance where the allegation is minor, you may choose to address the matter with the employee in an informal way. For example, it may be sufficient to discuss the situation with the employee concerned and consider their views. If you have any queries about the appropriate level of investigation required in any case, we recommend seeking advice (this may be through the Sport NZ Legal Helpdesk).

For information about disciplinary investigations, see [investigations](#).<sup>70</sup>

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## INVESTIGATION PROCESS

**Did the investigation follow a fair process?**

**If “NO”: AT RISK**

See 6.1 Managing Employment Risks – Fair Process.

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## SUSPENSION

**Before suspending an employee, did you have sufficient grounds to justify the suspension and did you consult with the employee prior to making the decision to suspend?**

**If “NO”: AT RISK**

Suspension is a disciplinary step in itself, and must therefore be justifiable and follow a fair process. See 6.1 Managing Employment Risks – Fair Process.

Suspension may be appropriate where there are serious safety concerns or risks to the business, or where you may not be able to properly conduct the investigation with the employee at work. If suspension is not appropriate, you might consider alternatives like offering paid leave or temporary redeployment.

The employee must be consulted about the proposed suspension. If that needs to occur quickly, you might consider offering special paid leave for a day or so, to give the employee time to consider and respond to a proposed suspension. You will need to tell them about your concerns and why you think suspension is appropriate. You also need to genuinely consider the employee’s feedback before making a decision, and should record the decision in writing. Suspension should be on pay unless the employment agreement specifically allows for suspension without pay.

If the employment agreement does not contain a suspension clause, you may still be able to suspend an employee, but you must take care and follow a fair and reasonable process – in this situation we recommend seeking advice (this may be through the Sport NZ Legal Helpdesk).

For more information about suspension, see [suspension](#).<sup>71</sup>

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## RATIONALE FOR FACTUAL FINDINGS

**Was there a sound rationale for any factual findings, and were they thoroughly tested with the employee (and others if applicable)?**

**If “NO”: AT RISK**

You must have a sound rationale for any factual findings you make. This means that you must carry out an investigation into the allegations, consider whether you think the allegations are upheld (and why), and put that to the employee and consider their feedback before making a decision. One way to achieve this is to document your preliminary views in a draft report, and give the report to the employee to comment on (particularly where the allegations are serious). You could then consider whether your views have changed and the report needs to be amended before being finalised.

Where there are inconsistencies, for instance in a ‘he said, she said’ situation, where possible you should talk to any witnesses, or consider whether there is any other evidence that may support either view (eg, CCTV footage, recordings, emails, computer entries etc).

Once you have completed the investigation and established the facts, you can consider whether a disciplinary process may be appropriate. A formal disciplinary process is not always necessary; for instance, the

employer may be satisfied that there is no issue to investigate, or the issue may be resolved with an informal meeting between the employer and the employee. If the issue is more serious, a formal disciplinary process will usually be appropriate. You must, of course, comply with any requirements in your employment agreements or policies.

### 6.3 \_\_\_\_\_

## Disciplinary Action

**Disciplinary action may be appropriate in various situations, for instance where allegations of misconduct or serious misconduct have been upheld following an investigation (see 6.1 Managing Employment Risks – Investigating Concerns), or where there are serious performance concerns, or where previous performance management has not been successful (see Chapter 5 Creating a Performance Culture).**

When starting a disciplinary process, you must comply with any process set out in the applicable employment agreement or policy, and you must comply with the good faith and fair process principles as outlined above (see 6.1 Managing Employment Risks – Fair Process).

Failing to follow a fair disciplinary process or reach a fair outcome may give rise to a personal grievance for unjustified disadvantage or unjustified dismissal, and if a claim were successful, you may be liable for lost wages, compensation, costs, and reinstatement.

For information about disciplinary processes, including a suggested step-by-step process and a process flow chart, see disciplinary process.<sup>72</sup>

For more information about disciplinary action, see disciplinary action<sup>73</sup> and warnings.<sup>74</sup>

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## JUSTIFIABLE

**Is disciplinary action potentially justified in the circumstances (and having followed a fair process and conducted an investigation to determine what occurred as outlined in the earlier sections)?**

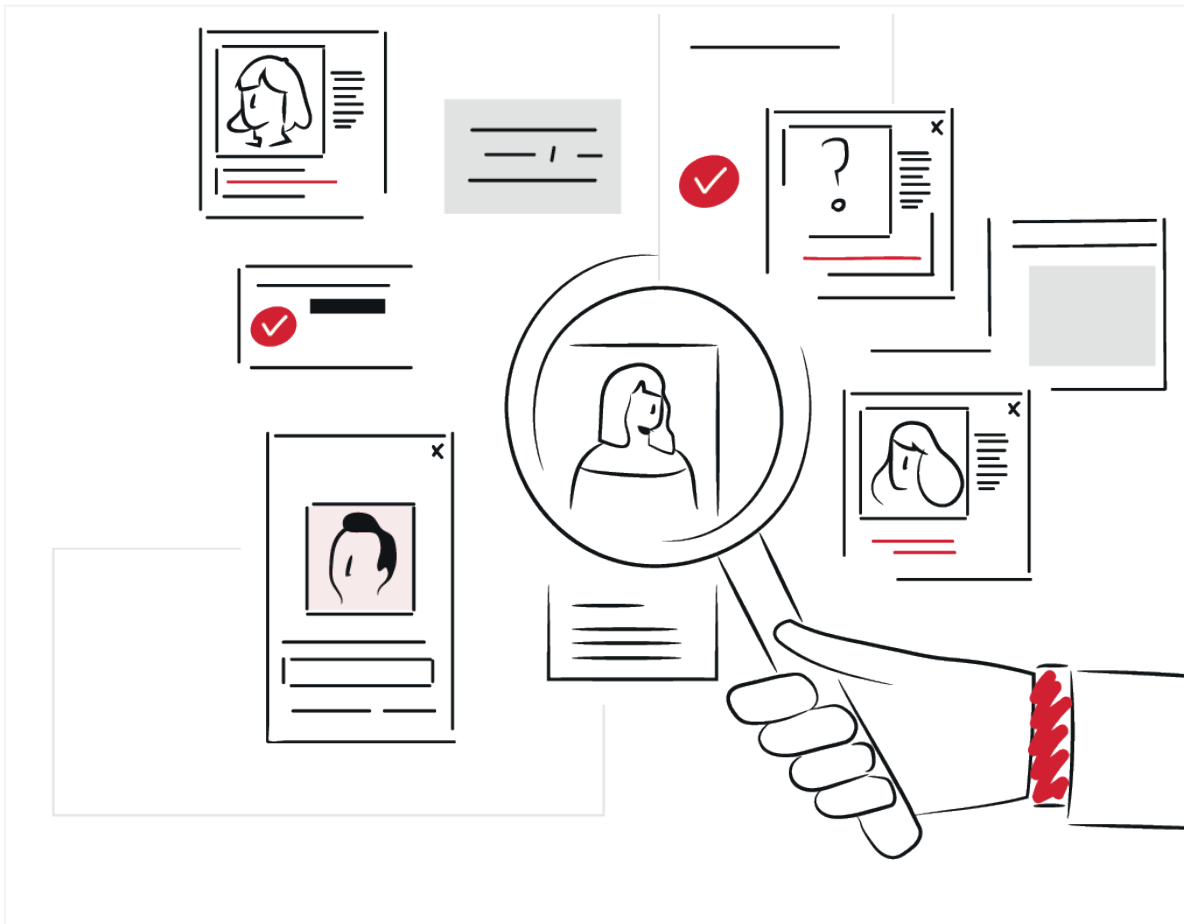
### If “NO”: AT RISK

You must follow a fair and reasonable investigation process to determine what has occurred before considering whether to impose disciplinary action. See 6.1 Managing Employment Risks – Fair Process and 6.2 Managing Employment Risks – Investigating Concerns.

In the performance context, you might consider disciplinary action is appropriate if the employee has not met reasonable performance expectations following a formal performance management process (see Chapter 5 Creating a Performance Culture), or where there is a serious performance issue, or an ongoing failure to improve performance after multiple opportunities to improve.

Before you consider imposing a disciplinary action, you must check the employment

agreement or applicable policy to determine if there are any requirements around whether you can take disciplinary action, and what form that may take. For instance, for a ‘first offence’, do you have to impose a verbal warning or first warning, or can you impose more serious disciplinary actions, like a final written warning or dismissal?

