

Commercial eSpeaking

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Welcome to the Spring edition of *Commercial eSpeaking*, the final issue for 2022.

We hope you enjoy reading this e-newsletter and find the content both interesting and useful.

If you would like to talk more about any of the topics covered, or indeed on any legal matter, please don't hesitate to contact us. Our details are on the top right of this page.



Contract compliance

Fair Trading Amendment Act 2021 now in force

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Unfair terms, unconscionable behaviour and direct sales are all targeted in the updated legislation.

In this article, we focus on the 'unfair term' changes as these will impact almost all businesses.

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Hybrid working

Now an option for many

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As hybrid working appears to now be a fixture in the employment landscape, what are the benefits of hybrid working and why are so many employers opting into this flexible working regime?

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Business briefs

Hiring migrant workers: What the new AEWV means for you

Immigration New Zealand has introduced the Accredited Employer Work Visa that replaces and consolidates six temporary work visas.

Changes to the Holidays Act on the horizon

The Holidays Act 2003 is a constant source of frustration. Although the replacement legislation won't be passed until 2023, we outline some of the government's intentions.

FMA review of ethical investing

The FMA is urging fund managers to improve disclosures relating to ethical investing after a recent review.

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Unfair terms, unconscionable behaviour and direct sales are all targeted in the updated legislation that includes an expansion on the regulation of 'unfair terms' impacting all consumer contracts and standard, trade and small contracts. This means all businesses should be reviewing these changes to ensure they comply with the 2021 Act to avoid penalties.

In this article, we focus on the 'unfair' contract term changes as these will impact almost all businesses.

What is an 'unfair' contract term?

Contract terms that are now considered 'unfair', and therefore unenforceable, are any terms that meet all of the following requirements:

- The contract or term causes a significant imbalance in the parties' rights and obligations arising under the contract
- The term is not reasonably necessary to protect the legitimate interest of the party who is advantaged by it, and
- The term would cause detriment (financial or otherwise) to a party if it were applied, enforced or relied upon.

There are a few exemptions to the above requirements, including where the contract specifies a transparent price term, upfront

price, defines the main subject matter of the contract or is expressly permitted by another law.

Examples that could be considered unfair include terms that:

- Refer to other hidden or ambiguous terms and conditions, such as committing your customer to 'standard terms that will be provided with the supply of goods'
- Prevent someone from taking legal action
- Give one party a unilateral 'final decision' status
- Make your customer bear all the risk
- Restrict your customer from transferring their rights under the contract (ie: non-transferable), and
- Allow you to transfer your contract without their consent.

If it is unclear whether a term is 'unfair', the Commerce Commission can make that determination or ask the court to do so. In making its decision the Commission or court is required to consider any matter it considers relevant; the two most important matters are, however, the contract as a whole and the unfairness of the term.

Does this apply to your contracts?

This legislation applies to a vast number of contracts including consumer contracts, standard contracts, in trade contracts and small contracts. While most people understand that a consumer contract is one engaged between a business and a customer, to properly understand if any of the contracts you use in your business come under this legislation, it is important that three key terms – 'standard', 'in trade' and 'small' – are clarified.



Standard contract

A 'standard contract' is any contract in a templated form. This template is not subject to negotiation and is more of a 'tick box' of a contract. Most terms of trade and standard issued terms and conditions would be considered a 'standard form contract'.

In trade contract

Using an 'in trade contract', you or your business must undertake any trade, business, industry, profession, occupation, activity of commerce or undertaking related to the supply of goods, services or interests in land.

Small contract

'Small contracts' are contractual business relationships that result in less than \$250,000 in anticipated value in the first 12 months of the relationship.

In addition, and importantly, almost all independent contractors will be caught up in these changes. Contractors should review their agreements to ensure they remain compliant with the legislation.

Hybrid working

Now an option for many employees

The Covid pandemic has reshaped the way New Zealanders work. Southern Cross Health Insurance conducted a nationwide survey¹ for its Workplace Wellness Report 2021 and found that since the Covid outbreak in 2020, 34% of businesses surveyed have changed their position on remote working and now offer it as an option to employees.

AUT Business School Professor Jarrod Haar² has monitored the New Zealand workforce since February 2020 and, as of November 2021, 48% of Kiwi workers were engaged in hybrid working. It is likely the percentage of hybrid workers has increased since the AUT study.

As hybrid working appears to be a fixture in the employment landscape, what are the benefits of hybrid working and why are so many employers agreeing to opt into this flexible working regime?

Benefits of hybrid working

Hybrid working provides a great deal of flexibility for both employees and employers. A worker who feels tied to their desk all day may feel overwhelmed and stressed by their inability to tend to at-home tasks. Hybrid working provides employees with more flexibility which directly correlates with efficiency. AUT's Professor Haar found hybrid workers had the highest scores of happiness and innovation compared with entirely remote workers and full-time office-based workers.

