



A-Z OF EMPLOYING

Volunteers Employment Protection Act

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Volunteers Employment Protection Act

Our guide for Employers and Managers

This is only a guide. It should not be a substitute for professional advice.

Please seek advice from our AdviceLine Team if you require specific assistance.

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Overview

- ▶ The object of the Volunteers Employment Protection Act is to protect the employment of members of the territorial or reserve forces who go on protected voluntary service.
- ▶ The Act extends protection to members of the territorial or reserve forces who are called out for service during a war or a state of emergency, or who undertake service in the national interest.
- ▶ Different provisions apply depending on the reason why the employee is taking the leave.
- ▶ While an employee is on volunteers leave they are entitled to have their employment protected, however the leave is not paid for by the employer.

Introduction

Volunteers employment protection legislation has been in place since 1973 but now provides employment protection not only for employees engaging in 3-month or 3-week periods of whole or part-time service or training in the territorial or reserve forces but also for territorial or reserve force members involved in service in the national interest or undertaken in times of war or emergency. Provisions relating to the two latter forms of service are along the lines of those applying to employees eligible for parental leave under the Parental Leave and Employment Protection Act.

Entitlement

Unpaid “volunteers’ leave” is available to members of the territorial or reserve forces in the following 3 circumstances:

Protected voluntary service

For periods of whole and part-time voluntary service or training of, respectively, 3 months and 3 weeks in any training year. Service of this kind is called “protected voluntary service or training.” A training year runs from 1 July in one year to 30 June the following year.

An employee who takes 3 months “whole-time” service is entitled to an extended leave period not exceeding 7 days when service ends. The leave may be further extended because of sickness or other reasonable cause. An employer can apply to the Ministry of Business, Innovation and Employment (formerly the Department of Labour) for the postponement of voluntary service or training upon the ground that this will cause undue hardship but postponement will not necessarily be granted.

The employer can refuse to allow a casual, temporary or seasonal employee to return to employment if, having regard to general conditions applying in the industry concerned, his or her work would not normally have continued until the end of the leave of absence period. Otherwise the employee is entitled, on returning to work, to be re-employed in the job he or she was doing at the time leave began. All employees are eligible for leave of this kind, regardless of how long they have worked for their employer.

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In times of war or emergency

If called out for continuous service – in New Zealand or elsewhere – in time of war or emergency (including any state of emergency declared under the Civil Defence Emergency Management Act 2002). Leave in this circumstance is for an unspecified period of time.

Eligibility for employment protection in this situation requires employees to be employed by their employer for at least 10 hours a week. An employee does not have to have worked for a continuous period for the same employer over the previous 12 months.

National interest

This applied where an Order in Council has declared that it is in the national interest for members of the territorial or reserve forces to offer themselves for special service. Those who respond are protected by the Act for a period of up to 12 months. Leave must be taken as a continuous period and is unpaid.

To be eligible for employment protection under this section of the Act employees must have been employed by the employer for 12-months for at least an average of 10 hours a week.

Employees are treated as being employed for an hour if, though normally expected to be at work, they were:

- ▶ Absent on leave with pay for that hour;
- ▶ On leave without pay for that hour (other than volunteers' leave) with the employer's agreement;
- ▶ Entitled to payment of weekly compensation under the Injury Prevention Rehabilitation and Compensation Act 2001;
- ▶ On parental leave under the Parental Leave and Employment Protection Act 1987; or
- ▶ Absent in any other circumstances that a Labour Inspector considers did not disrupt the employee's normal work pattern.

The hours that the employee would normally be at work must be calculated in accordance with the terms of the employment agreement or, if the period of leave without pay started more than 12 months ago, by reference to hours of work before the leave without pay began.

If an employee is absent on special service in the national interest for a period exceeding 28 days, the employer may be entitled to compensation payments from the Government of an amount equal to the highest minimum wage rate for the days or hours, or both, during which the employee would usually perform work for the employer.

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Continuous Service

When an employee takes leave under any of the three categories of volunteers leave outlined above, the employee's service is treated as unbroken in respect to any rights and benefits conditional on unbroken service and any period of leave is treated as time served under the employee's employment agreement (with certain exceptions in relation to annual and public holidays and superannuation – required contributions must still be paid).

Leave Applications

An employee intending to undertake 3 months' or 3 weeks' voluntary service or training must give his or her employer not less than 14 days' notice.

Where the employee is responding to a proclamation under which he or she is called out, or is liable to be called out, for continuous service in a time of war or emergency, written notice must be given as soon as practicable, indicating which situation applies (i.e. that the employee has been called out for service or is liable to be called out). The employer must also, as soon as practicable, be given notice of the duration of the leave.