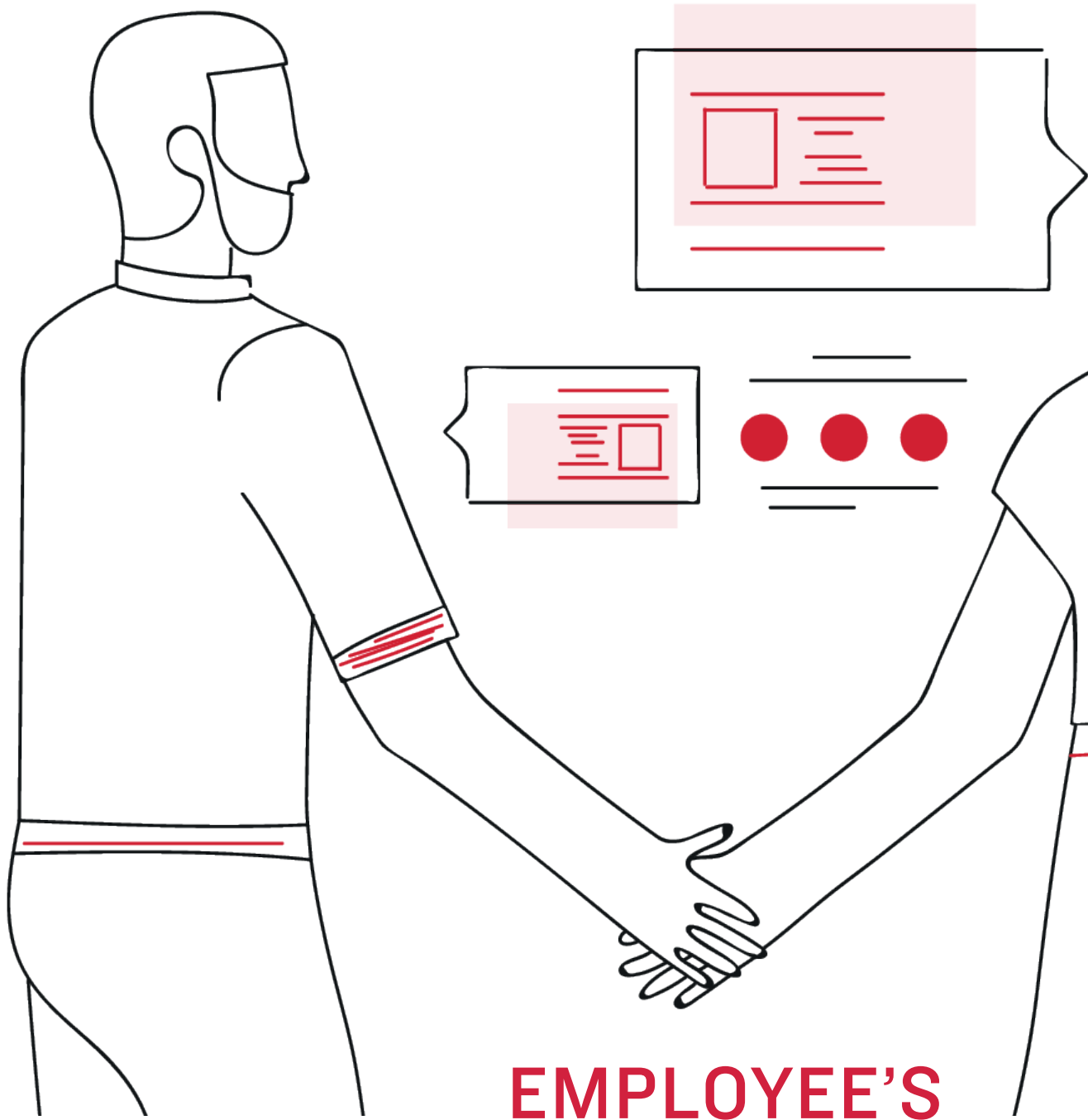


## CONSULTATION

Have you consulted the employee about whether the situation amounts to misconduct or serious misconduct, and if so, what sort of disciplinary action may be appropriate?

### If “NO”: AT RISK

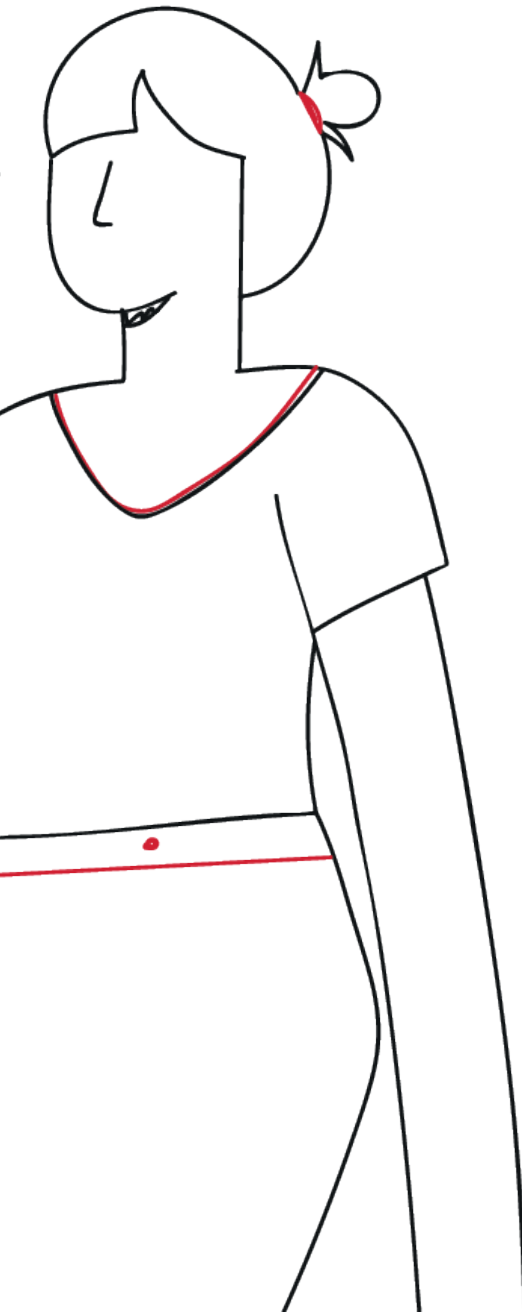
As well as consulting with the employee as to whether you consider the allegations have been substantiated (see 6.1 **Managing Employment Risks – Fair Process** and 6.2 **Managing Employment Risks – Investigating Concerns**), you must also consult with the employee about why you consider the conduct could amount to misconduct or serious misconduct and, if so, the proposed disciplinary action. You should refer to any specific provisions in the employment agreement or applicable policy (eg, any categories of conduct amounting to misconduct or serious misconduct).



**EMPLOYEE'S**

**FEEEDB**





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## AGGRAVATING OR MITIGATING FACTORS

**Have you considered the employee's response and all the relevant circumstances, including any mitigating or aggravating factors?**

### If "NO": AT RISK

You need to genuinely consider the employee's feedback on your view of their conduct and the proposed disciplinary action, before making a decision. This includes considering whether there are any relevant mitigating or aggravating factors. For instance, does the employee otherwise have a 'clean record'? Was the employee going through a personal crisis which caused them to act out of character? Was the employee unwell? Was the employee acting deliberately or recklessly? Has the employee been disciplined for this conduct previously? You must consider all the relevant circumstances before making a decision.

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## ALTERNATIVES

**Have you considered alternatives to any disciplinary action proposed?**

### If "NO": AT RISK

You have a duty to consider whether there are appropriate alternatives to any proposed disciplinary action. For instance, would a requirement to attend counselling or training or undergo a period of supervision be sufficient? Actions like these could be imposed in addition to disciplinary actions, provided of course that you have consulted with the employee first. Similarly you should consider whether a lesser form of disciplinary action might be appropriate; for example, do you need to dismiss summarily (without notice), or would dismissal on notice, or a final written warning be appropriate?

# ACK

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## PROPORTIONATE AND CONSISTENT

**Was the disciplinary action proportionate, and consistent with provisions in your agreement or policy and with similar situations involving other employees (or are any differences justifiable)?**

### If “NO”: AT RISK

The proposed disciplinary action must be proportionate to the misconduct. For example, a warning may be appropriate for minor misconduct, whereas a final warning or dismissal may be appropriate for serious misconduct.

You should also take into account other similar situations and outcomes, with a view to trying to treat similar situations with some degree of consistency; otherwise the employee may claim disparity of treatment. That said, no two cases are the same and there may be good reason for a different outcome in one case compared with another. The test is whether the employer's actions were fair and reasonable in the circumstances. If you have any queries about the appropriateness of a proposed disciplinary action we recommend seeking advice (this may be through the Sport NZ Legal Helpdesk).

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## DOCUMENTATION

**Did you document your decision to take disciplinary action, and the reasons for that particular outcome, confirm your expectations and outline the possible consequences of any future behaviour of a similar nature?**

### If “NO”: AT RISK

It's important that you advise the employee in writing of the outcome of the disciplinary process, the reasons for that

outcome, and the consequences of any future behaviour of a similar nature (ie, repeated behaviour may result in further disciplinary action, up to and including dismissal). You should also state your expectations around future conduct or performance as appropriate. You must also ensure that you comply with any requirements set out in the employment agreement or applicable policy (eg, if they provide for a warning to be time limited etc).

If disciplinary action results in dismissal (either on notice or summary dismissal), refer to **Chapter 8 Ending Employment**.

## 6.4 \_\_\_\_\_

### Miscellaneous Risks

**Employment relationships can bring a miscellany of employment issues that need to be managed appropriately in order to reduce risk. These include health and safety issues; bullying, harassment and discrimination complaints; medical incapacity; drug and alcohol testing; protected disclosures; and issues about confidentiality and intellectual property.**

The cornerstone of effective management of these employment issues is good faith, including treating each other fairly, engaging in open communication and following a fair process.

See **6.1 Managing Employment Risks - Fair Process** and **6.2 Managing Employment Risks - Investigating Concerns**.

#### **Health and safety issues and incidents:**

See the Health and safety' module in Sport Compass (outside of the employment modules).

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## **BULLYING, HARASSMENT AND DISCRIMINATION**

**Are complaints of bullying, harassment or discrimination handled fairly, properly investigated and appropriately responded to? Are appropriate work arrangements and support measures put in place for the complainant and respondent during the process?**

#### **If "NO": AT RISK**

Bullying, harassment and discrimination complaints must be handled fairly, and in accordance with any applicable requirements in policies or the employment agreement. Those documents may set out different options for responding to complaints – from 'self-resolution' and informal steps to a formal investigation. The process you follow will depend on your processes, the nature of the allegations and potentially the views of the complainant and respondent.

When investigating a complaint, you must follow a fair process (see **6.1 Managing Employment Risks – Fair Process**).

Regardless of the process you follow, you should ensure you support the complainant throughout the process, including offering them access to an employee assistance

programme (EAP), if available, keeping them informed, and considering whether any interim steps need to be taken to help them feel safe (ie, working from home or possible redeployment or suspension of the respondent if appropriate – see **6.2 Managing Employment Risks – Investigating Concerns**).

If you find that bullying, harassment or discrimination has occurred, you will need to take appropriate action to respond to the situation, and to ensure the behaviour is not repeated. Such action could include taking disciplinary action against the respondent (see **6.3 Managing Employment Risks – Disciplinary Action**); requiring the respondent to attend training or counselling; separating the complainant and respondent; introducing a policy; or amending a current policy or implementing broader training for your organisation.

Failure to follow fair processes and take appropriate action could give rise to a health and safety issue, and could lead to challenges through employment processes, or the involvement of WorkSafe or the Human Rights Commission. In serious cases where behaviour of a potentially criminal nature has occurred, you may consider involving the Police.

These processes are difficult, and even more so due to the sensitive nature and often heightened emotions. If you have any concerns at any stage, we recommend seeking advice (this may be through the Sport NZ Legal Helpdesk).

