

9. FACT SHEET ON PEOPLE - VOLUNTEERS, EMPLOYEES AND CONTRACTORS



This fact sheet outlines:

- the differences between volunteers, employees and independent contractors, and an organisation's obligations and potential liability in relation to these people
- obligations in relation to ACC cover for work-related personal injury to employees and volunteers
- the system of certification and registration of people and organisations that provide health and disability services, including hospitals and rest homes.

VOLUNTEERS

Who is a volunteer?

The word "volunteer" is not defined in most legislation, but is generally used to mean a person who chooses to work for the good of the community or some public benefit, and who is not paid or otherwise rewarded for this work and does not expect to be. The term is not used to include people doing on-the-job training.

"Volunteer" is specifically defined in the Health and Safety in Employment Act 1992. That Act distinguishes between different types of volunteers and imposes different duties on organisations for each type.

See Fact sheet 10: Health and safety.

The Human Rights Act 1993 also uses an expanded definition of "employment" that includes volunteers.

See Fact sheet 11: Human rights and discrimination.

Obligations owed to your volunteers

Organisations that are not employers owe their volunteers a general duty of care under the common law. Organisations should therefore adopt a series of good practices to ensure that volunteers are safe while undertaking voluntary work for an organisation. Volunteers working independently outside any organisational structure should also adopt those practices for themselves.

See Fact sheet 16: Torts (civil wrongs) and criminal offences.

Organisations also owe specific duties to their volunteers under the Health and Safety in Employment Act 1992. Other volunteers are owed a lesser duty.

See Fact sheet 10: Health and safety.

Some of the Acts that protect employees apply also to volunteers. See "*Statutes setting out rights and protections*" for employees on p5.

Liability for volunteers' conduct

An organisation will be liable for the negligence or other torts (civil wrongs) of a volunteer who is acting in the course of their activities on the organisation's behalf.

It is irrelevant that the volunteer is not an employee and is not being paid for their services. The key issue is whether the person was acting on behalf of the organisation at the relevant time. For example, the organisation may be liable for the negligent conduct of a volunteer driver while the driver is doing deliveries for the organisation; but the organisation will not be liable for the volunteer's conduct when he or she is driving home at the end of the day.

Organisations should exercise all reasonable care when taking on volunteers for specialist or expert roles. Failing to do so may expose the organisation to liability. For example:

- Although social workers are not required to be registered under the Social Workers Registration Act 2003, it is good practice to ensure that volunteers in this role are registered with the Social Workers Registration Board because registration gives you an assurance of their competence.
- Under the Health Practitioners Competence Assurance Act 2003, health practitioners must act within their scope of practice, which is defined by the relevant authority for the particular profession. Certain practices and health services may be performed only by registered health practitioners (some health practitioners will also be required to hold a practising certificate). You should therefore ensure that any health-related service is performed by an appropriate person.
- Council permits are required for particular activities, such as working on roofs or fundraising in the street.

For more information about civil liability generally, see *Fact sheet 16: Torts (civil wrongs) and criminal offences*.

Reimbursement of volunteers' expenses

Organisations often refund expenses incurred by their volunteers while carrying out their volunteer duties. For instance, a volunteer may be reimbursed for the actual cost of buying a bus ticket for work-related travel, or be paid \$5 for each working day as reimbursement for the estimated cost of buying lunch.

As a general rule, it is always best to refund actual and reasonable expenses for which the volunteer has receipts, rather than giving an allowance. Organisations should reasonably estimate the cost of mileage when refunding expenses to their volunteers who use their own vehicle for travel. As a guide, organisations can use the rates published by a reputable independent New Zealand source representing a reasonable estimate, such as the New Zealand Automobile Association Inc mileage rates. Organisations can also use the rates published by the Inland Revenue in their February 1996 Tax Information Bulletin (Vol 7, No 8).