¹ PowerPoint Presentation (businessnz.org.nz)

² Happy workers are hybrid workers – News – AUT

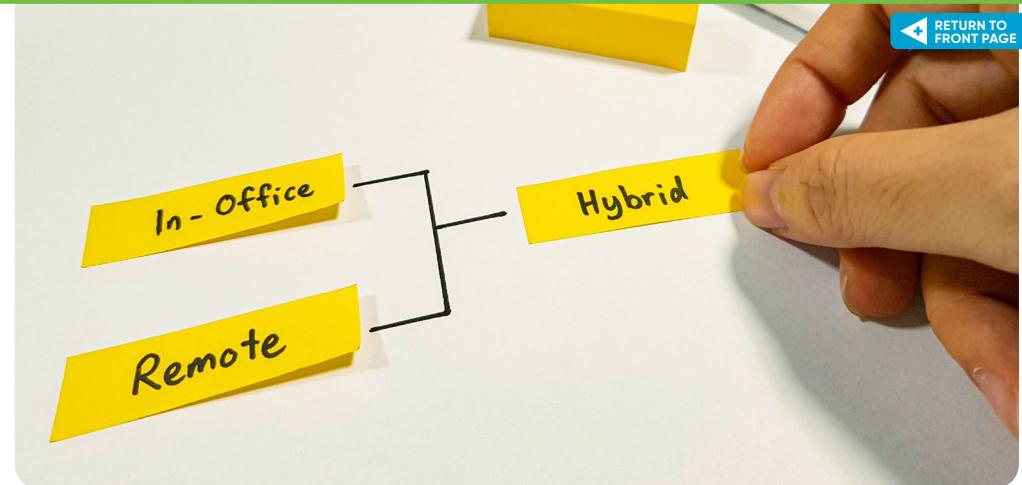
The government recently increased minimum sick leave entitlements from five to 10 days. This increase has allowed organisations to enforce strict rules around staying at home when their employees are unwell. In doing this, employers can protect both the people who are unwell and fellow colleagues from working with someone who is sick but doesn't want to take the day off. Those people who do not want to take a sick day, but still feel able to work, can do so from home.

The Southern Cross report found that the year 2020 had the lowest rate of employee sick leave absences recorded by one of the Workplace Wellness Reports. It is interesting to note that the average number of days a manual worker took off was 5.3 days, whereas a non-manual worker, who could work remotely, took 3.4 days off on average, indicating those who could work from home would work instead of taking a day of sick leave.

Disadvantages of hybrid working

There are, however, disadvantages that come with working remotely. The Southern Cross report stated that 73% of the organisations surveyed reported that some of their employees felt isolated when working at home and preferred to be in the office environment. This percentage increases in smaller businesses with fewer than 50 staff members.

Remote working can have an impact on team culture, feelings of connectivity and collaboration between colleagues in a workplace. Many employees enjoy their workplace not only because of the work they do, but also the people they work with.



Many new initiatives and problem-solving exercises happen in the office through collaboration. Although colleagues can communicate with each other via Microsoft Teams or Zoom, these platforms do not have the same benefits of interacting with an office colleague.

Communicating via an online platform can also result in smaller questions being brushed under the rug, due to the effort involved and fear of having to call and 'interrupt' a colleague to ask a question.

Health and safety considerations

The Health and Safety at Work Act 2015 requires employers to ensure the health and safety of all their workers, so far as reasonably practicable. If your employee is working from home, their home becomes a workplace and is subject to health and safety requirements. Relevant considerations include:

+ Ergonomics: desk workers who spend most of their day sitting are prone to strains and injuries relating to posture. Not having the correct equipment when setting up a home office is one of the biggest contributing factors.

+ Hazards: employees should be warned about hazards around the home including overloading power sources and confined work environments which may lead to tripping over cords and so on.

+ Mental health: employers' health and safety obligations extend to mental wellness, not just physical wellbeing. A worker's mental health can be difficult to assess if they are at home and out of sight. Personal and work boundaries can become blurred leading to overwhelming feelings of stress.

To address this, workers should be encouraged to use a specific area of the house for work and shut off that area when they finish for the day. Alternatively, workers could be encouraged to wear 'work' clothes during work hours, and they can change into more casual clothes to mentally separate themselves from all work associations.

+ Confidential information: the obligation to ensure employer information remains confidential is still applicable;

Business briefs

Hiring migrant workers: What the new AEWV means for you

Immigration New Zealand (INZ) has introduced the Accredited Employer Work Visa (AEWV) that replaces and consolidates six temporary work visas.

Employers must now apply for accreditation to hire migrants under the AEWV pathways by showing they are a good employer who will:

- Run a viable, genuine business which meets certain financial criteria
- Comply with New Zealand employment and immigration law
- Commit to pay all recruitment fees, and
- Assist the migrant with settling in New Zealand.

Once accredited, you (as the employer) can apply to INZ for 'job checks' and, in doing so, must provide evidence that:

- You have recently advertised the role on a national job listing website for at least two weeks to determine whether any suitable New Zealand candidates exist
- The job meets INZ's requirements, and
- You have provided an acceptable offer and an employment agreement to the applicant.