For information about dealing with bullying, harassment and discrimination complaints, see [general process](#).<sup>75</sup>

For information about how to prevent and respond to bullying, see [bullying](#)<sup>76</sup> and [bullying prevention toolbox](#).<sup>77</sup>

For information about harassment (sexual and racial) or discrimination, see [sexual and racial harassment](#).<sup>78</sup>

For information on how to report a crime to the Police, see [how to report a crime](#).<sup>79</sup>

For information about complaints to the Human Rights Commission, see [what you can complain about](#).<sup>80</sup>

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## MANAGING MEDICAL INCAPACITY

**If you have an employee who has been unable to work for a considerable period due to an illness or injury, do you have a good understanding of their health situation, and have you worked with them on a return to work, and signalled the possible consequences if the employee is unable to return within a reasonable period?**

### If “NO”: AT RISK

It is a difficult situation to manage when an employee is unable to work due to an illness or injury for a long period of time, or if they are often ill or unwell intermittently. It can also be challenging when a return to work is not certain, or the relevant timeframes are uncertain.

Where an employee is ill or unwell, you need to have a good understanding of their health situation, including the prognosis, and what that means for their return to work (whether that is possible, when, and in what capacity etc).

You will need to work with the employee to assist them to return to work. You should consider, and consult with the employee about, whether there are other options available, including light duties, temporary redeployment or a return on a part-time basis. You should also discuss with the employee the arrangements for their work in the interim (including any challenges around that), including reassigning work or using temporary cover.

Employers are not expected to hold a position open forever if an employee is sick or injured to the extent that they cannot do their job. It is important to make the employee aware of the challenges with holding the position open for a significant period of time, and that as a result the employer may terminate the employment relationship if the employee is unable to return to their full duties within a reasonable timeframe. The appropriate timeframe will depend on the circumstances – the legal test is whether enough time has passed in all the circumstances that the employer can ‘fairly cry halt’. It may be useful to seek advice (this may be through the Sport NZ Legal Helpdesk).

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## TERMINATION FOR MEDICAL INCAPACITY

If you are considering terminating for medical incapacity, has the employee been away for a significant period, has their continued absence become unsustainable, and did you follow a fair process, consult the employee about your proposed actions, and consider all relevant information?

### If “NO”: AT RISK

Before terminating for medical incapacity, you must follow a fair process (see 6.1 Managing Employment Risks – Fair Process). Before terminating, you should also:

01. \_\_\_\_\_ Give the employee a reasonable time to recover in the circumstances (taking into account the nature of their health issue, their job and the organisation, the length of the absence and whether their paid sick leave and/or annual leave has been exhausted)
02. \_\_\_\_\_ Carry out a fair enquiry, including determining whether you have sufficient information about their health situation and prognosis to make a decision, balancing fairness to the employee and the reasonable needs of the business, and seeking further information if appropriate
03. \_\_\_\_\_ Notify the employee that you are considering termination for incapacity, explain why, and seek input from the employee
04. \_\_\_\_\_ Consider the terms of the employment agreement and any relevant policy (including whether there is a prescribed process for medical incapacity dismissal), the nature of the employee’s position (including how hard it is to fill temporarily or how urgent it is to fill it), the length of time the employee has been employed, and whether any alternative options are available
05. \_\_\_\_\_ Consider whether your actions caused or contributed to the employee’s condition (such as a workplace injury or stress) - you may have had an ongoing responsibility to take reasonable steps to rehabilitate the employee
06. \_\_\_\_\_ Remember that the relationship is a ‘two-way street’. A lack of positive engagement from an absent employee may make it difficult for them to later raise a successful complaint.

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For more information about medical incapacity, see [medical incapacity](#).<sup>81</sup>

## DRUG AND ALCOHOL TESTING

**If you want to drug or alcohol test employees, do you have a valid legal basis to do so in your agreement or policy, and is the testing carried out fairly and in accordance with that agreement or policy?**

### If “NO”: AT RISK

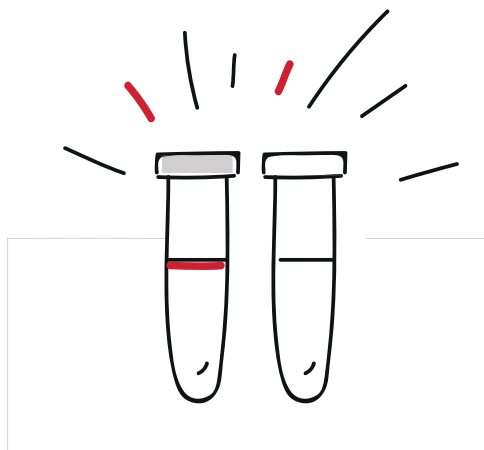
Generally, you can only carry out drug and alcohol testing if it is permitted in the employment agreement or a policy. If you don't have any rules that allow drug and alcohol testing, you probably can't test; however, you may be able to test if you have the employee's consent to do so. In any event, we recommend seeking advice (this may be through the Sport NZ Legal Helpdesk).

If you are permitted to carry out drug testing by an employment agreement or policy, you must follow to the letter any processes set out in those documents. Following correct processes in drug and alcohol testing is particularly important because it involves conflicting interests. You have health and safety obligations to keep your people safe, and employees are entitled to be protected from interference with their personal rights and freedoms.

If you want to drug or alcohol test an employee, you should:

- **Only test** in the circumstances permitted in the applicable policy or agreement (it may provide for testing with reasonable cause; following an incident; following a concern or complaint from another person; or randomly)
- **Inform the employee** that you want to carry out testing, explain why, refer them to the relevant policy or provision in the agreement, and give them an opportunity to seek advice

- **If the result is positive**, consider all circumstances before making a decision about the appropriate outcome (ie, was there an adverse impact on another person?). What does the result show (do you need further testing)? What does that mean for the person's work? Are they able to carry out their job safely? Are you comfortable that the employee will not use again? Would the employee benefit from rehabilitation and do you have any obligations about that? Is disciplinary action appropriate? If you consider that disciplinary action is appropriate, see 6.3 **Managing Employment Risks – Disciplinary Action**
- **If the employee refuses to test**, consider carrying out a disciplinary process.



In all cases, we recommend seeking advice (this may be through the Sport NZ Legal Helpdesk) before asking an employee to agree to drug or alcohol testing. Failing to get the process right can create risk, and ultimately you may not be able to rely on test results that were obtained unfairly.

For more information about drug and alcohol testing at work, see drugs, alcohol and work.<sup>28</sup>

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## PROTECTED DISCLOSURES

**If a ‘protected disclosure’ is made, is it dealt with in accordance with any applicable policy and the statutory requirements around such disclosures (including keeping information identifying the complainant confidential unless a statutory exception applies)?**

### If “NO”: AT RISK

Protected disclosures must be dealt with in accordance with any applicable policy, and in accordance with the Protected Disclosures Act 2000. A ‘protected disclosure’ is when an employee reports ‘serious wrongdoing’ in the workplace that the employee reasonably believes is true or is likely to be true. That Act defines ‘serious wrongdoing’ and sets out the protections that an employee making a protected disclosure is entitled to. Internal policies usually address these matters, as well as specifying who the employee can make the report to.

An employee who makes a protected disclosure is entitled to certain protections. This means that:

1. You can’t take disciplinary or other retaliatory action against that employee. If you do, they will be entitled to raise a personal grievance about that
2. The employee cannot be sued for having made the protected disclosure
3. In most cases, the employee will be entitled to confidentiality.

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If you receive a protected disclosure, you should take steps to investigate the alleged serious wrongdoing.

For more information about protected disclosures, check [protected disclosures](#)<sup>82</sup> on the Employment New Zealand website and [protected disclosures/whistle-blowing](#)<sup>83</sup> on the Office of the Ombudsman website.

Other helpful references: [Sport New Zealand Managing Sport](#).<sup>84</sup> See also 6.1 Managing Employment Risks - Fair Process and 6.2 Managing Employment Risks – Investigating Concerns.

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## CONFIDENTIAL INFORMATION

**Does the employment agreement include a provision about confidential information, and is appropriate action taken if a potential breach occurs?**

### If “NO”: AT RISK

It is important that your confidential information is kept secure. While there is no legal requirement for an employment agreement to contain a confidentiality clause (and certain confidentiality obligations by an employee are implied by law), we recommend as best practice including one as it is useful to clarify your expectations around confidential information.

A confidentiality clause should state that the employee can only use confidential information for work purposes, and not to disclose confidential information without authority. We also recommend that these obligations continue after the employment relationship ends. Failing to include a confidentiality clause, or failing to take other steps to protect confidential information, may result in your confidential information being at risk, and it could also involve breaches of the Privacy Act.

If you suspect an employee has breached their confidentiality obligations, even after the employment has ended, you should act swiftly and seek advice (this may be through the Sport NZ Legal Helpdesk). If the breach occurs during employment, refer to Chapter 6 Managing Employment Risks.

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## INTELLECTUAL PROPERTY

**Does the employment agreement appropriately protect your organisation's intellectual property, and is appropriate action take if a potential breach occurs?**

**If "NO": AT RISK**

It is important to protect your organisation's intellectual property. While there is no legal requirement for an employment agreement to contain an intellectual property clause, we recommend as best practice including one as it is a useful way to clarify your expectations around intellectual property.

An intellectual property clause should state that any intellectual property created by the employee in the course of their employment is the property of the employer, and that this continues after the employment relationship ends. Failing to include an intellectual property clause, or failing to take other steps to protect your intellectual property, could result in an employee taking or profiting from the work that they have created (including when they leave), and using it in a way that is inconsistent with the employer's interests.

If you consider that an employee has breached their intellectual property obligations, we recommend that you act swiftly and seek advice (this may be through the Sport NZ Legal Helpdesk). Where a potential breach occurs during employment, see Chapter 6 Managing Employment Risks.

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## CONFLICTS OF INTEREST AND SECONDARY EMPLOYMENT

**Does your employment agreement contain appropriate mechanisms to protect against, and deal with, any potential conflicts of interest, including limits on secondary employment if you have genuine reasons based on reasonable grounds for those limits?**

**If "NO": AT RISK**

While there is no legal requirement to include conflicts of interest and provisions restricting secondary employment in your employment agreements, it is often appropriate to use these provisions as best practice to protect your organisation's interests.

