

2020

EMPLOYERS' GUIDEBOOK





INTRODUCTION FROM THE COMMISSIONER OF LABOUR

A harmonious workplace is a productive workplace. In order for this to occur parties involved, employer and employee, need to be respected and treated in accordance with Vanuatu law.

It is up to employers to set this standard within their workplace, through their conduct and practices. Employers are also expected to carry out their duties and obligations towards their employees in good faith, and the same is expected from employees.

The revised Guidebook provides a clear guidance for employers to understand these duties, based on Vanuatu's current employment and labour laws. It is an easily accessible collection of information, that presents employers with legal solutions to an array of different situations most employers will find themselves faced with when managing the employment issues of their employees.

As Commissioner of Labour I encourage and support these good practices, to create better workplace environments for both employer and employee. It is my role to endorse good practices in every aspect of the workplace, and this guidebook is an important step towards our goal to achieve good and decent practices at the workplace.



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VCCI EMPLOYERS' GUIDEBOOK

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PART 1: INTRODUCTION

The Vanuatu Chamber of Commerce and Industry (VCCI) recognises that it is important for the business community to be viewed as “responsible employers” and that businesses, particularly new and small businesses, need practical support in order to comply with laws and maintain good practices.

The content of the 2020 VCCI Employers’ Guidebook condenses the content of previous editions and includes updates on legal developments through court judgements and legislative amendments in Vanuatu. New sections have been added to help employers understand obligations on health and safety in the workplace and the legal requirements for employing non-citizen workers. With the aim of making the guide more accessible to Vanuatu’s diverse range of employers, you will find some of the content restructured, a new design approach, language versions in English, French, Bislama and Chinese (Mandarin), and an online version and tools available at: www.vcci.vu



THE VCCI THANKS THE INTERNATIONAL LABOUR ORGANISATION (ILO) FOR SUPPORTING THE DEVELOPMENT OF THE GUIDEBOOK AND AUSTRALIAN DFAT GOVERNANCE FOR GROWTH PROGRAMME FOR THEIR SUPPORT OF THIS REVISED VERSION OF THE GUIDEBOOK

WHAT'S IN THE EMPLOYERS' GUIDEBOOK?

The purpose of the Employers' Guidebook is to assist employers in complying with Vanuatu's employment and labour laws, and to provide employers with tools to be responsible employers.

There are 8 Parts to the guide covering the main areas of law that employers are obligated to follow.

The **Guidebook can be downloaded from the VCCI website** and used as a quick reference tool for employers. The online interactive version contains the same content but is accompanied with the online tools below and document templates for maintaining employee records.

NEW ONLINE TOOLS

Employment Contract Builder

This tool has been developed to assist employers with drafting basic employment contracts in accordance with Vanuatu laws.

The tool allows you to select the options for your specific employment arrangements, which will then be used to generate a customized employment contract that will be emailed directly to you in minutes. VCCI also maintains a database of example contracts and can provide personalized advice to members. For more information contact the VCCI.
Employment Issue FAQ and ChatBot

A quick reference tool for frequently asked questions (FAQs) where you can search for answers for a range of employment issues and ask further questions to an automated Messenger ChatBot.



WHO IS THE GUIDE DESIGNED FOR?

This guide is designed for use by all employers in Vanuatu with a focus on individual employment relationships and contracts. These are the most common type of employment relationships in Vanuatu and most often take place in small to medium businesses, although we hope that large organisations will also find this guide useful.

Specific areas of employment that are not detailed in guide include:

- Personnel manuals, which contain detailed staff regulations that are often used by larger organisations with more complex employment rules. These manuals are necessarily specific to the particular organisation. We recommend organisations using staff regulations have them approved by the Department of Labour.
- Collective employment contracts, which are permitted but not common in Vanuatu. They are often negotiated on behalf of many employees by a trade union and specific to the particular collectives who set them up.
- Public service employment issues arising under the *Public Service Act*.



EMPLOYEE OR INDEPENDENT CONTRACTOR?

This guide is focused on assisting employers manage their employees, it does not cover relationships with independent contractors beyond this section. Before going through this guide, ensure that your relationship with your worker is intended to be one of employment, rather than one of an independent contractor.

The Employment Act does not define what an employee is. Sometimes people ask if they can “put their staff on contract” or “use contract workers” in order to avoid employment related costs such as severance payment, leave and VNPF.

An employee is someone who works under a **contract of service**. The main alternative type of worker is an independent contractor, who works under a **contract for services**.

They both are “**on contract**”. So what is the difference? The fundamental difference is that an independent contractor has his or her own business. This does not mean that you can get your workers their own business licences and they are no longer employees. You cannot avoid your obligations as an employer by saying that your workers are independent contractors, even if they are working on their own business licences.

If a dispute arises and is challenged in court, the court will consider all the facts and circumstances to determine whether the worker is an employee or an independent contractor.[1] It is a good idea to go through the checklist of factors that may inform this decision, [available on the VCCI website](#).

Once going through the checklist of factors, if you and your worker still intend to have an independent contract relationship then you should be very clear about this intention, particularly if you have helped the worker to get his or her business license. It would be a good idea to have a written contract (not an employment contract) with information on whether the worker is permitted to sub-contract, how and when payment is to be made (on invoice, usually), who is responsible for leave and insurance, how work is to be done etc. This will help to establish your intention to engage the worker as an independent contractor.

[1] *Lowen v Public Prosecutor* [2003] VUSC

IMPORTANT NOTE

This guide is **not intended to replace legal advice or provide legal support** in the case of litigation between employers, employees and authorities. We strongly recommend that you seek advice from a labour officer, a more experienced employer or a lawyer for any disputes, particularly those relating to termination of employees.

Furthermore, although this guide has been prepared with the support of lawyers, the law is often not 100% clear and interpretation of the laws can change following court decisions. For areas of law that are currently unclear, i.e. grey areas of law, we have included this information in Grey Boxes.

A number of special terms are used in this guide. These terms and their meanings are presented in the Glossary table at the back of this Guidebook.

FURTHER HELP

If you are struggling with certain aspects of employment law, then you can also contact the Department of Labour and ask to speak to a Labour Officer. VCCI can also help to explain this Employers' Guidebook to employers, although please note that it does not provide expert legal advice.





PART 2: EMPLOYMENT CONTRACTS

The basis of an employer - employee relationship is a contract. This Part provides examples of different clauses to consider using in your employment contracts.

On the VCCI website you can find an employment contract tool to draft basic employment contracts in accordance with Vanuatu laws. The tool allows you to select options based on your specific employment agreements and an employment contract template with the relevant clauses will be generated from this.



IMPORTANT NOTE TO EMPLOYERS:

Please carefully review each clause before you sign to ensure they meet your needs.

If you are unsure about anything relating to your employment contract it is a good idea to ask a labour officer or lawyer to check it before signing.

WRITTEN CONTRACT REQUIREMENTS

Employment agreements can be made verbally or in writing. It is best practice to use clear written contracts as it makes the terms of employment clear to both you and your employee, i.e. what you have both agreed to, and may avoid unnecessary disputes.

However, you are not legally required to have written employment contracts unless: [2]

- it is a fixed term employment exceeding 6 months; or
- the employee needs to live away from his ordinary place of residence.

There is no legal requirement that a lawyer write your employment contracts, though for more complex employment arrangements and large organisations this can be useful.

Most simple employment agreements can be written using simple contract clauses - fancy or technical language is not needed. It is better to have a contract written in plain language that you and your employee both understand.



CONTRACT CLAUSES?

Clauses are specific provisions or sections in your contract that detail the parts of the agreement. Clauses clearly define each party's duties, rights, and privileges under the terms of the contract.

[2] Section 9, *Employment Act*

TYPES OF EMPLOYMENT CONTRACTS IN VANUATU

In Vanuatu's law there are two main categories of employment contracts:

- **Fixed term contracts**, which have a definite start and end date (maximum 4 year period); and
- **Open ended contracts**, which have a start date, but no set end date.

The difference between these two types of contracts is how the contract is terminated. There is a different process for both. [See Part 6: Termination for more information on this.](#)

Although employers in Vanuatu often refer to **full time**, **part time** and **casual** employees, Vanuatu's law does not define full time, part time and casual employees. Instead, some benefits, such as paid leave and severance allowance are only available to employees who are in **continuous employment**.

