

WORKPLACE STRATEGIES

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Should You Be Fixing Your Employment?

The use of fixed-term employment agreements in the workplace varies dramatically from one company to another and between industries. At some point, most employers will have an occasion to consider their use and the following article discusses the advantages and risks involved as well as tips for correctly implementing fixed-term employment agreements.

What is a fixed-term employment agreement?

A fixed-term employment agreement is a contract of limited duration that terminates upon the occurrence of a specific date or event. Fixed-term agreements differ to the manner in which most employees are employed, namely on an indefinite basis following the successful completion of a probationary period.

The most common type of fixed-term agreement terminates on a specific date, usually a stipulated amount of months after the commencement of the employment. There are no hard and fast rules regulating the length of fixed-term agreements. Some fixed-term employees may be employed for only one day, whilst in industries such as health and tertiary education, fixed-term employment agreements of five years duration are not uncommon. As a general rule, agreements lasting between three months and one year are the norm.

A fixed-term employment agreement need not terminate on a specific date; some fixed-term agreements expire upon the occurrence of a specific event, regardless of when that may occur. For example, project managers are often retained only until completion of the project under management.

What are the benefits?

One of the benefits of implementing fixed-term agreements is that they allow for short-term staffing needs, such as situations where work is seasonal or to fill gaps left vacant by employees on long-term leave (most commonly, maternity leave). In these circumstances, employees know in advance that their employment will be for a limited duration, once the employer's short-term need has been satisfied.

Another benefit of fixed-term employment agreements is that the arrangement simply expires on the effluxion of time (or the agreed event). In this respect, the employment is not terminated at the initiative of the employee or the employer and does not constitute a "dismissal" for the purposes of the Labour Relations Act 1995 ("**the Act**"), thus precluding the unfair dismissal regime.

When should I use?

Not surprisingly, the most frequent users of fixed-term employment agreements are employers operating in seasonal industries such as agriculture, event management and retail sectors. Industries where a company's staffing needs are dependent upon the retention of an outsourcing contract, such as in the cleaning or security industries, also tend to be high users of fixed-term agreements.

However, the use of fixed-term arrangements need not be confined to those industries and other employers should consider implementing fixed-term employment agreements, particularly if they wish to 'test the waters' with new employees. South African labour legislation itself provides impetus for such a course of action. In many international jurisdictions, employees must complete a minimum period of service (between six to 12 months) before they are granted unfair dismissal rights. Under our Act, employees are granted such a right regardless of their length of service or whether they are serving a probationary period. With the existence of these broad legislative rights, employers cannot be blamed for making use of arrangements that allow them to get to know a new employee before offering a permanent employment relationship and limit their exposure to unfair dismissal claims.

There are, however, human resource issues that must be taken into account when adopting fixed-term employment agreements. Job applicants with permanent employment are unlikely to accept an alternative employment offer if that offer is for a limited duration, particularly in times of low job security. Similarly, employers retaining agencies to recruit staff may find that the costs associated with using those agencies means that short-term employment arrangements are not financially viable.

What are the risks?

There can be no doubt that some unscrupulous employers have sought to use fixed-term employment to permanently avoid legislative obligations and the Act attempts to address this by including the expiry of a fixed-term contract (or an offer to renew on less favourable terms) in the definition of a 'dismissal', if the employee reasonably expected the employer to renew the contract on the same or similar terms. The important phrase here is "*reasonably expected*". If, for example, an employee had been placed on a series of fixed-term agreements and had a reasonable expectation that he or she would be offered another, but was not, the employer may be held to have dismissed the employee for the purposes of the Act, giving rise to a possible finding of unfair dismissal. Factors that will be considered when assessing whether there was a reasonable expectation include:

- whether the employee could have objectively formed such a view;
- the reasons for which the parties entered into the fixed-term contract;
- the number of times the contract had been renewed; and
- the employer's conduct, both at the time of entering into the contract and during the employment relationship.

Employers considering the use of fixed-term agreements quite understandably seek advice about the implications of terminating such an agreement before its expiry. In such circumstances, there is a risk that the employer could be ordered to pay out the remainder of the fixed-term period. To avoid this possibility, employers must include a notice of termination clause in the agreement that entitles them to prematurely bring the arrangement to an end. Such agreements have been referred to by the Labour Court as 'maximum duration' contracts.

Risks also arise if an employer forgets the date of expiry of an employee's fixed-term employment agreement. If the employee's agreement reaches its fixed-term and his or her employment continues in the normal manner, the employment no longer has an expiry date and the employee may be deemed to be a permanent employee. Given that risk, when using fixed-term employment agreements it is crucial to be aware of the date of expiry and well before that date, either confirm with the employee that his or her employment will end or otherwise negotiate new terms of employment.

What should I do now?

The starting point for employers considering the use of fixed-term employment agreements is to ensure such arrangements are in writing. In the absence of a written agreement, it can be very difficult to establish the agreed commencement and cessation dates of the contract.

Employers should also appreciate that a fixed-term agreement will alter other employment entitlements, such as annual leave. For example, do not adopt the annual leave clause used for permanent, full-time employees (usually entitling them to 21 consecutive days), if the employee is engaged for only a three month period. In this respect, it pays to have fixed-term agreements professionally drafted.

Furthermore, if you implement fixed-term agreement, clearly record and monitor the dates of expiry to ensure that the purpose of the fixed-term nature is not underdone by administration oversight.

Should the Minister of Labour follow through with current plans to legislatively prohibit the use of labour brokers, many employers will need to re-assess how they retain short-term workers and we can expect a spike in the use of fixed-term employment agreements.

Workplace Strategies assist clients with drafting a range of employment-related documentation, including fixed-term employment agreements.

For more information:

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