A conflict of interest clause should cover the rules about an employee's ability to be involved in other activities, including secondary employment. The clause should also involve a process for managing actual or possible conflicts of interest, including an obligation on the employee to raise any actual or possible conflicts as soon as practicable.

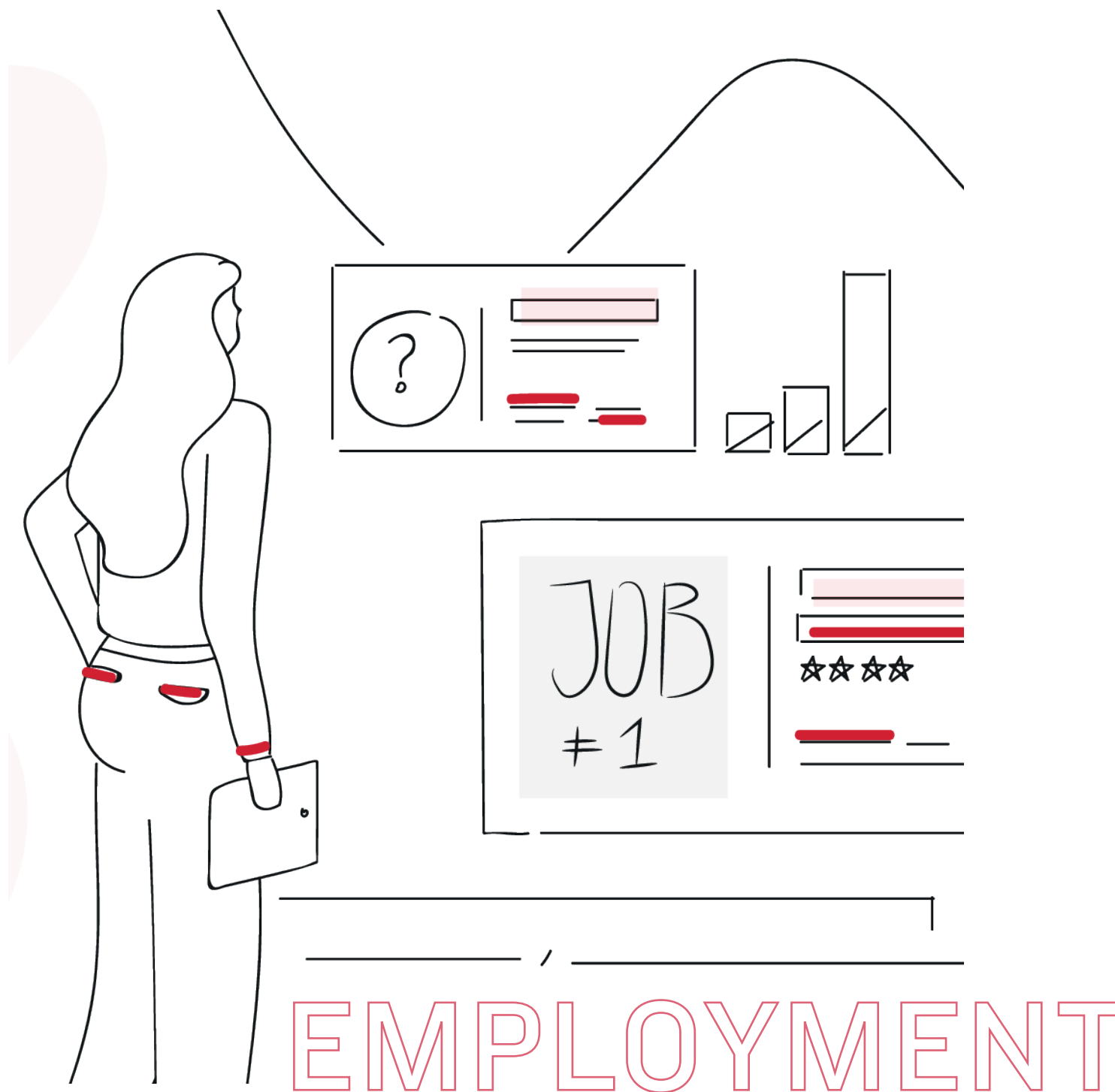
With secondary employment, there is no general rule preventing a person from having more than one job. You are only allowed to restrict an employee from working for another employer if certain requirements are met. These requirements include having genuine reasons based on reasonable grounds for the restriction, and the reasons being included in the employment agreement (usually in the conflict of interest clause). The restriction must be necessary, and cannot restrict the employee to a greater extent than is necessary. If these requirements are not met, you will not be able to restrict an employee from working elsewhere while they are employed by you.



If you have any issues about conflicts or secondary employment, we recommend seeking advice (this may be through the Sport NZ Legal Helpdesk).

For information about working more than one job, see the [Employment New Zealand website](#).<sup>85</sup>

For an example of a conflict of interest clause, see [MBIE's Employment Agreement Builder](#).<sup>86</sup>





# Chapter Seven

# Managing Changes

**Organisations and their needs change over time, and you may need or want to make changes to an employee’s job, ranging from low-level changes through to disestablishing their role. An employee may also ask to make changes, whether through negotiating a variation to their employment agreement, or through a formal flexible working arrangements request governed by legislation.**

**IN THIS SECTION**

**7.1**  
Updating Job Descriptions

**7.2**  
Flexible Working Requests

**7.3**  
Restructuring and Redundancy

**7.4**  
Sale or Transfer of Business

This chapter looks at different types of changes, when you need agreement, and what process and other statutory requirements apply. Fair and reasonable change processes will assist you to manage changes as smoothly as possible and limit the risk of challenges (including claims of unjustified disadvantage or dismissal, breach of good faith, breach of contract or breach of statutory requirements).

This chapter focuses on common employment risks in change management and ways for employers to reduce those risks in the following areas:

- Changes to terms and conditions including job descriptions
- Flexible working arrangement requests
- Restructuring and redundancy
- Sale or transfer of business situations.

**Other helpful references:**

For information about change processes generally, see workplace policies

[HR policies and employee handbooks<sup>1</sup>](#)

[Hours of work and flexitime policy<sup>1</sup>](#)

Managing Employment Risks – Fair process

Hiring People – Bargaining for Employment Agreements/Terms

**Do your employees' job descriptions accurately reflect their jobs?****If "NO": AT RISK**

Sometimes the work an employee does may evolve over time to reflect changes in the business, different work requirements and the development of skills. This often happens organically and without issue. However, it is useful to ensure that you keep an employee's job description up to date, and you should consider reviewing it periodically with the employee. This is particularly important if you are looking at making changes to the job – it is important to know what an employee is doing currently and to have an up-to-date and accurate job description. In making changes to a job description, you should follow any requirements in the agreement or relevant policies (eg, some agreements enable the employer to make reasonable changes unilaterally).

See questions below for changes by agreement or changes an employer can make unilaterally, including for information about the process to follow. Also see **3.3 Starting People – Employment Records** for records of changes you need to keep.

**CHANGES TO TERMS AND CONDITIONS****Are any changes to contractual terms and conditions negotiated and agreed in good faith and following a fair process?****If "NO": AT RISK**

The standard rule is that you can only make changes to an employee's contractual terms and conditions (eg, hours, benefits, duties etc) with their agreement. Doing otherwise would be a breach of contract and would likely be unjustified, unless the change was very minor or inconsequential.

This rule applies unless the employment agreement allows you to make the change without the employee's agreement (eg, some agreements contemplate that the employer can make reasonable changes to hours, duties or place of work etc). Unless that situation applies, you need the employee's agreement.

You need to provide the employee with a written copy of the proposed change, and bargain with them fairly and in good faith (see 2.6 Hiring People – Bargaining for Employment Agreements/Terms). Any agreement should be documented (see 3.3 Starting People – Employment Records). If you don't get the employee's agreement, you may need to look at whether you can make the change through a restructuring process (eg, making a change of such a substantial nature that the employee's role ceases to exist) (see 7.3 Managing Changes – Restructuring and Redundancy).

If in doubt about the nature of the change and what process you need to follow, seek advice (this could be through the Sport NZ Legal helpdesk).

## CHANGES TO TERMS AND CONDITIONS

**If the agreement allows you to make a change unilaterally, is the change reasonable, and do you still follow a fair process and provide reasonable notice of the change?**

### If “NO”: AT RISK

This may apply to changes to terms and conditions like hours, duties and place of work, or to policies and procedures, where the agreement contemplates that the employer can make a change unilaterally (or where the change is to a non-contractual term or condition). However, even then, the employer must still act fairly and reasonably, and should talk to the employee about the change, consider views the employee expresses and respond to any questions the employee has. Any changes should take effect on reasonable notice. What that period is will depend on the nature and extent of the change and the impact on the employee. Changes should be properly documented (see 3.3 Starting People – Employment Records).

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If in doubt about the nature of the change and what process you need to follow, seek advice (this could be through the Sport NZ Legal Helpdesk).

## 7.2 Flexible Working Requests

Employees are entitled to request changes to their working arrangements, both informally and formally (under the flexible working arrangement provisions in the Employment Relations Act). Formal requests must be made a certain way, must be responded to within certain timeframes, and can only be refused for certain reasons, as outlined on page 88. (If dealing with an informal request, see the information on changes to terms and conditions earlier in this chapter). Any agreed changes should be properly documented (see 3.3 Starting People – Employment Records.)

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## WRITTEN REQUESTS

**Is any request for a flexible working arrangement under the Act in writing and does it contain the relevant information?**

### If “NO”: AT RISK

You will need to advise the employee, and they may resubmit the request with the relevant information. Requests must be in writing and include:

01. \_\_\_\_\_ The employee’s name and the date of the request
02. \_\_\_\_\_ A statement that the request is being made under Part 6AA of the Employment Relations Act. (If not, they may be asking for a contractual variation outside of the flexible working arrangements scheme, which can be negotiated, and if agreed, documented, between the parties)
03. \_\_\_\_\_ The variation requested (eg, a change to hours, days or place of work or any combination of these)
04. \_\_\_\_\_ Whether the variation is permanent or for a period of time, and the date proposed for it to start (and, if applicable, end)
05. \_\_\_\_\_ An explanation of what changes if any the employer may need to make to their arrangements if the request is approved.

