



## EMPLOYMENT CHECKLIST

### 1. Recruitment

- Don't make verbal offers when discussing terms and conditions
- Don't make discriminatory comments in interviews
- Make offer in writing
- Send contract out for signature
- Provide employee with superannuation "choice of fund" letter
- Ensure contract is returned and signed by employee

### 2. Employment Contract (standard clauses to include)

- Job description
- Probation
- Hours
- Leave entitlements
- Confidentiality
- Intellectual property
- Post employment restraints
- Conflicts / other employment
- Termination
- Tailored clauses
- Dispute resolution

### 3. Enterprise Agreement

- Job description
- Probation
- Leave entitlements
- Confidentiality
- Post employment restraints
- Termination
- Requisite clauses
- Contracting out of Modern Award



#### 4. Induction

- Present employee with company policy and procedure documents
- Obtain written confirmation of employee's reading and understanding of company policy within seven days
- Conduct training session on company policy

#### 5. Employee Management (during course of employment)

- Train staff regularly on company policy
- Provide regular performance appraisal
- Document all disciplinary issues and meetings

#### 6. Termination

- Document all meetings
- Provide written notification of dismissal
- Ensure all statutory entitlements are paid
- Decide whether to pay notice period in lieu
- Consider "gardening leave" option
- Ensure all company property is returned
- Ensure redundancy is legally compliant
- Ensure severance payments are in accordance with the law
- Consider out-placement
- Consider providing Deed of Release when there is potential for dispute

#### 7. Post Termination

- Ensure compliance with any restraint orders
- Monitor employee's confidentiality obligations

Please see attached explanatory notes for more detail.



## EMPLOYMENT CHECKLIST

### EXPLANATORY NOTES

#### 1. Recruitment

- Oral offers during interviews, or afterwards, may confuse the terms and conditions of any subsequent written offer of employment. There is also a risk that such verbal offers will be later held as constituting part of the terms and conditions of any subsequent written offers. The written offer must be the complete offer to the candidate. Do not promise any candidate the job in an interview or even indicate a decision has been made. Such conduct may lead to allegations of breach of procedural fairness.
- Do not make discriminatory comments regarding race, gender, age, sexuality, disability etc. Do not ask questions such as “are you planning on having children?”, “are you married?”, “when are you going to retire?”, “what is your nationality?”, “are you a homosexual?”.

Questions as to the history of physical injury may be asked where it concerns the inherent requirement of the job description.

Questions may also be asked as to the status of any visas.

- An offer in writing together with an absolute agreement clause, provide the ultimate protection for the employer if there is any dispute as to the terms and conditions of employment.
- An unsigned contract is not a binding written contract and does not afford the employer the best protection in case of a dispute. If the employee has not signed the contract it is difficult to argue that there has been an agreement as to the terms of the offer of employment.
- It is required by law that all employers provide new employees with a letter inviting them to nominate their own superannuation fund within 28 days of commencing employment. All employers must have a default fund (which should be nominated in the letter) for a situation where the employee does not elect a particular fund.
- A common trap for employers is that they assume an employee has returned a signed copy of the contract where acceptance of the offer of employment has been made orally. In such circumstances the employee commences employment, but there is no written record of the terms and conditions, as the employer has not followed this up.

#### 2. Employment Contract (standard clauses to include)

- It is important that both parties have a clear understanding of what the role entails. The better the quality of communication on this aspect, the less risk there is for a dispute to arise in relation to job performance. The job description should be an extensive list of all of the requirements of the position.
- A probation clause should be included as a matter of course to guard against situations where it is clear at an early stage of the employment that the employee is not suitable for the position. Depending on the drafting of the clause, the employer may only be required to pay a lesser notice period during the probationary period.
- Maximum working hours will need to be specified being a maximum of 38 hours per week for full time employers. There are certain exceptions to this and it is important that the employment contract or where applicable, an Individual Flexibility Agreement, reflects any agreed exception where relevant.
- Leave entitlements include annual leave, personal / carer's leave and compassionate leave, maternity leave, bereavement leave, community service leave and long service leave.



- Confidentiality is a vital clause in every agreement as it serves to protect important company property, both intellectual and otherwise. It is important that a tight and extensive clause is contained in the contract. A loose clause may lead to the employer to lose its competitive edge.
- It is vital that the intellectual property of the employer is protected and the employment contract must clearly afford full protection to the employer. Issues that should be covered include discoveries, inventions, processes, designs, copyrights, trademarks and patents and moral rights (where applicable).
- Post employment restraint is also an important clause, particularly for senior employees and employees with customer facing work. There is a fine line to be traversed between a tight and protective clause and one that is reasonable to both parties. Depending upon the State in which the employee is engaged, the clause may need a cascading effect.
- The employer may wish to ensure that the employee is working solely for it and not for any competitors and this should be expressed in the contract.
- The termination clause must clearly outline the different circumstances in which an employee may be terminated. A clause based on termination for serious and willful misconduct is recommended, as is a clause which gives the employer the option of paying notice in lieu.
- There are certain roles within an organisation that may require tailored clauses to reflect the nature of the work. This may include sales staff on commission based remuneration for example.
- The dispute resolution clause is important as it will define the steps to be taken by the parties in the case of a dispute. By emphasising conciliation and resolution, an employer can often be successful in resolving an issue prior to the employee leaving the employment.