This is defined differently in the Employment Act for leave and severance allowance entitlements – [refer to these definitions in the Glossary.](#)

APPRENTICESHIPS, INTERNS, WORK EXPERIENCE

The current employment laws in Vanuatu do not specifically regulate these kinds of employment. Although section 71 of the *Employment Act* gives the Minister of Internal Affairs powers to make regulations for apprenticeships, to date, no regulations have been made. The law is also silent on work arrangements such as internships, whether paid or unpaid, and work experience although these arrangements are common practice both in the private and government sectors.





If you are considering or have people working with you under these arrangements, it is best to have the terms of the agreement in writing to ensure both you and the worker understand the nature of their employment. It is also important to note that there are general prohibitions to employing persons under 18 years old, subject to some exceptions found in Part 8 of the *Employment Act*.

INTRODUCTORY CLAUSES A WRITTEN CONTRACT

Basic written contracts should contain the following information at the beginning:

- the **names** of employer and employee and contact details;
- employees **VNPF** number and **bank** account details (if not paid in cash/cheque);
- the **type of work** to be done by the employee, which can include a job description or work plan;
- the **nature of employment**, i.e. casual, part-time, full-time, in continuous employment;
- the **start date** and if the contract is a fixed term contract, the specific end date;
- a **probationary period**, of 3 months for open ended contracts;
- the amount and the mode of **payment of remuneration**; and
- any **other terms and conditions** of employment.

GREY AREA: Amendments were made to the probationary period in 2020. Probationary periods of 3 months are mandatory for any open-ended contracts. On the expiry of the 3 month period, the employee will become a 'permanent employee' – a term undefined in the Employment Act. This period cannot be extended or renewed. It is not clear what probationary periods are permitted for fixed-term contracts.

CONTRACT CLAUSES ON HOURS OF WORK AND OVERTIME

Part 3 discusses the legal requirements in relation to hours of work in detail. Below are some clauses that could be included in your contract.

- **Usual hours of work**, no more than statutory maximum hours of work.
- **How hours of work can be extended (overtime)** should be explained, particularly if the employer can require the employee to work extra hours.
- **Overtime compensation** Whilst paying overtime is about remuneration, clauses on overtime payments are often found in the hours of work section.
- **Breaks** should be stated in order to ensure that the employee is being provided their legal entitlements. If the employee is paid a wage based on the number of hours worked it is also useful to state whether breaks are paid or unpaid.

Other things you might like to include are clauses covering:

- if the employee volunteers to work on Sundays;
- if the employee volunteers to work on public holidays;
- if the employee is unavailable to work on particular days;
- a clause about taking time in lieu instead of overtime payments.



CONTRACT CLAUSES ON REMUNERATION

Part 4 discusses the legal regulation of payments in detail.

Important clauses relating to payment for work are:

- **Amount of payment** including the basis for determining payment and how much (per hour, week, month or year) will be paid.
- **How and when payment is to be made** so that employees know when and where payment can legitimately be expected.
- **Other benefits** i.e. any additional allowances or benefits that are being paid in order to ensure both parties understand the total remuneration package agreed to.

It is also useful to cover:

- **Payment of VNPF** Although this is a legal requirement, it will show you are committed to following VNPF laws.
- **Deductions** Again this is regulated by law, but a clearly worded clause about deductions provides clarity for both you and your employee relating to this.
- **Reviews of salary** and performance is an area that is not regulated by law but best practice, and demonstrates your commitment to being a good employer.

You can also include clauses about other things such as gratuities, who payment will be made to in the event of the employee's death etc.

CONTRACT CLAUSES ON LEAVE

Part 5 discusses the legal requirements for different types of leave in detail. The Employment Act provides the following forms of statutory leave:

Annual leave

Sick leave

Maternity leave

This means that even if your employment contract does not include clauses detailing these leave entitlements, your employee will still be entitled to leave by law. It is not strictly necessary that you include leave clauses in your employment contracts but it is good practice and helps ensure that both you and your employees are clear about their legal rights and how to calculate their minimum leave entitlements.

Employers may also wish to include clauses about other, non statutory types of leave such as:

- **unpaid leave** and
- **compassionate leave**

This is not required by law but best practice, and demonstrates your commitment to being a good employer. There are no legal restrictions on providing more generous leave entitlements to your employees.



CONTRACT CLAUSES ON TERMINATION

Part 6 covers the legal regulation of termination and discusses legal requirements in detail.

Important clauses relating to termination are:

- **Ending employment by giving notice** should be stated for both the employer to end, and the employee. This is particularly important for contracts that are made for a fixed term.
- **Ending employment due to misconduct by the employee** Some companies have detailed procedures for termination that are explained in the employment contract or associated rule books. We recommend seeking advice if you want to state more complicated procedures.
- **Payments and allowances on termination** can be briefly explained by referencing the relevant law. If this is done it can be useful to attach the relevant law to the contract, so parties do not have to look beyond the employment contract in the event of a dispute.



PART 3: HOURS OF WORK

This Part briefly explains your responsibilities as an employer for arranging hours of work for your employees. Please note that hours of work is a complicated area of the law. There are considerable variations in requirements depending on the industry sector you operate in and also the type of work undertaken by individual employees.



Part 6 of the Employment Act [Cap 160] details the relevant legal clauses for hours of work and overtime.

NORMAL WORKING HOURS

There are limits to how many hours of work you can request from your employees. These limits are for the protection of your employees health and wellbeing.

The normal maximum hours of work are **44 hours per week**.^[3] Daily limits are set at **8 hours per day**^[4] excluding any break times,^[5] and employees can only be required to work **6 days per week**.^[6]

44
HOURS/WEEK

8
HOURS/DAY

6
DAYS/WEEK

This is regardless of whether your employee is employed on a part time, casual or full time basis but these hours can be exceeded in some specific situations, including by voluntary agreement.

The working hour limits do not apply to the following categories of workers:

- Family member employees in organisations where only family members are employed
- Employees working in public administration
- Employees working as managers or employed in a confidential capacity

There are also limits on the hours and type of work **women and young people** can do. If you are planning to employ women in the night work or someone under 18 years old it is recommended you familiarize yourself with the limits and exceptions found in Part 8 (sections 35-44) of the *Employment Act*.

If you want to be able to change your employee's hours of work this will need to be stated in the employment contract. If you do not do this, the hours of work they have regularly worked in the past may determine what their regular hours are and you will be liable to pay for these regular hours, even if they are not given work to do in those hours.^[7]

^[3] Section 26(1), *Employment Act*

^[4] Section 22(1), *Employment Act*

^[5] Section 28, *Employment Act*

^[6] Section 22(1), *Employment Act*

^[7] Section 12, *Employment Act*

WORKING MORE THAN THE NORMAL MAXIMUM HOURS OF WORK

There are some situations where you can require the employee to work extra hours but the hours must not exceed, on average, 56 hours per week.[8]

These are:

- If an emergency occurs, or an actual or threatened accident occurs, or urgent work must be done to machinery or plant, and additional hours must be worked in order to avoid serious interference with the ordinary working of the business;[9] or
- If the employee is engaged in a job that must be carried out continuously by using shift work.[10]

If you will occasionally require your employee to work variable hours, it is good practice to include this in your employment contracts.

Also, you can require an employee to work longer hours to make up for hours that have been lost due to holidays, accidents, power cuts, damage to plant etc. subject to the following limits:[11]

- You must notify a labour officer of any increase of hours of work due to making up for lost hours as soon as possible
- The hours of work which have been lost cannot be made up on more than 30 days in the year;
- The hours are to be made up within a reasonable time
- The increase in hours of work in the day cannot exceed 1 hour
- The hours of work in the day must not exceed 10 hours

[9] Section 22(2)(a), Employment Act

[10] Section 22(2)(b), Employment Act

[11] Section 22(3), Employment Act

GREY AREA

Normal hours of work are 8 hours per day. Limiting to a 1 hour increase would mean only 9 hours per day could be worked.

To be safe, seek voluntary agreement from your employees for any more than 9 hours work per day. There are no limits in the law as to the amount of voluntary overtime that can be agreed to, but overtime must be paid.

OVERTIME

You **are required** to pay overtime to employees who you require to work above the normal maximum hours of work (44 hours per week, 8 hours per day or 6 days in a week),^[12] apart from the exceptions referred to above under 'normal working hours'. **Domestic workers** are also not entitled to overtime pay but the normal limits on the hours of work still apply.^[13]

You do not have to pay your employees overtime if you have not asked them first or given them approval to work overtime. Note, approval might be implied if you are asked them to complete specific tasks before a certain time that may require more than normal maximum hours of work.