For more information about flexible working arrangements, see [flexible work](#).<sup>87</sup>

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## DEALING WITH REQUESTS

**When you received a request for flexible working, did you deal with the request as soon as possible and within a month of receiving it by notifying the employee in writing that it was approved or refused?**

### If “NO”: AT RISK

These are statutory obligations and failing to comply could have legal implications. You must consider the request in good faith. This may mean meeting with the employee to discuss and understand the request, and what agreeing to it may mean for the business. If you or the employee are unsure about the arrangements, you could agree to an informal or formal trial of the arrangements, or agree for the arrangement to be time limited. You should document any arrangements you agree to so that there are no misunderstandings and to comply with legal obligations. See [3.3 Starting People – Employment Records](#).

For more information about considering and responding to a request, see [Considering a request](#).<sup>88</sup>

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## REFUSING REQUESTS

**If you refused a request, did you state the statutory ground/s for refusal and explain the reasons?**

### If “NO”: AT RISK

Under the Employment Relations Act, requests can only be declined on one (or more) of the eight grounds outlined in section 69AAF. Reasons for why those grounds apply must also be provided.



**Those grounds are:**

- Inability to reorganise work among existing staff
- Inability to recruit additional staff
- Detrimental impact on quality
- Detrimental impact on performance
- Insufficiency of work during the periods the employee proposes to work
- Planned structural changes
- Burden of additional costs
- Detrimental effect on the ability to meet customer demand.

Requests must also be refused if the proposed new working arrangement conflicts with the provisions of an employee's collective employment agreement.

For information about declining a request, [see declining a request](#).<sup>89</sup>

7.3 —————  
Restructuring and  
Redundancy

**An organisation's business needs can change over time, and this may result in changes that could affect an employee's employment, for example, a substantial change involving the disestablishment of an employee's position (that is the focus of this section). If this is the case, you need to have a genuine business reason for making changes, and you need to follow a fair and reasonable process.**

The exact process you should follow will depend on various factors including any prescribed processes in the applicable employment agreement or policies, and the nature and extent of the proposed changes. Failing to comply may give rise to claims of unjustified disadvantage or unjustified dismissal, and you may be liable for lost wages, compensation, costs, and even reinstatement of an employee. We recommend seeking advice (this may be through the Sport NZ Legal Helpdesk).

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## COMPLIANCE WITH AGREEMENTS/ POLICY

**Did you comply with any requirements (including about procedure) provided in the applicable employment agreement or relevant policy at all stages of the process?**

### If “NO”: AT RISK

In carrying out a restructuring process, you must follow any requirements in the relevant employment agreement or policy. For example, sometimes those documents might specify particular steps you need to take, and the timeframes in which you must take those steps. They might describe different outcomes, and entitlements flowing from different outcomes (eg, redundancy compensation if employment is terminated for redundancy). Failing to comply with any contractual or policy requirements could affect the ultimate decision, and will generally make the process unjustifiable.

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## RATIONALE

**Did you have a genuine business reason for the proposed change?**

### If “NO”: AT RISK

An employer must have a genuine business reason based on reasonable grounds for making a change that affects an employee's employment. Restructuring processes cannot be used as a vehicle for ‘moving on’ certain employees (eg, for performance reasons), or for any other reason. Remember that a genuine change process is typically about the roles, not the individuals.

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## REPRESENTATION

**Did you provide the employee with the opportunity to have a representative/support person present with them during the restructuring process?**

### If “NO”: AT RISK

Although not a legal requirement (it may be written into employment agreements or policy), it is best practice to provide employees who are impacted by the proposed change with the opportunity to bring a representative/support person with them to meetings. There needs to be advance notice of meetings to provide employees with time to organise a representative/support person.

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## FAIR PROCESS

**Did you follow a fair process, including providing information about the proposed changes, and an opportunity for the employee to take advice and to provide feedback about the proposal? Did you engage with employees about any feedback provided, and genuinely consider it before you made, and communicated, a decision?**

### If “NO”: AT RISK

If an employee may lose their job as a result of the restructuring, you have a statutory obligation to provide them with information relevant to the decision and an opportunity to comment on that information before the decision is made.

For instance, you will need to put together a proposal that sets out relevant information relating to the change, the possible impacts on roles and employees, and the possible outcome. You should provide copies of other information relevant to the decision (eg, details of finances etc if cost is part of the



rationale for the change). If you think the roles of certain individuals will be disestablished, you should talk to those individuals first about the proposal and possible impacts. You will need to give this proposal to affected employees, discuss it with them, and give them sufficient time to provide feedback and ask questions. It's important at this point to advise employees of their right to seek legal advice, and offer them an EAP (if available).

Before making a decision, you must genuinely consider all feedback, including considering whether there are any alternatives. Once you make a decision, you need to document that and communicate it to all affected employees.

All the usual good faith and fair process rules apply to change processes (see **6.1 Managing Employment Risks – Fair Process**). These processes can be difficult, particularly when employees' continued employment is at risk. If the situation is challenged, the processes and decision making can be carefully scrutinised. We recommend seeking advice (this may be through the Sport NZ Legal Helpdesk).

For information about change processes, see [workplace change](#).<sup>90</sup>

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## CONTESTABLE SELECTION

**If the proposal involved a contestable selection process for a role, did you consult affected employees about the proposed selection process and selection criteria?**

### If "NO": AT RISK

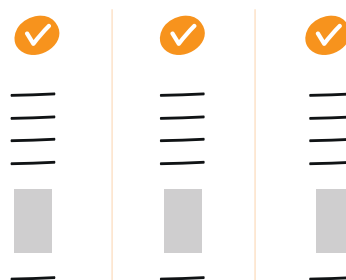
You must consult potentially affected employees about the proposed selection process and selection criteria. For more information, see [selection process](#).<sup>91</sup>

**If the employee was unsuccessful as a result of that contestable process, did you share relevant information with the employee about the decision and provide them with an opportunity to comment before a final decision was made?**

### IF "NO": AT RISK

You must share with the employee the reasons why they were unsuccessful in the role, and consider any feedback before making a final decision (this links back to statutory obligations and how they have been interpreted by the Employment Relations Authority and the court).

For more information about selection processes, see [selection process](#).<sup>91</sup>



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## CONSIDERING ALTERNATIVES

**If an employee's role was disestablished as a result of a restructuring process, did you consider and discuss with the employee any alternatives, including reconfirmation or redeployment?**

### If "NO": AT RISK

If, after following a fair process, you decide to disestablish an employee's role, and the employee has not been successful in any contestable selection process (or no such process applies), you have an obligation to consider alternatives for the employee. This includes looking for suitable redeployment opportunities within the organisation.

For more information, see [selection process](#).<sup>91</sup>

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## REDEPLOYMENT

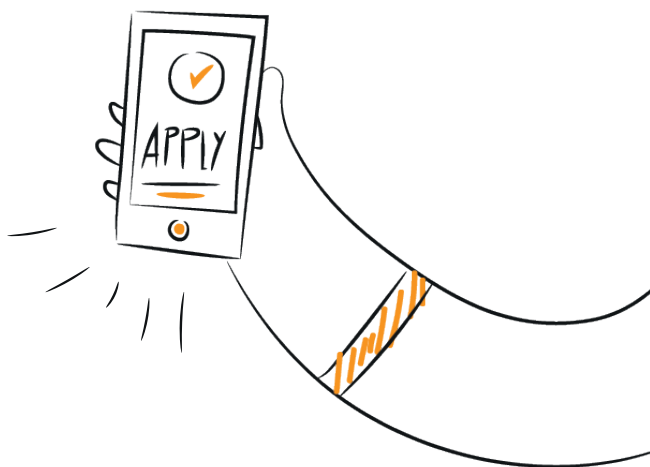
**If there was a vacant position that the affected employee was capable of performing, allowing for some reasonable retraining/upskilling, did you offer to redeploy the employee into that position?**

(Unless the position is contested by more than one affected employee, see previous links to contestable processes).

### If “NO”: AT RISK

You have an obligation to consider alternative employment options for employees, and in some cases may be obligated to reconfirm or redeploy them into another position, even where it may require some reasonable retraining or upskilling, and even where there may be better (but unaffected) people to perform that role available internally or externally. You must also comply with any specific requirements in your employment agreement or policies about redeployment.

For more information, see [selection process](#).<sup>91</sup>



# NOTICE PERIOD



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## REDUNDANCY

**If there were no reassignment or redeployment options for the employee, did you give appropriate notice of termination on the grounds of redundancy in writing?**

### If “NO”: AT RISK

Notice of termination for redundancy must be given to the employee in writing and should include how much notice you are giving them, the end date of their employment and details of any compensation payable (as stated in the applicable employment agreement or policy).

For more information, see [employee redundancy](#).<sup>92</sup>

**If you are proposing to sell or transfer all or part of your business to another organisation, then the restructuring process obligations in section 7.3 apply, including around consultation (see 7.3 Managing Changes – Restructuring and Redundancy). Legislation also provides additional rules that apply. The aim of these is to provide extra protection to employees who will be affected by the sale or transfer. Your employment agreement must contain an ‘employee protection provision’ that sets out the steps you must take if your organisation (or part of it) is being sold or transferred. This includes obligations around asking the new organisation if they will offer your employees employment on the same terms and conditions.**

There are other special statutory rules that apply if your organisation has employees providing cleaning services or food catering services (sometimes called ‘vulnerable employees’).

For information about the sale and transfer of organisations, including the special rules for vulnerable employees, see [restructuring when a business is sold or transferred](#).<sup>93</sup>

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### **EMPLOYEE PROTECTION PROVISION**

**Did you follow the terms of your employee protection provision around the process you followed with the new organisation, and with your employees?**

#### **If “NO”: AT RISK**

It is important that you comply with the employee protection provision in the employment agreement; failing to do so will be a breach of contract. All employment agreements must contain an employee protection provision. If your employment agreement does not contain an employee protection provision,

it will not prevent you from undertaking a sale or transfer process, but we recommend that you take advice. One option is to try to agree an employee protection provision with affected employees at that time. If this is not practicable, you should follow a fair process as if you had an employment protection provision, for instance a process that includes talking to the new employer about taking on existing employees on their current terms and conditions, and a process that keeps employees informed about what is happening, and what it means for them.