Whether your organisation refunds volunteer expenses, and how it does so, is significant under a number of laws. For instance:

- **Income tax:** Reimbursement of expenses that are not “actual and reasonable” may mean that the volunteer is liable to pay income tax. See *Fact sheet 8: Taxation*.
- **Immigration:** If a visitor to New Zealand (on a visitor’s permit) receives a “gain or reward”, they must hold a work permit. If expenses reimbursed to a volunteer are not “actual and reasonable”, they may be considered to be a “gain or reward”.
- **Driver licensing:** You must hold a passenger service licence and have a “P” (passenger) endorsement on your driver licence if you carry passengers in your own car, are reimbursed for your expenses, and are not doing so for an area health board, local authority or incorporated charitable organisation. For further information refer to Land Transport NZ’s fact sheet 18, *Volunteers transporting passengers* available from www.landtransport.govt.nz.
- **Benefits:** If your volunteer is a beneficiary, reimbursement of expenses that are not “actual

and reasonable” may be considered to be income. If the volunteer’s income is more than \$80 a week, their benefit may be affected.

Student-loan borrowers volunteering abroad for charitable organisations

Student-loan borrowers volunteering (or working for a token payment) overseas for a charitable organisation may be eligible for interest-free loans. See *Fact sheet 8: Taxation*.

EMPLOYEES

Who is an employee?

An employee is someone employed under what the law terms a “contract of service” (or simply “employment agreement”) – as opposed to an independent contractor, which is someone in business on their own account and who provides their services under a “contract for services”. Under the Employment Relations Act 2000, an “employee” includes a home-worker.

Employees may be employed on a full-time, part-time or casual basis:

- Full-time employees work for pay for the standard 40-hour, five-day week prescribed by the Wages Protection Act.
- Part-time employees work for pay for less than the standard 40-hour week. They may work full-time hours on only some of the standard five working days (Monday to Friday), or for fewer hours a day than a normal full-time worker.
- Casual employees are employed for pay on a daily, hourly or weekly basis, on an “as and when required” basis, rather than for a set number of hours.

Distinguishing between employees and independent contractors

There is sometimes a fine line between being an employee engaged under a “contract of service” and an independent contractor engaged under a “contract for services”. The distinction is very important, however, because many significant statutory obligations are owed to employees but not to independent contractors.

The leading test under the Employment Relations Act requires the Courts to look at “the real nature of the relationship” when determining a person’s

employment status. All relevant matters must be taken into account, including what the parties intended. Any statement in the relevant contract that says that the worker is or is not an employee will not necessarily decide the issue.

Relevant factors for determining employment status include:

- the degree of control the worker has over the tasks
- whether the worker provides equipment used in the work
- whether the worker employs staff on their own account
- whether the income tax is paid by the employer or by the worker as part of his or her business.

Liability for employees' conduct

An organisation will be liable for the negligence or other torts (civil wrongs) of an employee who is acting in the course of their employment.

See Fact sheet 16: Torts (civil wrongs) and criminal offences.

All reasonable care must therefore be taken when employing professional and expert staff. Failing to do so may expose the organisation to liability. See "Liability for volunteers' conduct" on p1 for examples of social workers, health practitioners and council permits.

Employment relationships

Duty of good faith

The Employment Relations Act requires parties to an employment relationship to deal with each other in good faith and not to do anything that would, or would be likely to, mislead or deceive each other, whether directly or indirectly.

The duty has a wider scope than the obligations of mutual trust and confidence that the Court implies into all employment relationships. It requires the parties to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

If a party fails to comply with their duty of good faith, they may be liable to a penalty under the Act if:

- the failure was deliberate, serious and sustained, or
- the failure was intended to undermine one of

the following:

- bargaining for an individual employment agreement or a collective agreement
- an individual employment agreement or a collective agreement (including by passing on terms and conditions agreed to in a collective agreement to an individual agreement or another collective agreement)
- an employment relationship.

Union rights

A union is entitled to represent its members in relation to any matter involving their collective interests as employees.

A union representative is entitled to enter a workplace for purposes related to the members' employment or for the union's business. Unions must exercise their rights of access in a reasonable manner, taking into account normal business operations. When discussing employment matters or union business with union members, the discussions must be only for a reasonable time. The discussions are not to be treated as union meetings, and employers cannot make any deductions from wages because of these discussions. Union representatives must also comply with reasonable health, safety and security requirements.