OVERTIME RATES	
CATEGORY	RATE
Sundays and Public Holidays	1.5 times the normal hourly rate
Over the normal weekly hours of work being: <ul style="list-style-type: none">• Over 44 hours per week;• Over 8 hours in a day; or• Over 6 days in a week.	1.25 times the normal hourly rate for the first 4 hours; and 1.5 times the normal hourly rate for any hours worked over the first 4 hours
Night work between 8pm and 4am (excluding night watchmen)	1.75 times the normal hourly rate

Note: These amounts are **minimums**.^[14] You can agree to pay a higher rate for overtime than these rates above. If your employee requests time off in lieu instead of overtime (i.e. time off equivalent to the extra hours worked), this may be possible but you cannot require your employee to do this, the employee must voluntarily agree.

The *Employment Act* allows employers and employees to make arrangements that are in the employees favour (i.e. the employee must voluntarily agree) provided the legal minimum requirements in the *Employment Act* are met.^[15]

^[13] Section 26(2), *Employment Act*

^[14] Section 26(1), *Employment Act*

^[15] Section 6, *Employment Act*

DAYS OFF

Employees are usually entitled to a weekly rest period of 24 consecutive hours. This day off should usually be taken on a Sunday, but it can be varied if agreed to by both you and your employee, or if it is usual for another day to be taken off in that trade.

You are also allowed to allocate two half days in place of one full day of rest, or roster rotating days off, if it is not possible for proper working of the business to continue if all employees take the same day off.[16]

Some people in Vanuatu have their religious day of rest on a Saturday or Friday. Where possible, try to ensure that the day/s off fit with employees preferences by agreeing to work days when the contract made. If the employment contract states that your employee is to work Saturday or Fridays, your employee will be in breach of the contract if they later become unavailable on those days.

WORKING ON SUNDAYS OR PUBLIC HOLIDAYS

In general, **no** employee can be required to work on a Sunday or public holidays but there are **some exceptions**.[17] Employees in the following types of business activities can be required to work on Sundays or public holidays:

- transport of passengers or goods by road, sea or air
- public utilities and similar services
- hotels, guest houses, bars, restaurants, clubs etc
- theatres and places of public amusement
- health and related services
- newspaper and radio broadcasting
- animal husbandry

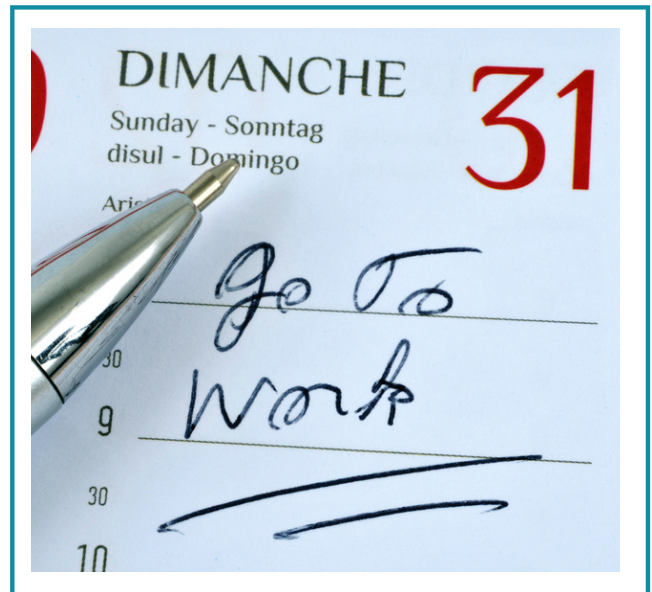


[16] Section 25, Employment Act

[17] Section 23(2), Employment Act

You can also apply to a labour officer for approval of compulsory work on Sundays or public holidays, but need to have a good reason to do so.[18]

Your employee may also voluntarily agree to work on a Sunday or public holiday,[19] but you must be careful not to pressure your employee into agreeing as this may be considered ill treatment, giving your employee the legal right to leave and sue you for damages. If your employee voluntarily agrees to work Sundays or public holidays, it is recommended your employment contract include a clause for this to avoid any claims about this in the future.



The Employment Act allows employers and employees to make arrangements that are in the employees favour (i.e. the employee must voluntarily agree) provided the legal minimum requirements in the *Employment Act* are met.[20]

Also be aware of **public holidays that are declared for elections** and try to ensure that all employees get the opportunity to exercise their civic right to vote.

There is no legal requirement for you to pay overtime to your employee if their normal hours of work include Sundays or public holidays, only if they are working more than the normal maximum hours of work (i.e. 44 hours per week, 8 hours per day or 6 days in a week). [21]

The law is silent on whether you have to pay your employees for public holidays on regular working days that the employee does not work. If an employee's payment is a monthly or yearly salary that is not dependent on the number of hours worked, he or she will still get paid the same, regardless of public holidays. However if an employee's wages are based on the number of hours worked, then there is no legal requirement that wages be paid if an employee does not work on a public holiday.

[18] Section 23(2)(h), *Employment Act*

[20] Section 6, *Employment Act*

[19] Section 23(1), *Employment Act*

[21] Section 26(1), *Employment Act*

BREAK TIMES

All employees who work for 6 hours or more in one day must be given the following breaks:

- 1 hour meal break; and
- tea breaks totalling 20 minutes. [22]



These meal and tea breaks do not have to be paid but, as a matter of practicality, employers usually do not deduct the time taken for short tea breaks from the hours worked.

Employees who are breastfeeding are also entitled to a nursing allowance. [See Part 5: Employee Leave](#) for further information on this.

[22]Section 24, Employment Act



PART 4: REMUNERATION

This Part explains your responsibilities as an employer to ensure your employees are appropriately paid for the work they do for you. Disputes over pay are common in Vanuatu. It is important that employers are well organised around paying their employees; this include both waged and salaried employees.

The relevant sections of the *Employment Act* uses the word 'remuneration' to refer to wages, salaries and other monetary compensation, such as housing allowances, commission based payments and overtime payments. It also includes non-monetary compensation, such as providing a house or a car.

Wage is usually used to refer to payments to employees that are calculated based on the number of hours worked.

Salary is usually used to refer to payments to employees that are not directly related to the number of hours worked, but are an agreed payment per year or month.

These definitions **are not** technical legal definitions, but reflect how most employers in Vanuatu use these words.

On the VCCI website you will find a set of standardised forms designed to assist employers in meeting their obligations in relation to payment of remuneration.

This includes:

***Employer Pay Record
Salary Advance Agreement***



MINIMUM WAGE

The current minimum wage is **220 vatu per hour**.^[23]



This is the minimum amount of payment that you must legally give to your employees. There are some exceptions to this for seasonal copra cutters, students and children.

The rate of the minimum wage includes the employees' VNPF contribution, but **excludes** the employer's VNPF contribution i.e it includes the employees 4% contribution but excludes your 4% contribution.

There is no official monthly minimum wage. If you want to pay your employee a monthly salary that is based on the minimum wage you must make sure that if you divide the monthly salary by the usual hours of work per month this amount is still equal to or higher than the hourly minimum wage.

LEGAL REQUIREMENTS FOR PAYING WAGES AND SALARIES

Part 5 of the Employment Act details the laws on how to pay employees.

When to Pay

You are required by law to regularly pay your employees. How regularly depends on whether they are waged employees (paid by the hour or day) or salaried employees (not paid on the number of hours or days worked):^[24]

TYPE OF EMPLOYEE	PAY PERIOD
Waged employees (paid on an hourly or daily basis)	Every 15 days
Salaried employees (not paid on an hourly or daily basis)	Every 15 days

^[23] Order No. 116 of 2019, Minimum Wages and Minimum Wages Board Act [Cap 182]

^[24] Section 16(7), Employment Act

You may pay your employees weekly, or even daily, if needed. It is a good idea to include this in the employment contract. However often you decide to pay your employees, **ensure that payment is not delayed more than 8 days** after the pay period has ended.

It is common practice in Vanuatu for employees to request cash advances on their pay. Many employers voluntarily agree to do this, but there is no legal requirement that you do. If you are providing a cash advance it is a good idea to get details in writing in order to protect yourself from any claims that you have not paid wages properly.

Visit the VCCI website for an example **salary advance agreement**.

How to Pay

The *Employment Act* is very outdated in how it regulates payment of remuneration. It requires that you pay your employees in legal tender (i.e. Vanuatu Vatu)[25] but requires that you get written approval from a labour officer to pay in bank cheques or give any other allowances as remuneration.[26] Payment in alcohol or drugs is strictly prohibited.[27]



If you are paying your employees in cash, you must do so at or near the place of work, unless another arrangement is more convenient for the employee.[28] Such payments are not, however, allowed to be made in taverns, retail shops or other places of amusement, unless the employee is employed in such a place.[29]

To avoid problems relating to how you pay your employees, it is best for your employee to voluntarily agree to how you pay them, and include a clause in the employment contract for this.