If INZ grants the job check, the relevant role must be filled within six months, or you will have to reapply. INZ will then add the relevant migrant's details into Immigration Online and send the AEWV applicant a unique link to apply for their visa.

If you have any questions about the AEWV or the accreditation process, please don't hesitate to contact us or an immigration advisor.



Changes to the Holidays Act on the horizon

For many employers, the Holidays Act 2003 is a constant source of frustration, especially when it comes to calculating pay for annual leave or days in lieu. Getting these calculations wrong, or failing to meet the requirements of the Act, can result in tens of thousands of dollars' worth of penalties for serious breaches.

The government has signaled upcoming changes to streamline and simplify compliance, hopefully coming in 2023, including:

- Annual leave payments will be calculated based on the hours in the employment agreement, or averaged over the previous 13 weeks
- Employees will be entitled to take annual leave in advance, including during their first 12 months of employment
- Eligibility for alternative holidays will be based on whether an employee worked more than half of the corresponding days over the previous four or 13 weeks (eg: if the public holiday is a Monday, the employee must work more than half of the previous four or 13 Mondays to qualify for an alternative holiday)
- 'Casual employee' will be defined for the first time
- Only casual employees will be eligible to be paid 8% 'pay-as-you-go' holiday pay, and
- Employers will be required to provide pay slips to their employees each pay period.

These proposed changes look very promising, but the current laws will still apply to the upcoming Christmas and summer holidays. Until the changes take



effect, all employers must ensure they are compliant with current law.

FMA review of ethical investing highlights need for improvement

The Financial Markets Authority (FMA) is urging fund managers to improve disclosures relating to ethical investing after a recent review found that, despite growing demand, New Zealand investors struggle to select managed funds based on ethical and socially responsible credentials.

Based on the review, New Zealand investors will be keen to monitor fund managers' responses to the FMA's recommendations. The FMA recommends that fund managers should consider the following:

- Consolidating disclosures relating to ethical investment practices into an easy-to-read format that investors can easily understand

Contract compliance

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Penalties

If your contract, or terms of trade, is considered unfair, a court may determine any number of remedies should be applied including:

- Removal of the clause
- Refunding money or pay damages
- Preventing the business from using the clause in any way, and
- Fines of up to \$200,000 for an individual or \$600,000 for a company or body corporate.

If a clause is considered unfair in a standard contract, there is a risk it could extend to all the contracts issued by your business and every consumer or business negatively impacted by that clause could be entitled to a remedy.

The new law reflects the reality that many small businesses are sole traders or small family-owned businesses that require more protection from unfair contractual terms than large corporations. On the flipside, it also means all businesses should take additional care to ensure their contractual terms are fair and reasonable, and comply with the legislation.

If you are uncertain if your contracts are compliant or would like to discuss this change, please contact us. [+](#)



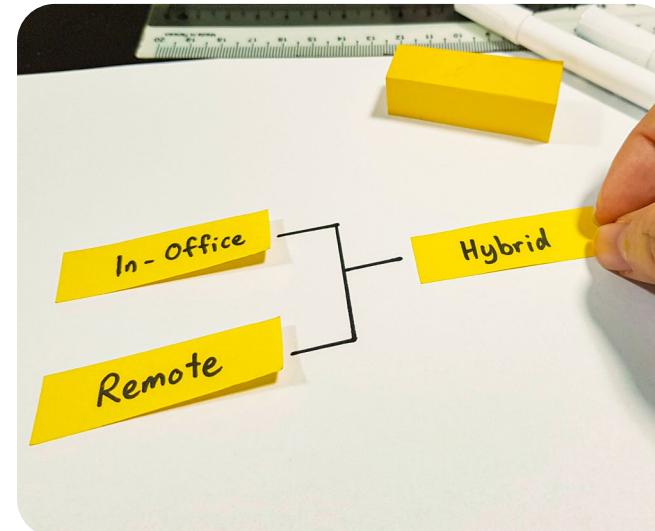
Hybrid working

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it is probably more heightened working from home. Hybrid workers should be reminded of their obligations and advised to be particularly diligent when dealing with confidential information at home; provisions should be included in policy documents to this effect.

The way of the future

It is clear hybrid working is the way of the future. Although there are some disadvantages in working this way, these look to be outweighed by the vast number of benefits, including overall increases in a worker's happiness. The key is finding the correct balance and ensuring there are days that all staff are in the office together so everyone can get the best of both worlds. [+](#)



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- Clearly explaining the criteria used to exclude investing in certain companies or sectors
- Providing better information to investors about risk and return trade-offs, and the benefits of the fund. One suggested example is to avoid using vague terms such as 'the fund's returns will be financial and a reduced climate impact'
- Ensuring the non-financial outcomes are meaningful, and clearly state the consequences of failing to achieve them, and
- Ensuring investors better understand the purpose and value of organisations providing assurance, measurement standards or endorsement, such as the Responsible Investment Association of Australasia.

The FMA's review highlights the need for fund managers to provide a greater level of detail and clarity in disclosures to support their ethical investing claims. If you would like to read the review in full, please [click here](#). [+](#)