Union access may be denied on the basis of national security or prejudice to the investigation or detection of criminal offences, or on religious grounds.

Employers must allow union members to attend two union meetings a year and to pay them while they are at the meeting. Employees are also entitled to paid employment relations education leave. The Employment Relations Act provides a formula for calculating this.

Initiating bargaining for a collective agreement

If there is a collective agreement in force, a union must not initiate bargaining earlier than 60 days before the date on which the collective agreement expires. An employer must not initiate bargaining earlier than 40 days before the date on which the collective agreement expires. An employer who initiates bargaining or receives a notice initiating bargaining must, within 10 days, draw the attention of all employees to the existence and scope of the bargaining and to the intended parties.

Unions can initiate bargaining with two or more employers for a single collective agreement, or two

or more unions can propose to initiate bargaining with one or more employers for a single collective agreement. The minimum number of employers needed for negotiations is one.

Different timeframes may apply where there are one or more applicable collective agreements in force that bind one or more unions or one or more employers.

Good faith bargaining

Good faith bargaining for a collective agreement requires the union and employer:

- to do their best to agree on a process for bargaining as soon as possible after bargaining is initiated
- to meet with each other
- to consider and respond to each other's proposals
- to recognise the role and authority of any person chosen to be the other party's representative or advocate
- not to bargain (directly or indirectly) with those for whom the representative or advocate is acting, unless the other party agrees.

Strikes and lockouts

Strikes and lockouts are unlawful if a collective agreement is in force, or until the parties have been negotiating for a new collective agreement for at least 40 days. It is legal for employees to strike for a multi-employer collective agreement (although "sympathy" strikes are unlawful). It is also lawful for employees to strike on health and safety grounds.

During a strike or lockout, an employer may employ another person to perform the work of a striking or locked-out employee if the person:

- is already employed by the employer when the strike or lockout begins
- is not employed principally to perform the work of a striking or locked-out employee, and
- agrees to perform the work.

An employer may also employ or engage another person to perform the work of a striking or locked-out employee if this is necessary for health and safety reasons and the person performs the work only to the extent necessary on those grounds.

Individual employment agreements

When a new employee is not a union member and there is an applicable collective agreement, the terms and conditions of the collective agreement apply for

the first 30 days of the individual agreement. After that, the parties can choose to vary the individual agreement, but they cannot agree to do this at the start of the employment.

The new employee must be told about the collective agreement covering their work and must be given a copy of it. They must also be told that they can join the union and how to contact the union, and that the collective agreement will apply if they join the union. If the employee agrees to the union knowing that he or she has entered into an individual agreement, the employer must inform the union of this as soon as is practicable. When there is no applicable collective contract, the employer and employee may agree to the terms and conditions that will apply to the individual employment agreement.

Probation (trial) periods

An employment agreement can provide for a period of probation or trial, but the agreement must state this in writing. However, even if the agreement does include a probation period, the employer must still follow the requirements of procedural fairness in dismissing the employee. This means the employer must provide the proper warnings and give the employee assistance, training and opportunities to improve their performance, the same as with any other employee.

Personal grievances and employment disputes

All employment agreements must include a plain language explanation of the services available for resolving employment relationship problems. This explanation must include a reference to the 90-day time limit for raising a personal grievance.

Mediation is the primary focus for resolving employment problems. Parties can use the Employment Relations Service (Department of Labour) mediation service or a private mediator. Disputes that cannot be resolved through mediation can be taken to the Employment Relations Authority – this is an investigative body that resolves employment problems by establishing the facts and deciding disputes on the substantial merits of the case. The primary remedy under the Employment Relations Act 2000 is to reinstate the aggrieved employee to their former position.

The Employment Court hears appeals from decisions of the Employment Relations Authority or when the parties apply to have the dispute heard in the Employment Court in the first instance, on the grounds that the matter is of high public importance or relevant

to a number of different parties.

