



## 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 the section "Statutes setting out rights and protections" for employees below.

#### 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.

## VOLUNTEERS (CONTINUED)

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).

If your organisation is making reimbursement payments to volunteers there are a number of laws you need to consider. For example:

- **Tax laws** – Reimbursement payments are treated as tax-exempt income (the volunteer will not need to pay income tax), provided that the payment is based either on actual expenditure or a reasonable estimate of the likely cost. See *Fact Sheet 8: Taxation* for more information.
- **Honoraria** – Some organisations make “honoraria” payments to their volunteers. Honoraria are payments paid for volunteer services where no fixed payment (e.g. wages) would normally be made. Honoraria payments are not tax-exempt and treated as taxable income. For more information 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](http://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.

## 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. For more information 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” above 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

## EMPLOYEES (CONTINUED)

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*

From 1 March 2009, businesses and organisations employing less than 20 people can employ new employees under a 90 trial period. The employer and the employee must agree to the trial period at the time of hiring. During the 90 day period the employee can be dismissed at any time and cannot bring a personal grievance for unjustifiable dismissal.

#### *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**

- **Employment Relations (Rest Breaks, Infant Feeding and Other matters) Amendment Act 2008** - From 1 April 2009 all employers must provide employees with paid rest breaks and unpaid meal breaks. For example, employees working a six to eight hour shift are entitled to two paid 10 minute breaks and one unpaid 30 minute meal break. This Act also requires employers to provide breaks and facilities for employees who want to breastfeed their babies or express milk in the workplace.
- **Employment Relations (Flexible Working Arrangements ) Amendment Act 2008** - This Act gives employees with "caring responsibilities" the right to request flexible working conditions. An employee must have the care on another person (eg. child, elderly or ill family member) and must have been employed by their current employer for at least six months. A request can be made for a variation to hours of work, days of work or place of work. Employers can deny a request if it conflicts with a collective agreement or certain Recognised Business Grounds specified in the Act. For more information see [www.dol.govt.nz/worklife/flexible](http://www.dol.govt.nz/worklife/flexible)
- **Criminal Records (Clean Slate) Act 2004** – Under this Act, an individual who has a minor conviction and has not re-offended 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 Act sets out an employee's minimum legal entitlements to annual and public holidays, and to sick and bereavement leave. Employees are entitled to four weeks paid annual leave after their first year of employment. The leave can be taken at any time agreed between the employer and employee. For information on how to calculate leave entitlements and holiday pay and for details about payment for public holidays see [www.ers.dol.govt.nz](http://www.ers.dol.govt.nz)
- **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*.

## INDEPENDENT CONTRACTORS (CONTINUED)

- **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** - This Act sets minimum rates of pay for all employees. There are three levels of minimum wage; the adult minimum wage, the new entrants' minimum wage and the training minimum wage. All employees aged 16 years and over are entitled to be paid the adult minimum wage, with the following two exceptions 1. The new entrants minimum wage can be paid to employees aged 16 or 17 until they have completed either 200 hours or three months employment (after which they are entitled to the adult minimum wage) 2. The training minimum wage can be paid to employees aged 16 years or older doing recognised industry training involving at least 60 credits/year.

There is no statutory minimum wage for employees under 16 years. Note that minimum rates of pay change. To check current rates see [www.ers.dol.govt.nz](http://www.ers.dol.govt.nz)

- **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 employees 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 the section

“Distinguishing between employees and independent contractors” above.

### 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 also *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 the section above “Statutes setting out rights and protections” for employees.

### 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.

## ACC Support

ACC can provide support to employers when an employee is injured, whether injury is work-related or not. For example, ACC can provide assistance in managing injured employees, and in creating return-to-work programmes.

## “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.

## Non-work injuries

The cost of non-work injuries of employees is met 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.

The Inland Revenue collects a residual claims 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.

## Returning to work

When an employee returns to the same job with the same employer, employers must take all practicable steps to assist their rehabilitation.

If an employee is unable to return to the job they had 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.

When the rehabilitation in the employee’s individual 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.

## Reviews

An employer may apply for an independent review of an ACC decision that an employee's injury is a work-related personal injury suffered during employment with that employer.

## Volunteers and ACC cover

ACC cover for volunteers is more limited than for 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 child care.
- 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.

## CERTIFICATION OF HEALTH AND DISABILITY SERVICE PROVIDERS

The Health and Disability Services (Safety) Act 2001 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.

All hospitals, old people's homes and homes for people with disabilities must meet the following standards:

- Health and disability sector NZS8134: 2008
- Infection control NZS8142: 2000
- Restraint minimisation and safe practice NZS8143: 2001.

Those providing mental health services must also meet National mental health sector standard NZS8143: 2001.

## RESOURCES

Fact sheets

- Fact sheet 8 - *Taxation*
- Fact sheet 10 - *Health and safety*
- Fact sheet 11 - *Human rights and discrimination*
- Fact sheet 12 - *Privacy*
- Fact sheet 16 - *Torts (civil wrongs) and criminal offences*
- Fact sheet 18 - *Contracts*

## Websites

[www.acc.co.nz](http://www.acc.co.nz)

The Accident Compensation Corporation website has more information on ACC cover, its levies and the responsibilities of organisations.

[www.ers.dol.govt.nz](http://www.ers.dol.govt.nz)

The Employment Relations Service of the Department 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.

[www.legislation.govt.nz](http://www.legislation.govt.nz)

This website provides access to all the legislation referred to in this fact sheet.

[www.moh.govt.nz/certification](http://www.moh.govt.nz/certification)

The Ministry of Health provides an online system for applying for certification and ongoing registration.

[www.neon.org.nz](http://www.neon.org.nz)

The National Equal Opportunities Network has information about sexual harassment and other topics relating to equal opportunities.

## Publications

Copies of the relevant standards and workbooks may be purchased from Standards New Zealand. Call 0800 735 656 or 04 498 5991.

Land Transport NZ's fact sheet 18, *Volunteers transporting passengers*, available from [www.landtransport.govt.nz](http://www.landtransport.govt.nz).