[25] Reserve Bank of Vanuatu Act

[27] Section 16(3), *Employment Act*

[29] Section 16(5), *Employment Act*

[26] Section 16(1) and (2), *Employment Act*

[28] Section 16(4), *Employment Act*

Keeping records of payment

You must keep records of payments made, which should be signed by each employee or marked by her thumbprint, each time payment is received.[30] You are required to keep the records for at least 3 years.[31]

If your employee requests a payslip, you must provide a copy of a statement, showing your business name and the employee's name, as well as the amount of payment and how it was calculated.[32]

It is also good practice to include information on accumulated annual leave in the payslips. Visit the [VCCI website](#) for an example **employer pay record**.

Deductions

You can make deductions of up to 1/3 of the employee's remuneration in any pay period[33] to recover the following costs:

- salary advances[34]
- the actual cost to the employer of materials or tools supplied to the employee for use outside of work[35]
- the cost of articles other than materials or tools purchased on credit by the employer for the employee, if the employee made a written request to the employer to purchase these articles[36]
- the fair value of rations or accommodation provided, if this amount has been approved by a labour officer[37]
- the cost of food provided by the employer and prepared or eaten at the place of work, if this food has been supplied at the written request of the employee[38]



[30] Section 17(1), Employment Act

[32] Section 16(4), Employment Act

[34] Section 21(2)(a), Employment Act

[36] Section 21(2)(d), Employment Act

[38] Section 21(2)(d), Employment Act

[31] Section 17(2), Employment Act

[33] Section 21, Employment Act

[35] Section 21(2)(b), Employment Act

[37] Section 21(2)(c), Employment Act

You may also deduct trade union membership fees and pay them directly to the trade union on the employee's request, but this is not a legal requirement.[39]

You are not allowed to automatically deduct amounts to recover losses due to negligent or bad work or damage to your property or materials without the written approval of a labour officer.[40]

Liability for unpaid remuneration

If you underpay your employee, your employee can sue you for unpaid remuneration anytime within 3 years from the 'end of the period to which the remuneration relates'.[41]

How this 3 year period is defined is not clear and has been raised in many court cases. Some of these cases have found that the 3 year bar does not apply if they are still in your employment or its application would be an injustice,[42] and may not start from when the employee was dismissed or resigned.[43]

The 3 year limit is also only for remuneration and does not apply to unpaid severance.[44] If you underpay your employee and they accept underpayment without complaint, or you write a statement that any payments they have received are a full and final settlement of any claims, you will still be liable.[45]

VNPF CONTRIBUTIONS

As an employer, you must register for VNPF. You will be given an employer registration number once you have registered.

All employees in Vanuatu earning a minimum monthly pay of 3,000 vatu are required to contribute to the VNPF and therefore should apply to obtain a VNPF membership number. There are a very few exceptions to this.

The total contribution rate to VNPF is 8%. Employees have 4% of their salary deducted by their employer and paid into the VNPF. The employer also contributes an amount which is equal to 4% of the employee's salary to the VNPF.[46]

[39] Section 21(2)(e), Employment Act

[41] Section 20, Employment Act

[43] *Saltukro v Teaching Services Commission* [2019] VUSC 71

[44] *Fogarty v Air Vanuatu (Operations) Ltd* [2014] VUSC 165

[45] Section 18(2), Employment Act

[40] Section 21(1), Employment Act

[42] *George v Teaching Service Commission* [2020] VUSC 56

[46] See *Vanuatu National Provident Fund Act* [Cap 189]



PART 5: EMPLOYEE LEAVE

This chapter details your responsibilities to give your employees leave under Vanuatu law. There are three types of paid leave:

- Annual Leave
- Sick Leave
- Maternity Leave

IMPORTANT NOTE ON THE PHRASE ‘CONTINUOUS EMPLOYMENT’

The *Employment Act* does not define what continuous employment means for the purposes of sick leave. As a result the definition used in respect of defining continuous employment for annual leave is probably used.

“Continuous employment” has been defined by the court as working more than 22 days a month. The other option for defining continuous employment comes from section 54(2)(a).

This section defines continuous employment for the purposes of determining eligibility for severance allowance as requiring the employee to work 4 or more days per week.



In practice many employers interpret continuous employment to mean workings 4 or more days per week and do not “count” the number of days per month an employee works.

Use the tools on the [VCCI website](#) to help you with your leave records including **annual, sick and maternity leave records**.

ELIGIBILITY FOR LEAVE AND ENTITLEMENTS

Employees will be eligible to take paid leave depending on how long they have worked for you. The table below sets out the eligibility and entitlements to the 3 types of paid leave. These are the legal minimum requirements. You can voluntarily choose to give your employees more leave if you want to.

TYPE OF LEAVE	ELIGIBILITY	MINIMUM ENTITLEMENTS
Annual leave	<p>Employee in continuous employment for more than 1 year.[47]</p> <p>Continuous employment cannot be broken due to absence from work due to an accident at work, illness caused by work, maternity leave up to 12 weeks, and other leave due to illness for periods of up to 3 months.[48]</p> <p>Part-time and casual employees working less than 4 days a week not eligible.</p>	<p>Full-pay at usual salary or average wage + VNPF. Number of days entitled is determined by the length of that employees service with you:[49]</p> <ul style="list-style-type: none"> • 1 – 6 years of employment: 1.25 days per month or 15 days per year • 7 – 19 years of employment: 1.75 days per month or 21 days per year • 20 – 24 years of employment, for all employees except for agricultural workers: 3 days per month 36 days per year • 25 – 29 years of employment, for all employees except agricultural workers: 4 days per month or 48 days per year • 30 + years of employment, for all employees except agricultural workers: 6 days per month or 72 days per year for employees • Agricultural workers who work for more than 20 years get 21 days per year.

[47] Section 29(1), Employment Act
[49] Section 29, Employment Act

[48] Section 29(3), Employment Act

TYPE OF LEAVE	ELIGIBILITY	MINIMUM ENTITLEMENTS
Sick leave	<p>Employees in continuous employment for more than 3 months.^[50]</p> <p>Generally, part-time and casual employees working less than 4 days a week are not eligible.^[51]</p>	<p>Full-pay at usual salary or average wage + VNPF.</p> <p>Up to 21 days per year.</p>
Maternity leave	<p>No minimum working time or continuous employment requirements for eligibility.</p> <p>Applies to all pregnant full-time part-time and regular casual employees.</p> <p>Fathers and adopting parents are not eligible.</p>	<p>66% of usual salary or average wage + VNPF.</p> <p>Up to 12 weeks per pregnancy.</p>

Some employers also provide the following types of leave, although it is not required by the law:

- **Compassionate leave.** e.g. in the event of a death of a close family member. This can be paid or unpaid leave. Sometimes employers treat compassionate leave as part of annual leave and deduct it from an employee's annual leave entitlement.
- **Unpaid leave.** Unpaid leave is commonly given where employees have used up all their paid leave entitlement or are not eligible for paid leave but have a genuine reason for wanting to be absent from work, such as sporting or study commitments.

Written contracts of employment should clearly state the employee's leave entitlements and any conditions for being granted leave, particularly if you are offering to provide other types of leave.

^[50] Section 34(1), Employment Act

^[51] The Employment Act is silent on how 'continuous employment' is defined for sick leave entitlements.

MANAGING ANNUAL LEAVE

You can decide when your employees take leave but you should try to take employee's requests into account when deciding.[52]

Your employees are entitled to take annual leave after working with you for a year but annual leave starts to accumulate as soon as your employee starts working. If your employee requests to take leave before working a full year, you can allow them to use their paid leave entitlements.

Annual leave **accumulates indefinitely** and you are required to pay out all unused annual leave if:

- **you terminate** the employee for any reason before he or she has worked a full year; or
- **your employee resigns** and he or she has worked for you for more than 3 months.

In both these situations, your employee will be entitled to a payment of 1.25 days salary for every month worked, including the 3 month probationary period. [53] This must be calculated at your employees pay rate at the time they leave.[54]

Therefore, it is in your best interest to ensure your employees regularly take annual leave to avoid large payouts at the end of your employment relationship. It also helps to ensure the health of your employees, and healthy employees are more productive employees.