Sexual harassment

Sexual harassment is illegal under the Employment Relations Act and employers have responsibilities to protect employees from it. An employee can take a personal grievance against their employer (or complain under the Human Rights Act 1993) if they've been sexually harassed by:

- their employer, or
- a co-worker or one of the employer's clients or customers and the employer hasn't taken action to make sure it doesn't happen again.

Statutes setting out rights and protections

Criminal Records (Clean Slate) Act 2004

Under this Act, an individual who has a minor conviction and has not reoffended for seven years does not have to declare this information in most circumstances. This applies to employees, job applicants, volunteers and contractors. This does not apply to sexual offending. Full criminal records will still be available during Police investigations or Court proceedings, when applying for a firearms licence or for sensitive types of employment, such as the care of children or national security.

Equal Pay Act 1972

This prohibits employers from differentiating between employees solely on the basis of sex in areas such as conditions of work, fringe benefits and opportunities for training, promotion and transfer.

Health and Safety in Employment Act 1992

The main aim of the Act is to "provide for the prevention of harm to employees at work". The Act covers volunteers who work for an employer on an ongoing and regular basis and whose work is an integral part of the employer's business.

See Fact sheet 10: Health and safety.

Holidays Act 2003

This sets out employees' entitlements to holidays and holiday pay. The Act also covers employers' obligations in relation to the timing of annual leave and calculating holiday pay.

Human Rights Act 1993

This prohibits discrimination against employees and job applicants on certain grounds. The Act also applies to volunteers and contractors.

See Fact sheet 11: Human rights and discrimination.

Immigration Act 1987

All employers must ensure that tax code forms completed by the employee include a signed declaration that the employee is entitled to work for that employer. Non-residents require a work permit to work in New Zealand.

Minimum Wage Act 1983

This sets minimum wages for employees, the rate depending on the employee's age. The youth minimum wage also applies to trainees enrolled in industry training programmes.

Parental Leave and Employment Protection Act 1987

This contains the leave entitlements of male and female employees when a child is born or adopted under the age of six, provided the employees have worked for the same employer for the period prescribed in the Act.

Privacy Act 1993

This contains rules for the collection, storage, disclosure and use of personal information about employees, and also volunteers and contractors.

See Fact sheet 12: Privacy.

Wages Protection Act 1983

This requires employers to pay the employee the entire amount of wages payable, unless the employer is entitled to make certain authorised deductions.

INDEPENDENT CONTRACTORS

Who is an independent contractor?

An independent contractor is someone who is in business on their own account and who is engaged under a "contract for services". Employees, by contrast, are engaged under a "contract of service".

See "Distinguishing between employees and independent contractors" on p2.

Liability for independent contractors

An organisation is not generally liable for the wrongful acts or omissions of an independent contractor. The organisation will be liable if the contractor had express or implied authority to act on the organisation's behalf:

- "Actual authority" means there is a written document, such as a contract, a list of instructions or a board resolution, giving the contractor the right to act on the organisation's behalf.
- "Apparent authority" is less explicit. It may be

a spoken comment, or simply acting in a way that implies that the contractor has the authority to make binding agreements for the organisation. (Officers of an organisation usually have implied authority.)

See *Fact sheet 18: Contracts*.

Obligations owed to independent contractors

In general, an organisation's obligations towards independent contractors are determined by the terms of the particular contract with them.

Independent contractors are usually not protected by the Employment Relations Act and the other employment-related protective statutes. However, there are exceptions to this – for example, the various protective statutes extend their coverage to home workers on contracts for services. For other exceptions, see *“Statutes setting out rights and protections”* for employees on p5.

Contractors may not discriminate

Independent contractors may not discriminate against customers on the basis of any of the prohibited grounds of discrimination set out in the Human Rights Act.

See *Fact sheet 11: Human rights and discrimination*.

ACC COVER

The Accident Compensation Corporation (ACC) administers New Zealand's accident compensation scheme, which provides personal injury cover for all New Zealand citizens and residents and for temporary visitors to New Zealand. In return, people do not have the right to sue for personal injury, other than for exemplary damages.