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## NON-TRANSFERRING EMPLOYEES

**For any of your employees that are not transferring to the new organisation, did you discuss their entitlements and consider alternatives to redundancy including any redeployment options?**

**If “NO”: AT RISK**

See 7.3 Managing Changes – Restructuring and Redundancy including the sections on ‘Considering alternatives’ and ‘Redeployment.’

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## TERMINATION FOR REDUNDANCY

**If you are terminating an employee’s employment (whether or not they are transferring to a new employer), did you meet your statutory and contractual obligations on termination?**

**If “NO”: AT RISK**

Usually, you will need to give the employee notice of termination for redundancy. If an employee is transferring to a new employer, it might be a condition of the transfer, or you may otherwise agree with the employee, that the notice requirement will be waived.

If the employee is entitled to redundancy compensation (check the employment agreement), you will need to let them know how much compensation they should receive at the end of their employment. There may be situations where you are not required to pay the employee redundancy compensation, for example, under a ‘technical redundancy’ clause. A technical redundancy clause may, for example, provide that if an employee has been offered a suitable alternative role, they will not be entitled to redundancy compensation (whether or not they accept the role). Alternatively, you might agree, or it might otherwise be a condition of the transfer, that the redundancy obligation is waived (as for notice, above).

Where employees are transferring and the new employer is recognising their service as continuous, there is usually an apportioning of entitlements and liabilities between the two employers. We recommend you seek advice (which may be through the Sport NZ Legal Helpdesk).

For more information about obligations on termination, see **Chapter 8 Ending Employment.**







Chapter  
Eight

Ending  
Employment



## IN THIS SECTION

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### 8.1

Termination of  
Employment

### 8.2

Arrangements after Notice  
is Given

### 8.3

Final Pay

**Having provisions in employment agreements and documented policies and processes enables organisations to manage the risks associated with the ending of the employment relationship, however that comes about.**

**Employment may end in a number of ways: by the employee resigning, by the employer terminating for good cause, on the expiry of a fixed-term agreement, or through abandonment. In most cases, notice will be required (except in cases of summary dismissal, abandonment or the expiry of a fixed-term agreement). Employment agreements and policies will likely include applicable provisions that should be complied with (including in terms of the period of notice and how notice is given).**

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### **EMPLOYEE RESIGNATION**

**Does the employee provide notice as required by the employment agreement?**

#### **If “NO”: AT RISK**

An employee can choose to resign at any time by telling the organisation. It is a good idea for this to be done in writing, and employment agreements often require that. The employee should give at least the period of notice required by the employment agreement (see Notice below). An employer does not have to ‘agree’ or ‘accept’ the resignation for it to take effect. If the employer is not sure if an employee has resigned, they should check. If the resignation was done in the ‘heat of the moment’, employers should consider providing a ‘cooling off’ period before checking with the employee whether they want to resign. Doing otherwise could result in a possible constructive dismissal situation and potential liability for the employer.

For more information, see [resignation](#).<sup>94</sup>

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## TERMINATION BY THE EMPLOYER

Have you followed a fair process, properly investigated (see earlier links) and do you have sufficient legal reason to terminate?

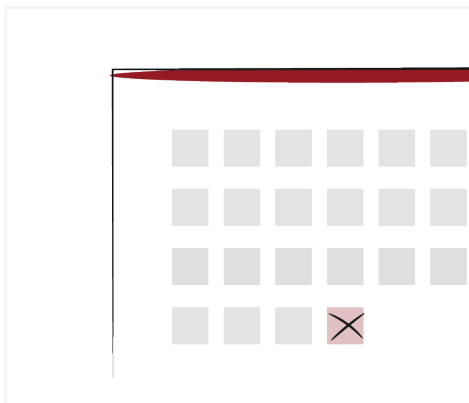
### If “NO”: AT RISK

Failing to meet these requirements will likely mean the termination is unjustified if it is challenged by the employee.

See **6.1 Managing Employment Risks – Fair Process** and **6.2 Managing Employment Risks – Investigating Concerns**.

The employment agreement may provide different reasons for terminating, and any requirements in the agreement or any applicable policy should be met. Good reason for termination might include termination during a trial period or probationary period (see **3.1 Starting People – Trial and Probationary Periods**), or for redundancy (see **7.3 Managing Changes – Restructuring and Redundancy**), poor performance or misconduct (see **6.3 Managing Employment Risks – Disciplinary Action**), incapacity (see **6.4 Managing Employment Risks – Miscellaneous Risks**), incompatibility, conflict of interest or loss of trust and confidence.

For more information, see [dismissal](#).<sup>95</sup>



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## NOTICE

Is notice provided as required by the employment agreement (unless it is a summary dismissal situation, fixed-term expiry or abandonment – see page 101). If there is no period of notice stated in the agreement, is reasonable notice provided?

### If “NO”: AT RISK

Notice is the amount of time between advising that the employment relationship is ending and the date it actually ends. Usually the employment agreement will state a period of notice for termination by either the employee or the employer, and may require that notice is given in writing. You must comply with any requirements in the agreement. If the agreement doesn't provide for a specific notice period, reasonable notice must still be given. What is reasonable will depend on factors like the type of job, the organisation, the length of service, how long it might take to replace the employee, and common practice in the workplace. Generally notice of between two and four weeks may be fair in many situations.

Notice must be given unless the employment is being terminated without notice for serious misconduct (see 'Summary Dismissal' on page 101). Notice does not apply in abandonment situations.

If the agreement is for a fixed-term contract, notice is not required if the relationship is ending on the expiry of the agreement, but will be required if the employer is terminating earlier than the expiry (and that is provided for by the employment agreement).



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## SUMMARY DISMISSAL

If you dismiss an employee without notice (summary dismissal), have you followed a fair process and properly investigated (see earlier links), and is the conduct sufficiently serious to justify dismissal without notice?

### If “NO”: AT RISK

See [6.1 Managing Employment Risks – Fair Process](#), [6.2 Managing Employment Risks – Investigating Concerns](#) and [6.3 Managing Employment Risks – Disciplinary Action](#).

In some situations of serious misconduct it may be appropriate to terminate the employment immediately (ie, without notice). This is the most severe sanction, and should be discussed with the employee if proposed, and alternatives should be considered. If summary dismissal is not justified in the circumstances, the employee may bring a personal grievance challenging that action. We recommend that you seek legal advice, which may be through the Sport NZ Legal Helpdesk. In a summary dismissal situation, the employment ends immediately. The employer must still pay the final pay (see [8.3 Ending Employment – Final Pay](#)), but not any payment for the notice period.

For more information, see [dismissal](#).<sup>95</sup>

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## ABANDONMENT

Do you comply with any requirements of your employment agreement or policies, act fairly and reasonably, warn them their employment is at risk and try very hard to contact them numerous times by different means before treating their employment as having been abandoned?

### If “NO”: AT RISK

Some employment agreements state that the employment may terminate after a specific number of days of unauthorised absence (usually three to five days). You must comply with the requirements of any such clause. You may still be able to treat an employee’s employment as having been abandoned even without a clause in the agreement. In either event you must try hard to contact the employee and find out if they are coming back to work. This includes making a number of attempts using different methods (eg, email, phone, text, visiting their house, considering contacting emergency contacts etc). You should try to get a message to them that their employment is at risk, and that you will treat their employment as having been abandoned if they don’t contact you by a certain time. If you don’t hear back, you should advise them in writing that you regard their employment as having been terminated by abandonment.

You should keep a very good record of all attempts at contacting them. You can’t rely on abandonment where you contact an employee and they had a good reason for their absence and intend to return to work. For more information, see [abandonment of employment](#).<sup>96</sup>

# TERMINATION

**There are practical considerations that apply after notice is given and on termination of the employment relationship. This includes whether the employee works out the notice period, and any handover. Employers should ensure that they collect their property from the employee on or before termination. There are also obligations that continue to apply post-termination for both employees and employers, which are outlined below. The next section focuses on final pay requirements.**

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**Does the employee work out the notice period unless you agree to a shorter notice period or to other arrangements, or your employment agreement lets you put the employee on garden leave or pay in lieu of notice?**

Generally an employee will be expected to work out the notice period unless other arrangements are provided for or agreed. The employment agreement may give the employer an ability to:

- 01.** ——— Direct the employee to do other work during the notice period
- 02.** ——— Put the employee on garden leave for some or all of the notice period (ie, direct them to stay away from work and not work but remain employed during this period)
- 03.** ——— Pay the employee in lieu of working some or all of the notice period (this will have the effect of terminating the employment at that point, but the employer will be liable to pay the remainder of the notice period).

The employer and employee may also agree to any of the above arrangements, or to shorten or waive the notice period completely (eg, if the employee wants to start another job immediately). It is a good idea to put any agreement in writing so there are no misunderstandings.

If the employee fails to provide the appropriate period of notice, the employer will not be obligated to pay the employee for any period they do not work (in some circumstances, they may also be able to deduct from the employee the period of notice not given).

For more information, see [giving notice](#).<sup>97</sup>

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**Do you discuss any arrangements for handover and work to complete, and arrange for the employee to return any property (eg, access cards, keys, credit card, phone, laptop, files)?**

The employer and employee should develop a plan to ensure that relevant work is completed or handed over to another person, and that someone else in the organisation is updated on where files are, and the relevant processes before the employee leaves. The organisation should also consider redirecting phone and email messages.

The employer should make sure that the employee returns all the organisation's property on or before their last day. This may include computer and electronic equipment (chargers etc), phone, files and documents (hardcopy and electronic), tools and equipment, uniform, credit or charge card, identification card and building access (key and electronic) and a vehicle. (If there is passcode access, you may want to consider changing the code.) There may be specific provisions in the employment agreement or policy that apply.

The organisation will need to remove access to its IT systems, and redirect email and phone calls etc.

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**Do you meet any obligations in the employment agreement on termination (eg, to provide a certificate of service)?**

**If "NO": AT RISK**

See also 8.3 Ending Employment – Final Pay.