Where the employee wants to take leave for special service in the national interest written notice must be given at least 28 days before the proposed date for leave to begin. The notice must state the proposed date on which the leave is to commence and how long the leave is to last.

Employer response to leave applications

Within 21 days of receiving the employee's notice seeking leave for special service in the national interest or in time of war or emergency, the employer must respond in writing (a form is prescribed for this purpose) stating whether:

- ▶ The employee is entitled to leave, and if not, the reasons why not;
- ▶ The employee's position can or cannot be kept open.

If the position cannot be kept open the reply must note that the employee may dispute the employer's decision.

Where there are genuine reasons why the employee's job cannot be kept open, the employer's response must indicate that for a 26-week period from the time leave ends the employee will have preference over other applicants for any substantially similar vacant position.

In the case of special service in the national interest, the response must also tell the employee about:

- ▶ Leave eligibility and entitlements;
- ▶ The duration of the leave (leave in the national interest cannot be longer than 12 months);

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- ▶ The right of the employer and employee to determine a leave commencement date; and
- ▶ The ability to end leave early or to extend it with the employer's consent (but not beyond 12 months in the case of special leave in the national interest).
- ▶ In the case of a call-out in time of war or emergency the response must tell the employee about:
 - ▶ Leave eligibility and entitlements;
 - ▶ When leave will begin (either the date when the employee is called out for service or an earlier or later date agreed with the employer);
- ▶ The need for the employee, where there is a superannuation scheme, to keep on paying required contributions if the leave period is to be counted as continuous service for that purpose;
- ▶ The right to end leave early or extend it with the employer's consent or where an extension is required by Proclamation.

Keeping the Position Open

An employer must keep an employee's position open when they are on protected voluntary service. The employer is required to keep open the job of an eligible employee undertaking service in the national interest or called out for service in time of war or emergency, unless it can be shown that a temporary replacement is not reasonably practicable because:

- ▶ The employee's position is a key position;
- ▶ A redundancy situation has subsequently occurred, in which case when leave ends, the employee, must be allowed a 26-week period of preference for employment in any position substantially similar to the one previously held.

In determining whether or not a position is a key position regard may be had to enterprise size and the training period or skills required for the job. However, in relation to parental leave "key position" has been so narrowly defined by the courts that the task of establishing that a position is "key" may be extremely difficult.

An employee's job must be kept open if the leave period does not exceed 4 weeks.

Special defences where employment is terminated

Where employment is terminated while the employee is on leave it is a defence for the employer to prove that a redundancy occurred after the employee was told that his or her position could be kept open and that the redundancy was of such a nature that there was no prospect of the employer being able to appoint the employee to a vacant position substantially similar to that previously held. The employer must also be able to show that he or she had not, between the time of taking leave and employment termination, prejudicially affected either the employee's seniority or superannuation rights.

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A similar defence applies to termination at the end of the 26-week preference period. Redundancy payments, either in terms of an employment agreement or the provisions of any Act, are not affected.

Once Leave Begins

Within 21 days of an employee going on leave the employer must provide a written notice stating:

- ▶ The date on which the employee's leave will end (where the employee is undertaking service in the national interest);
- ▶ The date on which the employee will be required to return to work if he or she decides to return to work (where the job can be kept open). This will be the next working day after leave ends. It will also outline when any preference period will begin if the job cannot subsequently be kept open;
- ▶ That the employee must, if reasonably practicable, inform the employer of the intention to return to work not later than 21 days before leave is due to end;
- ▶ The employee's rights and obligations in relation to the early ending or extension of leave (not beyond 12 months where leave is for service in the national interest), or the earlier beginning of the preference period. In such a case the employee must give the employer 21 days' notice.

When Leave is Due to End

An employee who has taken leave for service in the national interest or in time of war or emergency must inform the employer 21 days before leave is due to end whether or not he or she will be returning to work (unless it is not reasonably practicable to do so). If informing the employer within 21 days is not reasonably practicable, an employee who does not intend to return to work is still required to notify the employer of that intention as soon as it is reasonably practicable to do so. Where the employee intends to return to work but informing the employer within 21 days is not reasonably practicable, the employer and employee must co-operate in good faith for the purpose of agreeing on arrangements for the return to work. However, if agreement is not possible, the employee must give the employer 7 days' written notice of the date on which he or she will be returning to work.

