



## who is an employee and who is not?

It is important to be clear about whether your employment relationship is an "employment relationship" or some other form of relationship. This is because the law for employer-employee relationships is different from the law for other types of relationships.

Here we cover the main rights and obligations of employers and employees who are in an employment relationship. We do NOT cover rights and obligations relating to other types of relationships, such as those between principal and contractor or contractor and sub-contractor.

### **An employee is...**

An employee is anyone who has agreed to be employed, under a contract of service, to work for some form of payment. This can include wages, salary, commission and piece rates.

### **An employee is not...**

- a volunteer, who does not expect to be rewarded and receives only a reimbursement for their expenses
- a self-employed or an independent contractor
- a sharemilker
- a real estate agent who has a contract that says they are an independent contractor.

### **Indications of being an "employee"**

If all or most of these features are present in a work relationship, it is likely to be an employment relationship between employer and

employee:

- the intention of the employer and employee is to form an employment relationship, and this is shown in any written agreement or correspondence and/or by the behaviour of the parties to it
- the employer or their agent controls the hours worked
- the employer or their agent has the power to hire and fire
- the employer makes the profit or loss from the enterprise
- the employer deducts ACC premiums and PAYE tax on behalf of the employee
- the employer supplies materials for the work
- the employer owns or leases the equipment needed
- the employee is bound to one employer at a time and is expected not to compete or offer his or her skills to competitors of the employer.

### **Indications of being a “self-employed contractor”**

If all or most of the following features are present in a work relationship, it is likely to be a contract for services involving a self-employed contractor:

- the intention of the parties to the contract is not to form an employment relationship, and the actual nature of the relationship reflects this
- the contractor controls how and when the job is done
- payment is made in a lump sum at the end of a job, or in instalments as progress is made on the job
- the contractor can choose who does the job and can hire other people without approval from the other party
- the contractor pays any tax, ACC and insurance directly
- the contractor can make a profit or suffer a loss directly
- the contractor supplies equipment and materials
- the contractor is free to accept similar work from a number of sources at the same time

## **Unsure if you are an employee or contractor?**

Sometimes it is not clear whether someone is an employee or a self-employed contractor. This can be the case where:

- someone is engaged as a self-employed contractor, but they think they are really an employee; or, more typically
- during the course of either an investigation by a Labour Inspector, in the course of mediation or before the Employment Relations Authority, where there is an action, say to recover arrears of wages or holiday pay, the actual nature of the relationship sometimes comes into question.

Here, mediation assistance can first help settle the real nature of the relationship or the Authority can determine the matter. Also, the Employment Court can be asked to determine employment status either of an individual or a group of people in the same position.

## **More information**

### **Homeworkers are employees**

Anyone who works for somebody else in a private home (other than work on the house or its fittings or furniture) continues to be classed as an employee under the Employment Relations Act 2000.

This might be so even if the arrangement does not look like an employment relationship. For example, a person who works at home and buys in material to make a product that is sold back to the provider could be considered a homeworker.

### **People intending to work are employees**

The Employment Relations Act 2000 says that people who have been offered and have accepted employment are employees from the date of acceptance. They have the rights of employees. This applies even if the employees have not actually started to do the work.

### **Fixed-term and seasonal employees**

Sometimes employers and employees agree that employment will be for a set period of time (e.g. for six months) or until a certain event occurs (e.g. until a particular project ends) or until work is completed

(e.g. until the fruit is picked).

The basic rights and obligations of employees and employers apply to fixed-term and seasonal employment, except that the employment relationship ends at the end of the fixed term. The way in which provisions for annual holidays, sick and bereavement leave are applied can vary for these employees. Details are available on the Employment Relations website ([www.ers.dol.govt.nz/holidays\\_act\\_2003](http://www.ers.dol.govt.nz/holidays_act_2003)) or contact the [Employment Relations Infoline](http://www.ers.dol.govt.nz/help/index.html) (<http://www.ers.dol.govt.nz/help/index.html>).

Note, however, that employers must have genuine reasons for the fixed term. An employee cannot have a fixed-term arrangement when the job is really a permanent one. Also, employers have some special obligations when employing employees on a fixed term. They must set out in writing, in the employment agreement, the reasons for the fixed term and how the employment will end.

### **Casual or part-time employees**

Sometimes employment is on a "casual" basis. In other words, the employer and employee agree that the employer will offer the employee work when work is available. Temping agencies often employ people on this basis.

At other times, employers employ employees on a "part-time" basis (e.g. 7am to 10am on Tuesdays and Thursdays).

The basic rights of full-time employees apply equally to part-time employees. These rights also apply to casual employees, but the way in which provisions for annual holidays, sick and bereavement leave are applied can vary for these employees. Details are available on the Employment Relations website, or you can contact the [Employment Relations Infoline](http://www.ers.dol.govt.nz/help/index.html) (<http://www.ers.dol.govt.nz/help/index.html>).

### **Probationary or trial employees**

Employers and employees may agree to an initial probationary period or trial period. This must be recorded in writing in the employment agreement. The basic rights and obligations of employees and employers apply to probationary employment.

Employers have some special obligations when employing employees on a probationary arrangement.

## Changing employment status

Sometimes a person will move between being an employee in some work situations and a self-employed contractor in others.

You need to be an employee to have employee rights under the Employment Relations Act and other employment laws, but if you become injured you have the right to weekly compensation from ACC whether you are an employee or a self-employed person. However, the amount of that compensation may be limited if you frequently move between being an employee and being self-employed.

This is because if you're an employee when you're injured, your compensation is calculated on your previous earnings as an employee. Similarly, if you're self-employed when you're injured, your compensation is calculated on your previous earnings as a self-employed person.

It's an important factor to consider when you weigh up the advantages and disadvantages of changing employment status. You can get more information on this topic from the ACC website at <http://www.acc.co.nz/claimscare/entitlements/weekly-compensation/> [external site].

We welcome the opportunity to help you further. If you want further clarification, more detailed information or guidance on any matter covered here, contact the [Employment Relations Infoline](http://www.ers.dol.govt.nz/help/index.html) (<http://www.ers.dol.govt.nz/help/index.html>).

## Further information & guidance

We welcome the opportunity to help you further. If you can't find an answer to your question, or you want further clarification, more detailed information or guidance on any matter covered here, please contact us. We value your query and will respond to you as quickly as possible.

You can contact us via our website at [www.ers.dol.govt.nz](http://www.ers.dol.govt.nz).

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