

Employment Health Check

Common pitfalls to look out for



Is a worker an employee or a contractor?

There are two main ways to engage workers: as employees or as contractors. It's important that workers are correctly classified as getting it wrong can give rise to significant downstream consequences.

Employees have statutory rights and protections. On the other hand, contractors are engaged under a contract for services and are considered to be self-employed. Contractors are not entitled to minimum employment rights and protections. This means they do not receive annual leave or sick leave, cannot bring personal grievances, and are not entitled to receive minimum wage for hours worked.

Determining whether a worker is an employee or a contractor is dependent on a factual assessment of the real nature of the relationship, i.e. how the arrangement operates in practice, rather than how it is documented or the labels that are used to describe the relationship. In making this assessment, a large number of factors are relevant, such as the intentions of the parties, the method of payment, the degree of control over work performed, the extent to which the contractor is operating their own business, and ownership of tools of trade.

Contractors who believe they should be deemed to be an employee can challenge their classification in the Employment Relations Authority. If successful, they have the right to raise a personal grievance against their employer, and the employer may be held liable for extra costs including unpaid PAYE tax, and arrears for minimum wages and leave entitlements for the previous six years.



Getting holiday pay right

The Holidays Act 2003 (**Holidays Act**) is a complex and troublesome piece of legislation that many organisations struggle to fully comply with. One area that tends to be particularly challenging is determining holiday entitlements for casual employees and for employees who work variable hours.

To work out a number of entitlements under the Holidays Act, organisations need to be able to determine whether a day is an 'otherwise working day' for the employee. An otherwise working day is a day that an employee would have been working had the day not been a public holiday, sick or bereavement leave day, annual holiday or alternative holiday for that employee.

It is generally straightforward to determine an otherwise working day for an employee with a fixed work pattern or set roster as you can easily see whether the employee would otherwise have worked that day. However, this exercise becomes more difficult in the case of casual employees, or employees working hours that change week to week, as they do not have a regular pattern of work. If it is unclear whether a day would otherwise be a working day for an employee, the employer and employee should attempt to reach an agreement. Section 12 of the Holidays Act provides guidance on how to determine what would otherwise have been a working day for an employee.

[New legislation](#) is expected to be introduced next year which is aimed at addressing some of the issues experienced under the current Holidays Act. We recommend getting across the proposed changes and considering doing a review of current compliance (e.g. by undertaking a payroll audit) to ensure that any issues are identified and remediated before the new legislation comes into effect.



Employment agreements

An employment agreement is the fundamental document that underpins an employment relationship. It's important to get these right to set clear expectations from the outset and mitigate risk down the track.



Using the right type of agreement

When engaging employees on a temporary basis (i.e. fixed term or casual) it's important to ensure that they are being categorised correctly and the terms of their employment agreement align with the specific requirements that apply.

Casual employees are employees who have no guaranteed hours of work, no regular pattern of work, and no ongoing expectation of employment. A common issue we see is businesses incorrectly classifying an employee as a 'casual' as opposed to a 'part-time permanent employee'. If a casual employee develops a regular pattern of work, they could be deemed to be a permanent employee. This can give rise to some risks, including arrears for holiday entitlements and personal grievance claims.

Fixed term employees are engaged for a finite period of time, for a particular business reason. It's important to remember that there are specific legal requirements regarding what needs to be included in a fixed term employment agreement. This includes setting out the genuine business reason for the fixed term and a reason for the employment ending at the end of the specified term. There are some limitations on the reasons, for example, it's not lawful for the reason to be related to testing the employee's skills or suitability for the role.



Restraints of trade

Restraint of trade clauses in employment agreements are designed to protect an organisation's commercially sensitive information and relationships by restricting an employee's activities for a period of time after they leave the organisation. The two main types of restraints of trade are non-competition and non-solicitation clauses. A non-competition clause prevents an employee from working in/for a competitor organisation for a period of time within a particular geographical area, and a non-solicitation clause generally prevents an employee from soliciting clients or employees away from their former employer for a period of time after their employment ends.

In order to be enforceable against an employee, the duration and scope of the restraint must be reasonable in the specific circumstances and necessary to protect a genuine proprietary interest (for example, to protect confidential information or key client relationships). As a result, it's important for restraints to be tailored to the specific role and individual employee, rather than relying on a template clause. Generally speaking, restraints are more common (and are more likely to be enforceable) for senior level employees, or employees who deal with large amounts of confidential information and/or have close relationships with clients or customers.



Trial periods vs. probationary periods

Trial and probationary periods can be a useful tool for employers to set expectations and ensure that new hires are up to the job. However, these provisions often get confused, catching employers out due to the different legal requirements and protections that apply.

The key benefit of including a 90 day trial period in an employment agreement is that it bars the employee from bringing a personal grievance for unjustified dismissal if they are dismissed during the 90 days. For this reason, trial periods come with very technical requirements that must be met in order to be relied upon. For example, trial periods can only be used by employers with 19 or fewer employees, the employee cannot have worked for the employer before, and it must be agreed in the employment agreement prior

to the employee starting work. There are also specific requirements around giving notice of dismissal during the trial period.

On the other hand, probationary periods can be used no matter how many employees an organisation has and can apply for longer than 90 days. If trial periods are not available to an organisation, probationary periods can be a useful tool to assess an employee's skills and suitability for a role. However, as probationary period clauses do not provide protection against the employee raising a personal grievance claim (unlike during a 90-day trial period), it will be important to ensure the dismissal is based on lawful reasons and follows a fair process.

A common pitfall is dismissing an employee during a trial period, and later finding out that the trial period did not meet the technical requirements, or dismissing an employee during a probationary period thinking that it is a trial period. Both of these situations open the door for the employee to raise a personal grievance challenging their dismissal. Accordingly, we recommend seeking specific advice before dismissing an employee, even during a trial period.

If you need any assistance with employment relations, please do not hesitate to contact:

Chris Baldock | Director
PwC Legal
chris.p.baldock@pwc.com
+64 21 474 321

Dani Findlay | Senior Solicitor
PwC Legal
danielle.k.findlay@pwc.com
+64 27 257 6248

Courtney van Vosselen | Solicitor
PwC Legal
courtney.b.van.vosselen@pwc.com
+64 21 846 054

Layla Darwazeh | Solicitor
PwC Legal
layla.x.darwazeh@pwc.com
+64 27 251 7305