If an employee fails to return to work when leave ends, employment is taken to have ended on the day leave began, unless the employee can show good cause for not returning. This is also the case where an employee, without reasonable excuse, fails to accept an offer of preferential employment on the date specified by the employer or within 7 days of that date.

Replacement Employees

Anyone employed to take the place of an employee who is on service in the national interest or called out in time of war or emergency must be notified in writing that his or her position is temporary and can be terminated on the employee's return. Replacement employees must also be told in writing that their employment may be terminated at an earlier date if the employee taking leave returns from leave

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early. These are genuine reasons for fixed term employment, but if they are not provided, the replacement employee's entitlement to take a personal grievance on termination will remain. See the **A-Z Guide on Fixed Term Agreements**.

Replacement employees must also be told that their employment may terminate sooner than anticipated if the employee who is on leave exercises the right to return to work at a date earlier than initially requested.

Annual Leave

An employee is entitled to take all or part of his or her annual holiday entitlement (except where the employee requests otherwise) at a time that is not a period of voluntary service or training.

Where the entitlement to an annual holiday arises while the employee is on leave, during the preference period, or during the 12 months following a return to work, annual holiday pay is paid only at the rate of average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

Where an employee has taken 3 months' or 3 weeks' leave for voluntary service or training the period of leave of absence is to be treated as time served in the employee's employment.

For the purposes of any paid (public) holiday occurring during a 3 months' or 3 weeks' period of voluntary service or training, the employee concerned is to be treated as no longer employed. In other words, the employer is not responsible for public holidays that occur while the employee is on leave. (This, it is presumed, would apply also to periods of leave for service in the national interest or in time of war or emergency.)

Interim Reinstatement

Employees who are refused leave may apply to the Employment Relations Authority for an interim reinstatement order if notice of termination is given or employment is terminated because the employee:

- ▶ Has indicated a wish to take volunteers' leave;
- ▶ Is or has been a member of the territorial or reserve forces;
- ▶ Is entitled or may be entitled as a member of the territorial or reserve forces to take volunteers' leave; or
- ▶ Is on or has taken volunteers' leave.

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The Employment Relations Authority may from time to time renew an interim order for reinstatement on the application of the employee. A copy of any order made must be sent to the employer by registered letter. Reinstatement must occur immediately or when the Authority specifies, regardless of any appeal that may be made.

Complaints

An employee has the right to make a complaint if the employer has stated that the employee is not entitled to take leave or that the employee's position cannot be kept open. A complaint can also be made where there has been an alleged unjustified termination of employment or other action to the employee's disadvantage, or where it is claimed that the employer has discriminated against the employee. Complaints must be made within 26 weeks of the date on which the subject matter of the complaint arose, or within 8 weeks of the expiry of any volunteers leave, whichever is the later. Complaints are not personal grievances.

Complaints are to be made initially to the employee's immediate supervisor and settled as rapidly and as near the point of origin as possible. Where a complaint is not settled or is of such a nature that a direct discussion between the employee and the employee's immediate supervisor would be inappropriate, the employee must either notify a duly authorised representative of any union to which the employee belongs (in which case the union representative must first consider whether the complaint has any substance before taking the matter up), act on his or her own behalf, or appoint an agent or barrister or solicitor to take the matter up with the employer or employer's representative.

If a complaint is not settled with the employer, the facts relied on must be stated in writing. The employee's statement then establishes the nature of the complaint and the issues for any subsequent consideration of the case.

Unsettled complaints can be referred to the Employment Relations Authority which must either make provision for mediation or hear and determine the complaint after considering the written statement, any evidence or submissions the parties provide, and other matters as it thinks fit. Subsequent appeals to the Employment Court and Court of Appeal are possible (and follow the process set out in the Employment Relations Act 2000). Every party to a complaint has a duty to promote its settlement and not to do anything that might impede the effective functioning of the procedures. Remedies available are reinstatement, reimbursement of lost wages and compensation.

In the event of the employer's insolvency or company liquidation, an employee will have priority in respect to any compensation or reimbursement payment ordered as a consequence of a leave complaint.

Conclusion

Volunteers Employment Protection works in a similar way to Parental Leave to provide employment protection to employees in the territorial or armed services in specific situations. Should you require further information in regards to your specific obligations, do not hesitate to contact the AdviceLine on 0800 300 362.

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Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that's tailor-made for your business.
- ▶ Visit our website www.busiensscentral.org.nz regularly.
- ▶ Attend our member briefings (held every 4 months) to keep up to date with all changes.
- ▶ Send your staff to Business Central Learning courses and conferences designed for those who manage employees.

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