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## Trial Periods — Upcoming Changes

In our last newsletter we highlighted some of the changes that the new Employment Relations Amendment Bill would make to Employment Law. We will now take a closer look at the proposed changes to the trial period regime.

**Note: The law has not yet changed. The Select Committee Report on the Bill is due 1 August 2018. It will likely be at least next year before the law changes. The following comments may or may not come to pass.**

The Bill provides that only employers who employ fewer than 20 employees (19 or fewer) on the day that an employment agreement containing a trial period clause is signed can have a trial period clause in their agreements. This change has raised some questions.

### **Question: Are Company Directors included in the 19 or fewer employees?**

*Answer:* This depends on whether they fall within the definition of “employee” in the Employment Relations Act 2000 (ERA).

Section 6 of the ERA provides that an employee is any person of any age employed by an employer to do any work for hire or reward under a contract of service (employment agreement).

There are also several case law tests that are used to decide whether a person is an employee or not.



If Company Directors are subject to individual employment agreements they are likely to be employees and therefore may be included in the 19 or fewer employees. There are ways to structure the company to ensure that Directors are not employees. For more information, please call us and make an appointment to discuss this further.

### **Question: What about part-time employees?**

*Answer:* The new law does not differentiate between part-time or full-time employees. There is no case law to clarify this, so at this stage any employees, no matter how many hours they work, could well be included.

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## Question: What about casual employees?

*Answer:* Each time you engage a casual employee it is a new employment relationship. If you have 20+ employees including casuals, but 19 or fewer employees excluding casuals, you should ensure you have not engaged any casuals on the day that you sign an employment agreement that contains a trial period clause with a new employee. However please note that casual employees may become permanent employees in certain circumstances. We recommend you seek advice if you have casual employees and wish to use trial periods for new employees.



## Question: What about volunteers?

*Answer:* As long as they are not rewarded for their work, volunteer workers do not come within the definition of “employee” therefore they will not be counted as part of the 19 or fewer employees.

## Question: What about trial periods that are in effect when the law changes?

*Answer:* The Bill provides that any trial periods entered into before the law change will continue to apply as if the law had not changed. However for employees that are dismissed in reliance on trial periods after the law changes, we strongly recommend seeking advice. The courts are likely to be even more strict in their approach to determining whether the trial period can be relied upon. Such trial periods may be treated as “probationary periods” - where employers must work with the employee to try to address any issues with their work and give them a chance to improve (issuing the employee with warnings if necessary) before they dismiss them.



## Employment Questions? Contact us for advice about:

- Employment agreements;
- Trial periods;
- Collective bargaining;
- Disciplinary investigations;
- Restructuring and redundancy;
- Dismissal claims
- Workplace policies
- And more....