[52] Section 30(3), Employment Act

[53] Section 32, Employment Act

[54] Section 32, Employment Act

There are no laws that require you to keep leave records but it is best practice. Keeping leave records will help you make sure you are providing leave in accordance with the law, control costs and manage human resources (avoiding annual leave accumulation), reduce disputes about entitlements at termination and allow you to check employees are not taking abusing their leave entitlements.

A simple *form for recording annual leave* is available on the *VCCI website*.

GREY AREA: Under the law, leave is to be taken in either 1 or 2 periods each year. [55] In practice many people do not fully comply with this, because employees request to be allowed to take one or two days off at various points throughout the year. If this is something your employee requests, or voluntarily agrees to, it should be acceptable.[56]



GREY AREA: There is nothing in the law that permits you to give your employee a payment in lieu of providing annual leave. The only time that this might possibly be legal is if the employee requests it, so it is an advantage to the employee.[57]

However, taking annual leave is important for the physical and mental health of employees and good employers should ensure that annual leave is regularly used by their employees.

[55] Section 30(1), Employment Act

[56] Section 6, Employment Act

[57] Section 6, Employment Act

MANAGING SICK LEAVE

Your employees are required to let you know 'as soon as practicable' if they are not coming to work because they are sick.[58] It is recommended that you include a clause in the employment contract with exact procedures to follow if they are going to be absent due to sickness. This will reduce opportunities for unexplained absences.

Medical certificates are required by law if your employee is working in Port Vila or Luganville and takes 2 or more sick days off.[59] If your employee is working in other locations, medical certificates are required for 4 or more sick days.[60] However, it is not clear in the law whether the medical certificates need to be from a doctor or a local clinic.

PORT VILA OR LUGANVILLE	OTHER LOCATIONS
2 OR MORE SICK DAYS	4 OR MORE SICK DAYS

The law also allows you to require your employee to be examined, or undergo a second examination, by a doctor of your choice if they are absent due to sickness but you must pay for the cost of the medical examination.[61]

If you would like to make it a requirement that your employee provide a medical certificate for any days off due to sick leave (rather than the legal requirements of 4 or 2 days), or a requirement that the medical certificate be from a doctor, you can include this requirement in the employment contract provided are willing to be responsible for the medical certificate costs.

Unused sick leave does not accumulate and you are not required to payout any unused sick leave days on termination. It is not a holiday entitlement and only provided when there is a medical reason for being absent from work.

Sick leave records are not required by law but it is best practice and helps you ensure that you give sick leave according to law, and identify staff that are often absent due to sickness or potentially abusing sick leave entitlements.

A simple **form for recording sick leave** is available on the VCCI website.

[58] Section 34(2), Employment Act

[60] Section 34(2)(b), Employment Act

[59] Section 34(2)(a), Employment Act

[61] Section 34(4) and 34(3A), Employment Act

MANAGING MATERNITY LEAVE

The **minimum amount of maternity leave is 12 weeks** but you can choose to give more maternity leave. The law says that up to 6 weeks must be taken before the woman gives birth and 6 weeks must be taken after the woman gives birth.[62] A medical certificate showing the estimated date of giving birth is also required. [63] This wording means that it is compulsory for a woman to take leave.

However, if the employee wants to work up to the date where she gives birth then she can do so providing she produces a medical certificate which certifies she is safely able to work during the 6 weeks prior to giving birth.[64] The period of leave can be extended by up to 3 weeks if a doctor certifies that the woman is unfit to return to work after giving birth.[65]

In practice many employers choose to allow the woman to decide when the 12 weeks will be taken, as some women prefer to work up to their date of birth and take most leave after the child is born.

Grey area: Some women want to return to work soon after giving birth. Whilst this is not permitted in law, if your employee requests this it may be accepted as an agreement 'favourable' to the employee.[66] To be clear, you cannot require this from your employee.



[62] Section 36(1), Employment Act

[63] Section 31(1), Employment Act

[64] Section 36(2A), Employment Act

[65] Section 37, Employment Act

[66] Section 6, Employment Act

Maternity leave payment is set at 66% of the employees usual salary or wage.[67] The law is not clear on what should happen if the employee's wage varies depending on the number of hours worked. In this situation the amount of payment can be based on the average daily pay over the past 12 months.[68]

VNPF contributions are also paid on remuneration given to employees whilst they are on maternity leave in practice.

Nursing allowance is entitled when the employee returns to work. Nursing employees are entitled to nurse for 1 hour twice a day until the child is 2 years old. This time must be paid,[69] and there is no requirement in law that the employee proves she is nursing via a medical certificate, although an employer could require this in an employment contract. If employees are paid a salary, rather than an hourly wage, employers should be particularly conscious to ensure that workloads are reduced appropriately to take into account the nursing allowance.

Terminating or demoting employees absent on maternity leave is prohibited by law.[70] The law also requires that women who return from maternity leave be placed in the same position, or given a higher position.[71]

Maternity leave records are not required by law but best practice and will help you ensure that you provide maternity leave in accordance with the law and employees are not taking more leave than granted.

A simple **form for recording maternity leave** is available on the VCCI website.

[67] Section 36(2), Employment Act

[68] Section 31, Employment Act

[69] Section 36(3), Employment Act

[70] Section 37, Employment Act

[71] Section 36(4), Employment Act

PART 6: TERMINATION

Termination of employment is a complex area. The law is often not 100% clear and interpretations of the law can change following court decisions. This Part sets out the current situation and is intended to give general guidance rather than legal advice.

Termination of employment is the main cause of disputes between employers and employees. If you are terminating staff and are unsure of procedures we strongly recommend seeking advice from a labour officer or a lawyer. It is also strongly recommended that you keep full and thorough records of all termination decisions.



Methods of termination largely depend on the type of contract and also the reasons for termination. There are also rules regarding the payment of severance and other benefits to employees leaving your employ that you must follow.

There are six main areas covered in this Part:

1. Termination of open ended contracts by notice
2. Termination of fixed term contracts by expiry or notice
3. Termination by the employer due to serious misconduct by the employee
4. Redundancy
5. Payments on termination
6. Severance payments

TERMINATION OF OPEN ENDED CONTRACTS BY NOTICE

Open ended contracts are employment contracts that have no termination or completion date. That means that once commenced, they continue until terminated by either the employer or the employee.

To terminate employees on open ended contracts, you do not need to give the employee a reason for termination but you must give notice of termination (verbally or preferably in writing).[72]

In fact, case law suggests that it is better to not state any reason related to performance in case you are then considered to have unjustifiably dismissed an employee by not giving them an opportunity to reply to allegations of poor performance.[73]

Notice requirements for either you terminating your employee, or the employee resigning, if on an open ended contracts depends on how long your employee has been working for you. You may include a clause in the employment contract requiring more notice than the legal requirements in the table below.

LENGTH OF EMPLOYMENT	MINIMUM NOTICE REQUIREMENTS
Under 3 years and employee is paid less than fortnightly.	1 pay period[74]
Under 3 years and employee is fortnightly or longer	14 days before the end of the month[75]
More than 3 years	3 months[76]

Wages in lieu of notice is also permitted i.e. you can ask your employee to leave before the notice period is over provided you pay them for the notice period[77] and all other entitlements owing on termination.

[72] *Kelep v Sound Centre* [2008] VUSC 13; Section 49(1), Employment Act

[73] *Nin v Torres and Banks Provincial Council* [2011] VUSC 22

[74] Section 49(3)(b)(ii), Employment Act

[75] Section 49(3)(b)(i), Employment Act

[76] Section 49(3)(a), Employment Act

[77] Section 49(4), Employment Act

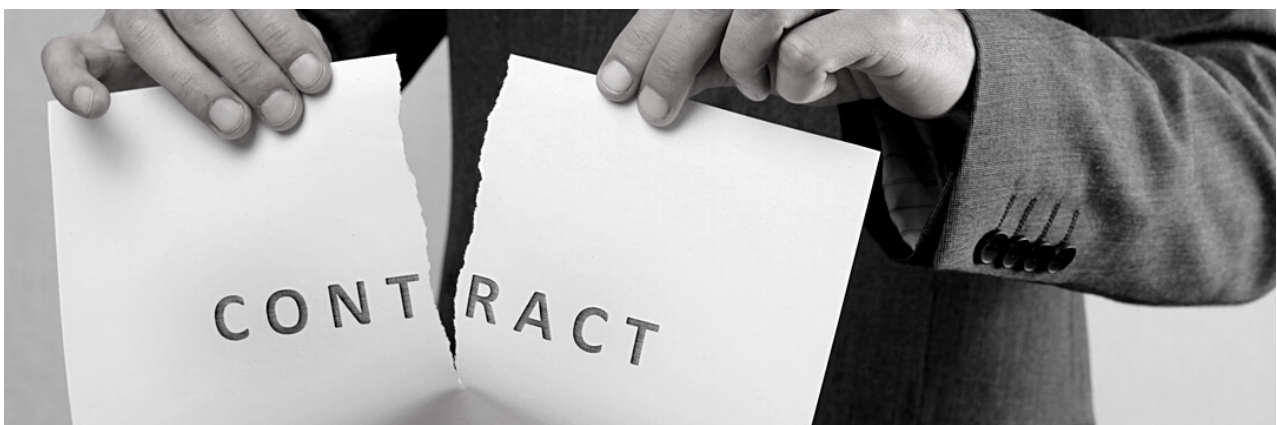
When giving notice it is good practice to write down calculations of the payments that will be given on termination, particularly if you are giving the employee a payment in lieu of notice, otherwise you might become liable for damages for instantly dismissing the employee without cause and without following procedures for instant termination for serious misconduct that are laid out in section 50. See *'payments on termination'* below.