Employers do not have to provide a reference, but may agree to do so, or to act as a verbal referee, depending on the organisation's policy.

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## POST-EMPLOYMENT OBLIGATIONS

**Does the employee comply with any obligations that apply post-termination, including confidentiality, and any applicable restraints?**

**If "NO": AT RISK**

If no, you may consider taking appropriate action to enforce the obligations and protect the organisation. We recommend seeking legal advice, which might be through the Sport NZ Legal Helpdesk.

The employment agreement may include some provisions that apply post-termination, including in terms of confidentiality, intellectual property, and in some situations, restraints of trade. To be enforceable, a restraint of trade must be reasonable and meet other legal requirements. We recommend seeking advice when drafting and looking to enforce any restraint provisions. Even without a confidentiality provision in the employment agreement, an employee is bound to keep information from their previous employment confidential.

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## POST-EMPLOYMENT OBLIGATIONS

Do you retain necessary records for the statutory time periods and only retain, use and disclose personal information as provided by law?

See 2.2 Hiring People – Privacy Obligations and 3.3 Starting People – Employment Records.

If there is a dispute, you should also retain relevant information until the dispute has been resolved.

You should only act as a referee or provide information about a former employee if that has been authorised by the employee; otherwise it is likely to be a breach of their privacy.

### 8.3 Final Pay

**An employee’s final pay must include relevant statutory and contractual entitlements, including payments of outstanding salary/ wages, payment in lieu of notice (if applicable), certain holidays and leave payments and other contractual entitlements. Some of these calculations (including around holidays entitlements) can be complicated. Further information is provided below, including links to other helpful resources.**

The organisation needs to pay an employee’s final pay on their last day or as soon as possible, and by no later than the next scheduled pay cycle. If employees do not receive all the relevant components of their final pay, they may bring a claim for unpaid wages, holidays or leave, or for breach of their employment agreement. They may also involve a Labour Inspector, and in some circumstances could seek a penalty.



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**Does the final pay include any outstanding salary/wages (including any payment in lieu of notice)?**

**If “NO”: AT RISK**

The final pay should include payment for all the hours worked since the last pay until the end of employment. If the employer is providing payment in lieu of all or part of the notice period, this should also be included in the final pay (see **8.2 Ending Employment – Arrangements after Notice is Given**).

If the employer and employee agree to waive some or all of the notice period, you don't need to pay the employee for this time. If the employee fails to give sufficient notice, you only need to pay for the period the employee worked.

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**Does the final pay include any entitlements to annual holidays and any accrued alternative holidays?**

**If “NO”: AT RISK**

Any untaken alternative holidays (ie, from when an employee worked on a public holiday) must be paid out on termination.

Any annual holidays must also be paid – the Holidays Act provides for different calculations depending on how long the employee has been working, when they last became entitled to annual holidays and what their annual holidays balance is. In many situations multiple calculations will be required. Any annual holidays taken in advance or paid on a pay-as-you-go basis may also be factored into (and taken off) these calculations. This can be a complex area, and you may want to consider taking advice, including through the Sport NZ Legal Helpdesk.

MBIE provides useful information about the [payments for leave and holidays in final pay](#).<sup>98</sup>

MBIE also provides a useful flow chart explaining the various components of a [final pay](#).<sup>100</sup>

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**If the employee has accrued annual holidays, do you include payment for any public holidays that the employee would have been entitled to if they had taken accrued annual holidays immediately after the termination date?**

**If “NO”: AT RISK**

There is a rule in the Holidays Act that means employees are sometimes entitled to be paid for public holidays that fall after their employment terminates. This can happen if they have accrued but untaken annual holidays on termination. For example, if an employee's employment ends on 20 December, but their accrued annual holidays (eg, 15 days) would cover the four public holidays over the Christmas and New Year period (and they would have otherwise been working days), the employee is entitled to payment for those public holidays in their final pay.

For more information, see [final pay](#).<sup>99</sup>

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**Do you make any agreed or contractually required lump sum payments (eg, bonuses, incentive payments, redundancy compensation, retiring/cessation/resigning leave)?**

**If “NO”: AT RISK**

You must comply with any agreement you reach or any requirements in your employment agreement around payments on termination. This will also include any payments negotiated as part of a leaving package. This could include payments for bonuses, redundancy compensation or other forms of leave you have agreed to pay on

termination (eg, untaken long service leave, sick leave, cessation, retiring or resigning leave etc). These payments may also impact the calculation of your annual holidays payments (see earlier) and, depending on the nature of the payment, may attract KiwiSaver deductions.

For more information, see [final pay](#).<sup>99</sup>

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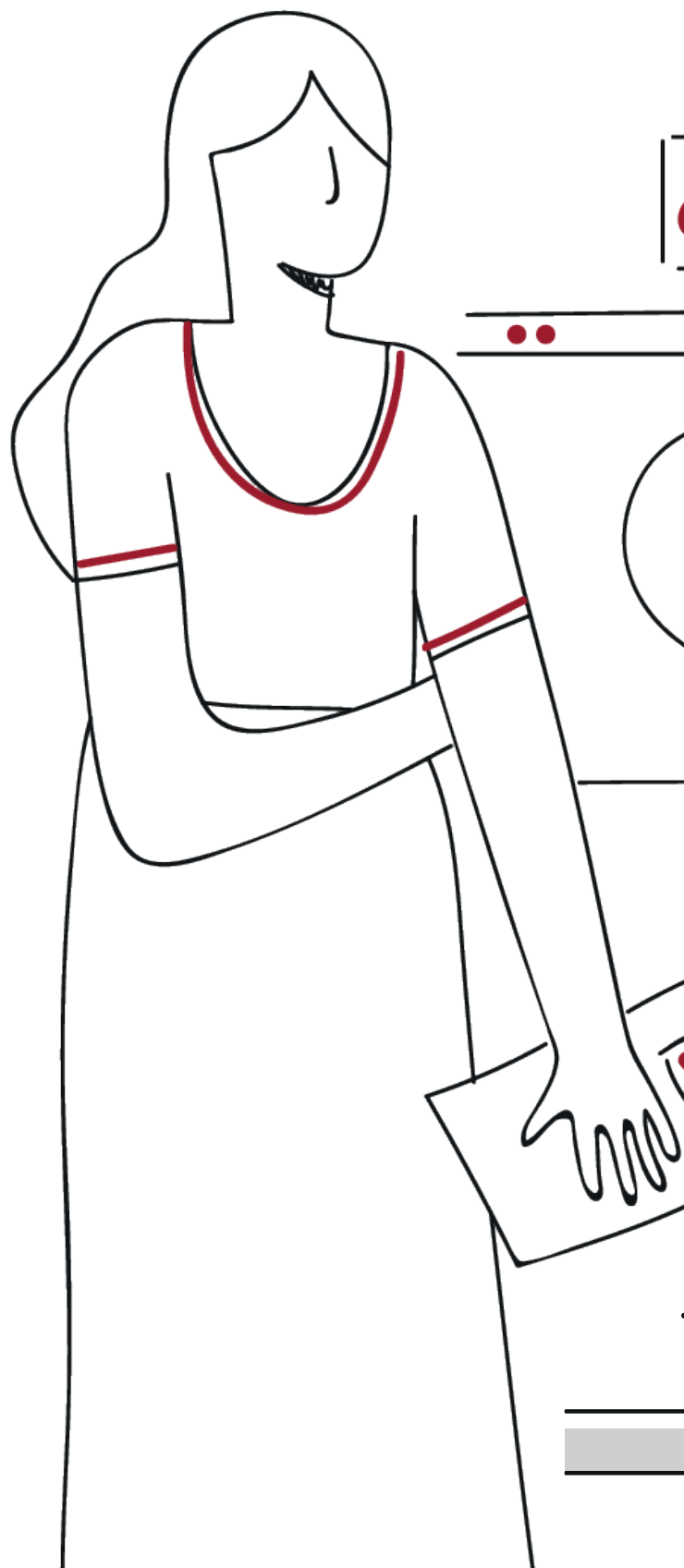
**If you make any deductions from the final pay, is the deduction reasonable, have you consulted the employee prior to making the deduction and do you have the employee's consent to the deduction (unless it is required by law)?**

**If "NO": AT RISK**

Deductions may only be made from an employee's pay if they are required by law, are agreed to by the employee or are overpayments in some circumstances.

Employers may have a general deductions clause in the employment agreement, which provides general agreement in writing for the employer to make certain deductions. However, an employer must consult before making a specific deduction under such a clause, and the employee can vary or withdraw their consent by notice in writing at any time. In some limited circumstances employers can make deductions to recover an overpayment.

For more information, see [deductions](#).<sup>100</sup>





# OBLIGATIONS



# Chapter Nine

Links/  
Resources



<sup>1</sup> <https://sportnz.org.nz/managing-sport/search-for-a-resource/guides/hr-policies-and-employee-handbooks>

<sup>2</sup> <https://sportnz.org.nz/managing-sport/search-for-a-resource/guides/advisory-contractors-vs-employees>

<sup>3</sup> <https://www.employment.govt.nz/starting-employment/who-is-an-employee/volunteers/>

<sup>4</sup> <https://www.employment.govt.nz/starting-employment/who-is-an-employee/difference-between-a-self-employed-contractor-and-an-employee/>

<sup>5</sup> <https://sportnz.org.nz/managing-sport/search-for-a-resource/guides/advisory-contractors-vs-employees>

<sup>6</sup> <https://www.employment.govt.nz/starting-employment/who-is-an-employee/types-of-employee/>

<sup>7</sup> <https://www.employment.govt.nz/starting-employment/hiring/describing-the-job/>

<sup>8</sup> <https://www.employment.govt.nz/starting-employment/hiring/discrimination-when-hiring/>

<sup>9</sup> <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/discrimination/>

<sup>10</sup> <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/exceptions-to-unlawful-discrimination/>

<sup>11</sup> <https://www.privacy.org.nz/privacy-for-agencies/your-obligations/>

<sup>12</sup> <https://www.privacy.org.nz/news-and-publications/books-and-articles/privacy-at-work-a-guide-to-the-privacy-act-for-employers-and-employees/>

