Contracts of Employment

Current staff are often presented with new contracts and told they must sign them, but nobody can ever force you to sign any contract. This IEU Advice looks at employment contracts and the related legal issues.

Everyone has a Contract

There is always a contract between an employee and employer. You may not have anything in writing, but a contract still exists. Your agreement to work for your employer and their agreement to pay you in return forms a contract. Your contract may be composed of any number of the following:

- A formal written contract
- A letter of appointment
- A verbal agreement
- Written or verbal agreements to change employment conditions
- Customs and practices
- Unspoken understandings about terms of employment

Your employer does not have to give you a written contract. However, if they do, it becomes enforceable, subject to its meeting the legal minima.

Do you have to sign?

If you are a new employee, or are starting a new fixed-term contract, you probably have little choice but to sign. However, if you are already a permanent employee, you cannot be forced to sign a new contract and you don’t lose your job if you don’t sign. Any variation to your existing contract must be by agreement. If the new contract is offering you something you are not otherwise entitled to (eg. an attractive pay increase) you may be tempted.

Otherwise, a new contract will normally benefit the employer much more than it will benefit you.

Most employees have little idea what the terms of contracts actually mean. For example:

A mere reference to a “modern award” can seem inoffensive, but in fact could remove five days’ sick leave, school holiday entitlements, various allowances, and slow down your progress up the pay scale.

The two words “entire contract” can mean that you lose the benefit of every perk, promise, custom, and previously accepted arrangement that is not expressly written in the contract.

There are almost always good reasons to refuse to sign a new contract, and seldom any reason to sign.

Written contracts can be misleading

Many employees read their written contract and assume that every word in it is enforceable, and cannot be pursued. This is far from true, because:

- Verbal agreements and understandings can be enforceable.
- The rights that you have under your contract of employment are in addition to the rights you have under law, including under the Fair Work Act and the applicable Enterprise Agreement (if there is one) or Award. Generally you and your employer can agree to whatever terms you wish, including anything that is equal or better than the Act/Award/Agreement. Anything in your contract that is less favourable to you cannot be enforced by the employer.

- In addition to the written (or “express”) terms of your contract, there will also be “implied terms”, which are those not specifically agreed between the employer and employee, but implied by custom and practice (e.g. what happened in the past, or was given to other employees) or by the general law. These may also be enforceable.

In short, much of your contract may not be reliable, and you almost certainly have many more rights than are stated in your contract.

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Get advice before signing

The IEU constantly reminds its members to seek our advice before signing a contract and to take up any concerns before they become part of your contract by “accession”. The IEU will continue to try to protect you by providing advice on your contract and by getting entitlements secured in Enterprise Agreements which over-ride all contracts. But, if you sign without first getting advice, you are running a risk.

What are the most common offensive terms?

The IEU has identified a few clauses that often appear in contracts in the non-government sector:

• making your tenure a “fixed term” appointment
• to the effect that “this contract excludes all other promises, warranties, arrangements…”
• stating that your conditions are set under the National Employment Standards, the Fair Work Act, and/or the 2010 Modern Award
• about Intellectual Property or confidentiality
• importing the employer’s policies
• permitting the employer to make deductions from your salary
• permitting the employer to change the terms of your contract
• permitting the employer to require criminal and other record checks further to your VIT registration or Working With Children Check
• requiring you to submit to examination by a school-nominated medical practitioner

Many employees sign contracts having no idea about their obligations under such clauses. They sign because their main interest is to secure the job, and they don’t feel in a strong position to be haggling over “details”. For all the reasons above, your signature on that page doesn’t necessarily mean you are bound to every word in the contract - never assume that the words in your contract accurately set out your legal rights and obligations.

Need more?

If you need more information on this issue, talk to your rep, call the IEU on 1800 622 889 or check the website: www.ieuvictas.org.org.au