Probation periods or trial periods are allowed for 3 months at the beginning of all open ended employment contracts.[78]

If your **employee leaves without giving notice** and there is no reason relating to your misconduct as an employer or frustration then you can deduct the sum the employee would have earned during the notice period from any payments on termination.[79]

However, if **you ill-treat an employee** or commit some other serious breach of the terms and conditions of employment, this amounts to constructive dismissal and your employee can leave immediately and claim payment for the notice period. [80] He or she may also be able to sue you for breach of contract for other amounts.

If an employee leaves without notice because he or she has become **too ill to work**, the contract has probably become frustrated, i.e. the contract ends because it can no longer be completed because of external events. In this situation, your employee is not liable to pay damages for breaching the contract, but you are also not required to pay to end the contract. It would be reasonable for you to expect the employee to provide medical certifications showing that it is impossible for the employee to continue working.[81]



[78] Section 14, Employment Act

[79] Section 49(5), Employment Act

[80] Section 53(1), Employment Act

[81] Section 54(1)(e), Employment Act

TERMINATION OF FIXED TERM CONTRACTS BY EXPIRY OR NOTICE

A fixed term contract has a stated expiry date. The employee's contract comes to an end on the date specified in the contract.[82] You need to pay all outstanding wages and any other payments on this final date of contract.

A fixed term contract has a stated expiry date. The employee's contract comes to an end on the date specified in the contract.[82] You need to pay all outstanding wages and any other payments on this final date of contract.

It is good practice **to remind your employee that the contract is ending**. If an employee continues to work beyond the fixed date without any amendments to the original contract, then the contract becomes an open ended contract and the process of terminating an open ended contract, detailed in above under 'termination of open ended contracts by notice', will apply and the termination entitlements will roll over.

It is also, of course, possible to end a fixed term contract, pay out all severance allowance, and then reemploy the employee on new terms and conditions.

Notice requirements are recommended to be included in fixed term contracts as without one, it is not possible for you or your employee to end employment early.

[82] Section 48, Employment Act

[83] Section 54(1)(e), Employment Act

If there is a notice clause in the contract then the length of notice and procedure for giving notice stated in that clause must be followed.

Without a notice clause in the contract, the only way you could terminate an employee who is employed under a fixed term contract early would be if he or she has committed an act or acts amounting to serious misconduct.

If your employee on a fixed term contract becomes **too ill to work**, the contract has probably become frustrated, i.e. the contract ends because it can no longer be completed because of external events.

In this situation, your employee is not liable to pay damages for breaching the contract, but you are also not required to pay to end the contract. It would be reasonable for you to expect the employee to provide medical certifications showing that it is impossible for the employee to continue working.[83]

TERMINATION DUE TO SERIOUS MISCONDUCT BY THE EMPLOYEE

If an employee has committed an act of serious misconduct he or she can be summarily dismissed, or instantly terminated, if the correct procedures are followed.
[84]

The majority of court cases relating to termination of employment relate to serious misconduct. The law is not always clear on what 'serious misconduct' is or the correct procedures to follow. If the correct procedures are not followed, you may also be liable for a payment of up to 6 times the usual amount of severance allowance.[85] The Court can also order additional damages payments for breaching your implied duties as an employer.

Case law confirms that even if misconduct has occurred, you can still terminate your employee by giving notice rather than for misconduct.[86] This approach requires that you payout all termination entitlements including severance, however, it reduces the risk of having the court finding you have unjustifiably dismissed an employee and then ordering you to pay damages to your employee.

Dismissal for serious misconduct falls under Section 50 of the Employment Act, which is silent on the process and procedures for dismissing someone in good faith. The other forms of termination are covered under Section 49 of the Employment Act, which details the conditions that must be met to justifiably dismiss. If you comply with the Section 49 conditions (detailed in the termination sections above), it can never be an unjustified termination, regardless of your reasons. If you dismiss someone for serious misconduct, whether it is justified will depend on the circumstances of each case.[87]



[84] Section 50, Employment Act

[85] Section 56(4), Employment Act; *Tarilongi v Republic of Vanuatu* [2020] VUSC 52

[86] *Nin v Torres and Banks Provincial Council* [2011] VUSC 22; *Vano v Airports Vanuatu Ltd* [2019] VUSC 55

[87] *Kalambae v Air Vanuatu (Operations) Ltd* [2014] VUCA 34

WHAT IS 'SERIOUS MISCONDUCT'?

The law does not define 'serious misconduct' and there are no fixed rules defining what misconduct will justify dismissal.[88] Serious misconduct is taken to mean conduct that is generally beyond simple performance problems. Examples of serious misconduct may include stealing, fraud, harassment of other employees, and wilful disobedience of a valid instruction.

Serious misconduct outside of work can also be a reason for dismissal.[89] Common examples of bad behaviour outside of work hours include convictions for theft, drug use, drunk driving offence, sexual offences and assaults.

Serious misconduct **is not** membership of a union or making a complaint in good faith about an employer.[90]

Ongoing poor performance issues may be sufficient to terminate an employee. However, the majority of employment termination cases that end up in court relate to this issue and can be very costly for employers.

It is **strongly recommended that you carefully record any disciplinary procedures** in case they result in termination and your employee later disputes this.

Serious misconduct is not necessarily sufficient grounds for instant dismissal. Instead you must follow correct procedures before dismissal.



[88] *Clouston v Corry* [1906] AC 122

[89] *NZ Bank Officers IUW v Databank Systems Ltd* [1984] ACJ 21

[90] Section 50(2), *Employment Act*

PROCEDURES FOR DISMISSAL OF AN EMPLOYEE FOR SERIOUS MISCONDUCT

The Employment Act says that you must:

1. give the employee an **adequate opportunity to answer any charges** made against him;^[91] and
2. **act within a reasonable time** after you become aware of the serious misconduct.^[92]

You also have a **duty to act in good faith** when dismissing employees for serious misconduct. Case law suggests that if you have tried to confront your employee about the misconduct in person, in writing and by phone, and they have not responded, this will satisfy your duty to act in good faith for these purposes.^[93]

Your duty to act in good faith also means you can only dismiss an employee for serious misconduct if you are no **other courses of action** available to you in the circumstances.^[94] This means you have to consider what other courses of actions you could take, for example providing additional training, demoting the employee or suspending an employee from work but the law on this is not clear.

If you believe **termination is the only course of action available** to you, you should:

- Write a letter to the employee outlining the allegations of serious misconduct and setting a time for a meeting to discuss allegations.
- Explain any evidence of misconduct.
- Keep a record of this meeting.
- If termination is still the only course of action, write a formal termination letter which clearly states the reasons for termination, the procedures followed and how payments on termination have been calculated.
- Give the letter to your employee on termination and also send a copy to a labour officer.

You also have a duty to ensure you do not **unduly humiliate employees** when you terminate them.^[95] If the dismissal is challenged in court, it will be your responsibility to prove the actions resulting in dismissal for serious misconduct took place.^[96]

^[91] Section 50(4), Employment Act

^[93] *Pacific Passion Ltd v Debay* [2019] VUCA 57

^[95] *Melcoffee Sawmill v George* [2003] VUCA 24; *Sakari v Origin Energy LP Gas & Suppliers Ltd* [2014] VUSC 47

^[96] *Nako v Public Service Commission* [2016] VUSC 156

^[92] Section 50(5), Employment Act

^[94] Section 50(3), Employment Act

OTHER COURSES OF ACTION

Warning letters are a course of action that can be taken instead of, or before, termination. If you decide to use warning letters, make sure you outline the consequences if the behavior does not stop in the letter and that you are consistent with the number of warning letters that are required before the employee can be dismissed.[97]

Additional training or instruction is another course of action to help improve poor performance. Poor performance is not generally considered serious misconduct. However, you should still keep a record any additional training or instruction given, because if the employee is later terminated for serious misconduct, these records demonstrate that other courses of action have been used prior to termination. A responsible employer will also undertake regular performance appraisals and keep employee records including records of additional training following warnings and other performance appraisal records.