## **2. Enterprise Agreement**

In addition to the above, the following are issues that relate directly to Enterprise Agreements:

- Enterprise agreements are agreements made at an enterprise level between employers and employees about terms and conditions of employment. Single-enterprise agreements involve a single employer or one or more employers (such as in a joint venture) co-operating in what is essentially a single enterprise. Multi-enterprise agreements involve two or more employers that are not all single interest employers. Greenfields agreements involve a genuinely new enterprise that one or more employers are establishing or propose to establish and who have not yet employed persons necessary for the normal conduct of the enterprise.
- From 1 January 2010, the NES provide a minimum safety net of employment conditions and standards that apply to all employees.
- The NES provide a safety net in respect of working hours, flexible working arrangements, parental leave and related entitlements, annual leave, personal/carer's leave and compassionate leave, community service leave, long service leave, public holidays, notice of termination and redundancy pay and fair work information.
- Enterprise Agreements must pass the Better Off Overall Test and must contain a dispute settlement procedure, flexibility and consultation clause.
- Enterprise Agreements should not include any unlawful content.

## **4. Induction**

- Policies and procedures are an important part of ensuring that an employer is compliant with its legal obligations. Employers will often fail in disputes with its employees because of either non existence of policies or the policies



lacking clarity. It is important that the policy and procedure manual is presented to the employee on the date of commencement of employment and that they be given the opportunity to read and understand the policy content. The employee should be invited to ask any questions.

- Not only is it important that the employee has read and understood the policy documentation but there must be written acknowledgement of having done so. This is a common problem in disputes. An employer may say that it has provided the policy documentation to the employee but in the absence of any written acknowledgement there is no evidence that the employee has read, or been provided with, the policy documentation.
- It is important to combine the provision of the written policies with a face to face training session which can more fully explain the policy content and provide an opportunity for the employees to ask questions.

## **5. Employee Management (during course of employment)**

- Not only should staff receive training on company policy at the start of employment but this training should be followed up with regular sessions every six to twelve months. This serves the purpose of refreshing the memories of employees as well as providing updates on the content of the policies.
- Performance appraisals serve the purpose of providing a record on an employee's performance as well as providing a forum for communication with the employee. It is not enough for a formal performance appraisal to be held annually. A formal appraisal should take place at least every six months and we recommend that informal discussions be held with employees every quarter. This should assist in capturing issues that arise and provide a mechanism for dealing with them rather than waiting until the yearly appraisal to confront a problem.

Appraisal documentation should be provided to the employee well in advance of the meeting and there should be ample space for comment on the document.

The formal appraisal should be documented and signed off by both the employer and employee.

Informal discussions need not be documented.

- It is important that a "paper trail" is established that can be referred to later in the case of a dispute. A file note taken at the time that an issue arose will always be superior to a person's recollection of events months or years later. If an issue arises that requires disciplinary action any discussion must be documented and confirmed in writing. This includes warning on performance and issues concerning misconduct.

Where meetings are held it is recommended that a witness be present who can verify events if necessary at a later date.

Where allegations of misconduct are made the employee must be allowed a reasonable period to respond.

It is also important that in the case of discrimination or harassment that the investigation or findings be kept confidential to protect the privacy of the accused, the victim and any witnesses.

## **6. Termination**

- Please see the last note regarding documenting meetings.
- Written notification avoids any dispute or confusion as to the time and reason for dismissal. This is particularly important in cases of dismissal for serious and willful misconduct.
- Statutory entitlements include superannuation, annual leave and long service leave and must be calculated to the last day of employment.



- In some cases it is preferable that the employee ceases employment instead of working out the notice period. This may be for issues of morale or to ensure that an employee cannot sabotage the company systems or customer relationships. In this situation the payment of the notice period is made and the employee ceases employment on that day.
- “Gardening Leave” is an option where the employee is required to continue employment for the notice period but for the above reasons is not required to attend the premises of employment or perform any work duties. This can be an effective way of restraining the employee from contacting competitors during the notice period.
- There may be property such as laptops, mobile phones, personal organizers etc that are at the employees home and their return should be required prior to final termination payment. Mobile phone numbers may also be the property of the company and arrangements might need to be made to ensure that the number is not taken with the employee.
- It is important that any redundancy is bone fide and not a sham arrangement to avoid a dismissal for other reasons. Issues such as a proper selection process (where a choice between employees is being made) and other options such as redeployment or re-training need to be considered.
- Ensure that severance payments have been made in accordance with the relevant industrial instrument or policy.
- Out-placement may assist the employee to find new work and is an act of good will that may reflect in a positive way on the employer. It is not however a legal right of the employee.
- A comprehensive deed of release will be important where there is a possibility of a dispute arising upon termination. The deed must ensure that no further claims can be made by either party and that issues such as non-disparagement, confidentiality and restraints of trade are covered.

## **7. Post Termination**

- Where restraint of trade clauses are in place it may be important to monitor any former employees during the period of restraint to ensure compliance and that the employers’ intellectual property and confidential information is not being used by its competitors. In some cases it may be appropriate to seek injunction orders against former employees to ensure these clauses are upheld.

This checklist is intended as a guide only and does not replace specific legal advice.

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