ACC levies

ACC provides cover and entitlements for work-related personal injury suffered by employees. Every employer is required to pay ACC levies to fund this. There are penalties for late payment.

ACC levies are set by regulations according to industry and sub-industry classifications. Some employers may qualify for reductions in levies where they meet the requirements of workplace safety audits carried out by ACC.

“Accredited employers”

Some employers may qualify for an “accredited employer”, or “partnership”, programme. This allows qualifying employers to meet the cost of cover, injury prevention, case management and payment of entitlements to injured staff for set periods in return for a reduced premium.

Qualifying employers must, among other things:

- have appropriate experience in managing occupational health and safety issues positively
- demonstrate commitment to injury prevention and understanding
- show awareness of the importance of rehabilitation and the employer's involvement in it
- have appropriate policies and procedures to prevent work-related personal injuries
- have adequate resources, policies and procedures to manage work-related injury claims and to promote and manage rehabilitation.

Entitlements for employees with work-related injuries

Employees who suffer work-related personal injuries (including those incurred in work-related motor vehicle accidents) are entitled to:

- treatment costs
- weekly compensation of 80 per cent of earnings lost by the employee as a result of the incapacity
- rehabilitation, including social and vocational rehabilitation
- an independence allowance (if there is permanent impairment)
- payments to family members in the case of fatal injuries.

An employee is entitled to compensation for loss of earnings during the first week of incapacity, if the employee:

- has an incapacity resulting from a work-related personal injury, and
- was an employee immediately before her or his incapacity.

When an employee has more than one job, the employer at the job where the employee suffered the injury must pay the first week's compensation to cover all lost earnings, including those lost in other employment.

from an earner's levy charged on an employee's earnings. An employer must deduct from an employee's earnings the prescribed earner's levy.

from every employer. This meets the ongoing cost of treating and rehabilitating people for work injuries before 1 July 1999 and non-work injuries sustained before 1 July 1992.

same employer, employers must take all practicable steps to assist their rehabilitation.

before the injury, they may undergo an initial occupational assessment to determine suitable work for them, based on their transferable skills. An initial medical assessment will determine whether they are capable of doing the types of work indicated by this occupational assessment.

rehabilitation plan has been completed, the employee will be required to undergo a vocational independence assessment to decide whether they can work for 35 hours or more in work to which they're suited by their experience and training. If they can do this, their weekly compensation will stop after three months. If they are unable to find a job, they will need to apply to Work and Income for a benefit.

of an ACC decision that an employee's injury is a work-related personal injury suffered during employment with that employer.

employees:

ACC will cover the cost of treatment for any injury suffered by a volunteer, whether it was suffered during their voluntary work, in their paid employment, or in any other situation. They may also be entitled to "social rehabilitation" – for example, home help and childcare.

Volunteers are not entitled to weekly compensation if they are injured while doing

voluntary work and are not in any paid employment. This is because they have not lost any income.

If a volunteer is injured while doing voluntary work and has to take time off their paid employment, they are eligible for weekly compensation from the second week of their time off work. Neither ACC, their employer nor the organisation for which they volunteer are liable to pay compensation for the first week off work.

SERVICE PROVIDERS

replaced the licensing of hospitals and rest homes and the registration of residential care homes with a system of certification of people and organisations that provide health and disability services. The Act covers a wide range of services and buildings and a wide range of governance issues. The Ministry of Health manages the certification system and audits service providers.

people with disabilities must meet the following standards:

Health and disability sector NZS8134: 2000
Infection control NZS8142: 2000
Restraint minimisation and safe practice
NZS8143: 2001.

meet the national mental health sector standard
NZS8143: 2001.

offences

has more information on ACC cover, its levies and the responsibilities of organisations.

of Labour provides information on the areas of employment law discussed in this fact sheet. The site also provides an online facility to help you build your employment agreements.

referred to in this fact sheet.

applying for certification and ongoing registration.

information about sexual harassment and other topics relating to equal opportunities.

may be purchased from Standards New Zealand. Call 0800 735 656 or 04 498 5991.

transporting passengers, available from www.landtransport.govt.nz.