[1] *Sese v Airport Vanuatu Ltd* [2018] VUSC 113

REDUNDANCY

Redundancy in employment law generally refers to the termination of your employees because they are not or no longer needed for the business. There are no laws specifically addressing redundancy, other than a requirement to notify the Commissioner of Labour if you are dismissing 10 or more employees within 30 days or less.[98]

Although **you are required to notify the Commissioner of Labour about mass redundancies**, case law suggests that you do not need to wait for the Commissioner's approval, even if the Commissioner has requested further information.[99] The law also recognises that in some circumstances, it might not be reasonably possible for you to notify the Commissioner within 30 days, however, your actions should still be reasonably practical for the circumstances.[100]

Redundancy is otherwise a matter solely for you, the employer, to determine within the organisational structure. In cases where employees have challenged the fairness of their dismissal, the courts have clearly stated:



In the final analysis, the decision when? and how? to restructure and what redundancies (if any) should occur within the organizational restructure are solely for the employer to make as it sees fit, and, it is not for the Court or the redundant employees to second-guess or undermine the restructure on the basis of some perceived unfairness in its implementation.[101]



When terminating employees for redundancy reasons, the laws relating to termination under Section 49 (i.e. not serious misconduct) will apply. The payments on termination, including severance payments,[102] will also be the same as those detailed below.

[98] Section 67, Employment Act

[99] Section 67(2), Employment Act; *Kalanu v Port Vila Municipality* [2018] VUSC 236

[100] Section 67(3), Employment Act

[101] *Kalanu v Port Vila Municipality* [2018] VUSC 236

[102] Section 54(1)(b) and (c).Employment Act

PAYMENTS ON TERMINATION

By law, you are required to pay all outstanding remuneration and allowances, including unused annual leave, as soon as employment ceases.[103] If termination of employment is carried out correctly there are four categories of payments on termination in Vanuatu:

Payment for all work done
Repatriation

Unused annual leave
Severance allowance

Whether payments to employees are required on termination depends on the method of termination. These are summarised in the table below:

	TERMINATION BY EXPIRY	TERMINATION BY NOTICE	TERMINATION FOR EMPLOYEE MISCONDUCT	TERMINATION BY FRUSTRATION (I.E SERIOUS ILLNESS, DEATH)
Payment for all work done	Yes	Yes	Yes	Yes
Unused annual leave	Yes – if eligibility criteria are met	Yes – if eligibility criteria are met	Yes – if eligibility criteria are met	Yes – if eligibility criteria are met
Repatriation	Yes – if eligibility criteria are met	Yes – if eligibility criteria are met	No	Yes – for remaining family if eligibility criteria are met
Severance allowance	Grey area – probably yes if other eligibility criteria are met	Yes – if eligibility criteria are met	No	Yes – if eligibility criteria are met

To calculate the unused annual leave payments, you will need to go through your leave records to find out how many days leave have not been taken each year by your employee. The number of unused leave days must then be paid out based on your employees pay rate (or average daily rate based on the previous year's wages) [104] at the time the employment relationship came to an end.

(# days unused) x (daily wage rate) = unused annual leave entitlements

[103] Section 16(8), Employment Act

[104] Section 31, Employment Act

DEDUCTIONS FROM TERMINATION PAYMENTS

If an employee owes you money (e.g. advance leave or salary, or other things purchased) then you are entitled to make a reduction of up to 1/3 of their total final remuneration for this.[105]

However, if you wish to recover money due to loss or damage suffered due to wilful misconduct or negligence of the employee you can only do this with prior written approval of a labour officer.[106]

All calculations for final payment of employees should be in writing.



REPATRIATION EXPENSES ON TERMINATION

Generally every employee whose ordinary place of residence is more than 50 kilometres away from his place of employment and who has been brought to the place of employment by the employer or his agent has the right to be repatriated to his ordinary residence[107] when his contract ends by:

- Expiry:[108]
- Notice and the employee has worked more than 1 year:[109]
- Termination due to misconduct by the employer:[110]or
- Termination due to employees incapacity due to sickness or accident.[111]

[105] Section 21(2), Employment Act

[107] Section 58(1), Employment Act

[109] Section 58(1)(b), Employment Act

[111] Section 58(1)(d), Employment Act

[106] Section 21(1), Employment Act

[108] Section 58(1)(a), Employment Act

[110] Section 58(1)(c), Employment Act

If your employee's contract is terminated by notice by either you or your employee, and he or she has worked less than 1 year then the employee only gets partial coverage of repatriation expenses.[112]

Your **employee loses the right to repatriation** if:

- Repatriation is not claimed within 6 months of finishing work[113]
- You terminate employment due to a serious breach of contract[114]
- He or she does not wish to exercise the right to repatriation[115]
- He or she has been settled near the place of employment, at his or her own request or with consent[116]
- The contract is ended for a reason other than sickness or accident of the employee and the labour officer is satisfied that the remuneration paid made allowance for the cost of repatriation and that arrangements such as a deferred pay system have been made, to ensure that the employee has the funds necessary for the payment of such costs.[117]

If the employee is eligible for repatriation and the **employee's spouse and dependent minor children** have been brought to the place of work by the employer then they are also entitled to repatriation allowance.[118]

There are **three main things** you must pay:

- Travel costs[119] with the mode of transport being determined by local usage, the employee's position and safety and reasonable comfort[120]
- Subsistence during travel[121]
- Subsistence in any time between the ending of the contract and repatriation travel commencing, [122] unless delays to repatriation travel commencing have been unreasonably caused by the employee[123] or have been caused by a force majeure.[124]

[112] Section 58(1)(b) and section 60, Employment Act

[114] Section 63(c), Employment Act

[116] Section 63(b), Employment Act

[118] Section 59, Employment Act

[120] Section 61, Employment Act

[122] Section 62(1)(b)), Employment Act

[124] Section 62(2)(b), Employment Act

[113] Section 58(2), Employment Act

[115] Section 63(a), Employment Act

[117] Section 63(d), Employment Act

[119] Section 62(1)(a), Employment Act

[121] Section 62(1)(a), Employment Act

[123] Section 62(2)(a), Employment Act

SEVERANCE PAYMENTS

For an employee to be eligible for a severance payment he or she must have been in **continuous employment** (working 4 or more days per week)[125] with you for 12 months or more, and his or her contract must come to an end in one of the following ways:

- You terminate employment by notice (not serious misconduct)[126]
- the employee retires or is retired by the employer on or after reaching the age of 60 years[127]
- the employee resigns after working for 6 years[128]
- the employee is unable to continue work due to illness or injury and this is certified by a registered medical practitioner or dies.[129]

There is **no obligation** to pay severance allowance if the employee is terminated for **serious misconduct**. [130]

There is also no obligation to pay severance allowance to employees who are recruited from outside of Vanuatu and are not ordinarily resident in Vanuatu. [131]

However, expatriates who were initially recruited outside of Vanuatu and have then renew successive contracts, becoming ordinarily resident in Vanuatu will be entitled to severance allowance.[132]

GREY AREA: If your employees contract expires (i.e. a fixed-term contract ends) it is not clear whether you are obligated to pay severance payment.[133] However, case law suggests that is likely that expiry of a contract counts as a termination by the employer, in which case severance allowance is payable.



[125] Section 54(2)(a), Employment Act

[127] Section 54(1)(b) and (c), Employment Act.

[129] Section 54(1)(e), Employment Act

[131] Section 55(1), Employment Act

[133] Air Vanuatu (Operations) Ltd v Molloy [2004] VUCA 17; Supa v Vanuatu Plant Hire [2010] VUSC 166

[126] Section 54(1)(a), Employment Act

[128] Section 54(1)(d), Employment Act

[130] Section 55(2), Employment Act

[132] Air Vanuatu (Operations) Ltd v Molloy [2004] VUCA 1

SALE OR TRANSFER OF BUSINESS AND SEVERANCE PAYMENTS

If you sell or transfer your business and your employees remain employed under the same conditions, the new employer/business owner will take on the responsibility of paying severance allowance. This is calculated from the date they first started working with you.[134]

If you are thinking to sell or transfer your business this is something that you and the new business owner will need to take into consideration and clarify. It is possible for you to terminate staff on open-ended contracts by notice, or even fixed-term contracts if you have included a notice clause in the employment contract and payout the severance allowance at the time you sell or transfer the business. The new business owner will only be responsible for severance allowance from the date they take over the business. Alternatively, you could also factor in severance payments accumulated into the sale price of the business.