<sup>13</sup> <https://www.privacy.org.nz/the-privacy-act-and-codes/privacy-principles/purpose-for-collection-of-personal-information-principle-one/>

<sup>14</sup> <https://www.privacy.org.nz/the-privacy-act-and-codes/privacy-principles/storage-and-security-of-personal-information-principle-five/>

<sup>15</sup> <https://www.privacy.org.nz/the-privacy-act-and-codes/privacy-principles/agency-not-to-keep-personal-information-for-longer-than-necessary-principle-nine/>

<sup>16</sup> <https://www.privacy.org.nz/the-privacy-act-and-codes/privacy-principles/access/>

<sup>17</sup> <https://www.privacy.org.nz/the-privacy-act-and-codes/privacy-principles/correction-of-personal-information-principle-seven/>

<sup>18</sup> <https://www.privacy.org.nz/the-privacy-act-and-codes/privacy-principles/limits-on-use-of-personal-information-principle-ten/>

<sup>19</sup> <https://www.privacy.org.nz/the-privacy-act-and-codes/privacy-principles/limits-on-disclosure-of-personal-information-principle-eleven/>

<sup>20</sup> <https://www.employment.govt.nz/starting-employment/right-to-work-in-new-zealand/>

<sup>21</sup> <https://www.immigration.govt.nz/employ-migrants/hire-a-candidate>

<sup>22</sup> <https://www.justice.govt.nz/criminal-records/clean-slate/>

<sup>23</sup> <https://www.employment.govt.nz/workplace-policies/tests-and-checks/criminal-record-checks/>

<sup>24</sup> <https://www.orangatamariki.govt.nz/working-with-children/vulnerable-children-act-requirements/safety-checking/>

<sup>25</sup> <https://www.justice.govt.nz/criminal-records/police-clearance/>

<sup>26</sup> <https://www.employment.govt.nz/starting-employment/hiring/selecting-and-appointing/>

<sup>27</sup> <https://www.privacy.org.nz/news-and-publications/privacy-news/private-word-55-august-2005/>

<sup>28</sup> <https://www.employment.govt.nz/workplace-policies/tests-and-checks/drugs-alcohol-and-work/>

<sup>29</sup> <https://www.employment.govt.nz/workplace-policies/tests-and-checks/credit-checks/>

<sup>30</sup> <https://www.employment.govt.nz/starting-employment/employment-agreements/things-an-agreement-must-contain/>

<sup>31</sup> <https://www.employment.govt.nz/starting-employment/employment-agreements/employment-agreement-builder/>

<sup>32</sup> <https://www.employment.govt.nz/hours-and-wages/hours-of-work/>

<sup>33</sup> <https://www.employment.govt.nz/about/employment-law/employment-law-changes/hours-of-work-law-changes-2016/>

<sup>34</sup> <https://www.employment.govt.nz/resolving-problems/employer-and-employee-must-dos/good-faith/>

<sup>35</sup> <https://www.employment.govt.nz/starting-employment/employment-agreements/offering-employment-agreements/>

<sup>36</sup> <https://www.employment.govt.nz/starting-employment/trial-and-probationary-periods/trial-periods/>

<sup>37</sup> <https://www.employment.govt.nz/starting-employment/trial-and-probationary-periods/probation-periods/>

<sup>38</sup> <https://employment.govt.nz/starting-employment/trial-and-probationary-periods/probation-periods/>

<sup>39</sup> <https://employment.govt.nz/starting-employment/hiring/induction/>

<sup>40</sup> <https://employment.govt.nz/hours-and-wages/keeping-accurate-records/>

<sup>41</sup> <https://www.ird.govt.nz/business-and-organisations>

<sup>42</sup> <https://www.employment.govt.nz/hours-and-wages/pay/minimum-wage/minimum-wage-rates/>

<sup>43</sup> <https://www.employment.govt.nz/hours-and-wages/pay/minimum-wage/>

<sup>44</sup> <http://www.ird.govt.nz/kiwisaver/employers/how-role-of-employers/>

<sup>45</sup> <http://www.ird.govt.nz/kiwisaver/employers/administering/getting-employees-started/ks-emp-prep-getting-started.html#01>

<sup>46</sup> <http://www.ird.govt.nz/kiwisaver/employers/administering/making-deductions/>

<sup>47</sup> <https://employment.govt.nz/hours-and-wages/breaks/rest-and-meal-breaks/>

<sup>48</sup> <https://employment.govt.nz/hours-and-wages/breaks/breastfeeding-at-work/>

<sup>49</sup> <https://employment.govt.nz/leave-and-holidays/minimum-leave-and-holidays-entitlements/>

<sup>50</sup> <https://www.employment.govt.nz/leave-and-holidays/annual-holidays/annual-holidays-entitlements/>

<sup>51</sup> <https://www.employment.govt.nz/leave-and-holidays/annual-holidays/fixed-term-changing-patterns/>

<sup>52</sup> <https://www.employment.govt.nz/leave-and-holidays/annual-holidays/taking-annual-holidays/>

<sup>53</sup> <https://www.employment.govt.nz/leave-and-holidays/calculating-payments-for-leave-and-holidays/calculating-annual-holiday-payments/>

<sup>54</sup> <https://employment.govt.nz/leave-and-holidays/annual-holidays/>

<sup>55</sup> <https://employment.govt.nz/leave-and-holidays/annual-holidays/annual-closedowns/>

<sup>56</sup> <https://employment.govt.nz/leave-and-holidays/annual-holidays/cashing-up-annual-holidays/>

<sup>57</sup> <https://employment.govt.nz/leave-and-holidays/public-holidays/>

<sup>58</sup> <https://employment.govt.nz/leave-and-holidays/bereavement-leave/>

<sup>59</sup> <https://employment.govt.nz/leave-and-holidays/sick-leave/>

<sup>60</sup> <https://employment.govt.nz/leave-and-holidays/sick-leave/sick-leave-and-acc-payments/>

<sup>61</sup> <https://employment.govt.nz/leave-and-holidays/jury-service/>

<sup>62</sup> <http://employment.govt.nz/leave-and-holidays/parental-leave/>

<sup>63</sup> <https://www.employment.govt.nz/leave-and-holidays/other-types-of-leave/defence-force-volunteers/>

<sup>64</sup> <https://www.employment.govt.nz/workplace-policies/employee-performance/>

<sup>65</sup> <https://www.employment.govt.nz/workplace-policies/employee-performance/managing-performance-issues/how-to-manage-performance-issues/informal-intervention/>

<sup>66</sup> <https://www.employment.govt.nz/workplace-policies/employee-performance/managing-performance-issues/>



<sup>67</sup> <https://www.employment.govt.nz/workplace-policies/employee-performance/managing-performance-issues/how-to-manage-performance-issues/formal-intervention/>

<sup>68</sup> <https://www.employment.govt.nz/resolving-problems/preventing-employment-relationship-problems/>

<sup>69</sup> <https://www.employment.govt.nz/resolving-problems/employer-and-employee-must-dos/fair-process/>

<sup>70</sup> <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/disciplinary-action/investigation/>

<sup>71</sup> <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/disciplinary-action/suspension/>

<sup>72</sup> <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/disciplinary-action/disciplinary-process/>

<sup>73</sup> <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/disciplinary-action/>

<sup>74</sup> <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/warnings/>

<sup>75</sup> <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/general-process/>

<sup>76</sup> <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/bullying/>

<sup>77</sup> <https://worksafe.govt.nz/the-toolshed/tools/bullying-prevention-toolbox/>

<sup>78</sup> <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/harassment/>

<sup>79</sup> <http://www.police.govt.nz/contact-us/how-report-crime>

<sup>80</sup> <https://www.hrc.co.nz/enquiries-and-complaints/what-you-can-complain-about/>

<sup>81</sup> <https://www.employment.govt.nz/resolving-problems/types-of-problems/medical-incapacity/>

<sup>82</sup> <https://www.employment.govt.nz/workplace-policies/protected-disclosures/>

<sup>83</sup> [http://www.ombudsman.parliament.nz/what-we-do/protecting-your-rights/protected-disclosures-whistle-blowing#What are the protections?](http://www.ombudsman.parliament.nz/what-we-do/protecting-your-rights/protected-disclosures-whistle-blowing#What%20are%20the%20protections?)

<sup>84</sup> <https://sportnz.org.nz/managing-sport/search-for-a-resource/news/whistle-blowing-policy>

<sup>85</sup> <https://www.employment.govt.nz/starting-employment/rights-and-responsibilities/working-more-than-one-job/>

<sup>86</sup> <https://eab.business.govt.nz/employmentagreementbuilder/generalprovisions/conflictOfInterest>

<sup>87</sup> <https://www.employment.govt.nz/workplace-policies/productive-workplaces/flexible-work/considering-a-request/>

<sup>88</sup> <https://www.employment.govt.nz/workplace-policies/productive-workplaces/flexible-work/declining-a-request/>

<sup>89</sup> <https://www.employment.govt.nz/workplace-policies/workplace-change/>

<sup>90</sup> <https://www.employment.govt.nz/workplace-policies/workplace-change/selection-process/>

<sup>91</sup> <https://www.employment.govt.nz/workplace-policies/workplace-change/selection-process/>

<sup>92</sup> <https://www.business.govt.nz/hiring-and-managing/ending-employment/employee-redundancy>

<sup>93</sup> <https://www.employment.govt.nz/workplace-policies/workplace-change/restructuring-when-business-sold-or-transferred/>

<sup>94</sup> <https://www.employment.govt.nz/ending-employment/resignation/>

<sup>95</sup> <https://www.employment.govt.nz/ending-employment/dismissal/>

<sup>96</sup> <https://www.employment.govt.nz/ending-employment/abandonment-of-employment/>

<sup>97</sup> <https://www.employment.govt.nz/ending-employment/giving-notice/>

<sup>98</sup> <https://www.employment.govt.nz/leave-and-holidays/calculating-payments-for-leave-and-holidays/calculating-payment-for-leave-and-holidays-in-final-pay/>

<sup>99</sup> <https://www.employment.govt.nz/ending-employment/final-pay/>

<sup>100</sup> <https://www.employment.govt.nz/hours-and-wages/pay/deductions/>