CALCULATING SEVERANCE PAYMENTS

Severance allowance is calculated at the rate of 1 month's remuneration per full year worked and is based on the salary being paid at the time of termination,[135] or average payment of wages based for the year prior to termination.[136] When calculating the average salary or average wages, you do not need to include overtime payments.[137]

(1 month salary) x (number of full years worked) = severance pay

For any partial years worked a pro rata payment is payable.[138]

(1/12 x 1 month salary) x (number of months worked) = pro rata severance pay

GREY AREA: Case law has said that remuneration only includes money paid as salary or wages. It does not include allowances such as housing allowance or travel allowance.[139] However, this has not been applied consistently by the courts.[140] Separating different components of total payment into wage or salary remuneration and other allowances and stating in employment contracts that severance allowance is calculated on the basis of wage or salary remuneration may help to clarify this.

DEDUCTIONS FOR GRATUITIES

You can make deductions from severance allowance if your employee retires, or is retired, on reaching the age of 60 years for gratuity payments made by your or other pension funds approved by the Commission of Labour, **other than VNPF**:[141]

Where employment ends in a situation other than retirement, you may deduct any gratuity payments you have made and any contributions made to pension funds **other than the VNPF**.

GREY AREA: It is not clear if gratuities such as Christmas bonuses can be deducted from severance allowance.[142]

MANAGING SEVERANCE PAYMENT OBLIGATIONS

It is possible for you to make private arrangements relating to gratuity payments, which you can then deduct from severance payments on termination. Although it is not expressly permitted under the Employment Act, case law supports this option provided the arrangement does not undercut or minimize your employee's entitlements' to severance allowance.[143]

If you decide to do this, ensure you have the arrangement clearly stated in the employment contract. It is common practice for employers to manage severance payments in the following ways:

- Keeping a savings account for severance liabilities, and depositing an amount to cover future severance liabilities into it each month, so that you have money saved.
- Getting a pension plan other than VNPF approved by the Commissioner of Labour, and paying into this every month, so that you can deduct most, or all, of this amount from severance allowance payable at the end of the contract.
- Paying severance allowance monthly along with salary may be allowed to replace severance allowance provided the arrangement does not undercut or minimize your employee's entitlements' to severance allowance.[144] You would need to word this in your employment contract very clearly.

The VCCI has been advocating for the laws around severance payments to be changed since 2014. If these laws change, these management strategies may be of limited use. However, for now, they provide practical solutions to protect you and your business from running insolvent if multiple employees leave at the same time.

GREY AREA: Some employers use fixed term contracts and pay out severance at the end of each contract, then reemploy the employee on a new contract so that the amount of severance allowance does not build up. However, this has not been fully tested in court.

[134] Section 55, Employment Act

[136] Section 56(3), Employment Act

[138] Section 56(2), Employment Act

[140] Benard v Republic of Vanuatu [2012] VUSC

[142] Mouton v Selb Pacific Ltd (Judgment #3) [1998] VUCA 8

[143] Air Vanuatu (Operations) Ltd v Molloy [2004] VUCA 17

[144] Air Vanuatu (Operations) Ltd v Molloy [2004] VUCA 17

[135] Section 56(7), Employment Act

[137] Desonville v Port Vila Municipality [2020] VUSC 66

[139] Banque Indosuez Vanuatu Ltd v Ferrieux [1990] VUCA 3

[141] Section 57, Employment Act

PART 7: HEALTH AND SAFETY AT WORK

This Part details the minimum health, safety and welfare laws that you must comply with as an employer. Health and safety laws are there to protect you, your employees and the public from workplace dangers. The Health and Safety Unit under the Department of Labour is responsible for regulating these laws, and have powers to carry out regular inspections, identify workplace hazards and make recommendations to employers to avoid serious accidents in the workplace.[145]



[145] Section 13, Health and Safety at Work Act; PART 9, Employment Act

DUTIES TO EMPLOYEES

The Health and Safety at Work Act, Workman's Compensation Act and Employment Act details the legal framework for these obligations. Any health issues or injuries resulting from your failure to fulfil obligations under these laws may give your employees, or even apprentices, a right to claim damages or compensation.[146] You have a general duty as an employer to ensure the health, safety and welfare at work of your employees[147] and you cannot charge your employees for anything you provide to fulfill these duties.[148]

Domestic servants in a private household are excluded as employees under these laws.[149]



DUTIES TO OTHER PERSONS

You also have obligations beyond your own employees to ensure that other persons are not exposed to risks to their health or safety.[150]

EMPLOYEES DUTIES

Employees also have duties to take reasonable care of themselves and other persons that could be affected by their acts or omissions at work. They must also cooperate, comply and perform any duties in the Health and Safety at Work Regulations, however, no regulations have been made to date.

DUTIES OF MANUFACTURERS

If you design, manufacturer, import, supply or install anything that is used by your employees, you must ensure that they are safe and if properly used, without risk to health, at least to the extent that is in your control. If there is testing necessary to ensure this, you must also carry this out.[151]

[146] Section 20, Health and Safety at Work Act; Section 1 and 3, Workmen's Compensation Act

[147] Section 2, Health and Safety at Work Act

[149] Section 1, Health and Safety at Work Act

[151] Section 7, Health and Safety at Work Act

[148] Section 6, Health and Safety at Work Act

[150] Section 3, Health and Safety at Work Act

SPECIFIC HEALTH AND SAFETY OBLIGATIONS

Specific obligations relating to health and safety are found throughout the 3 pieces of legislation referred to above. The main obligations in relation to health and safety are as follows:

- **Health and Safety Information** – You are required to appoint a person to help manage health and safety within your business. This may require displaying posters with information on legal requirements relating to health and safety in the workplace, provide information and training to employees on health and safety duties and to ensure their health and safety at work.[152]
- **Right Work Place Facilities** – You are required to provide and maintain a safe work environment, maintain conditions and accessibility to the work place, so your employees can work safely and without risks to their health or welfare. This includes the facilities such as toilets and washbasins are accessible. You must also make sure that any dangerous working conditions are fixed.[153]
- **First Aid** – You must keep a first aid kit with medicines, dressings etc. in the workplace, and provide first-aid, medical treatment, and first-aid training at your cost for your employees and first aid appointees. In the event of an injury or sickness occurring at the place of work, you are also required to make arrangements to move a sick or injured employee to the nearest hospital or clinic available.[154]
- **Insurance** – You are required by law to insure and maintain insurance to cover any injuries or illness as a result of work and display this in your principle place of business. You can be fined up to 100,000VT for failing to do this.[155]
- **Report Incidents and Illness** – You are required report all accidents and work related illnesses to a labour officer as soon as possible.[156]
- **Compensation** - You are required to compensate your employees if they suffer any injuries from any accident during work, or if your employee dies at work you must compensate the person or persons entitled to his or her estate.[157]

[152] Section 2, Health and Safety at Work Act

[153] Section 45, Employment Act; Vanuatu National Provident Fund Board v Aruhuri [2001] VUCA 16

[154] Section 47, Employment Act

[155] Section 3, Workmen's Compensation Act

[156] Section 46, Employment Act

[157] Section 1, Workmen's Compensation Act



PART 8: NON-CITIZEN WORKERS

This Part details the legal processes and requirements you must follow if you wish to employ a non-citizen worker. The employment of non-citizen workers is regulated to try and ensure that foreigners are not occupying positions that can be filled by citizens, in other words, to prioritise employment opportunities in Vanuatu for ni-Vanuatu citizens. You can find these laws under the Labour (Work Permit) Act and the Labour (Work Permit) Amendment Act of 2018.

The amendments made to these laws in 2018 have raised many concerns within the private business sector. As a member of the Vanuatu Tripartite Labour Advisory Council (TLAC) the VCCI has been advocating for the repeal of many of the amendments and will inform its members on any developments in this area.



CATEGORIES OF WORK PERMITS

It is an offence for a non-citizen to work in Vanuatu without a must valid work permit,[158] and if you do not follow the laws relating to employing non-citizen workers, you risk being convicted of an offence and imprisoned up to 1 month or fined up to 20,000VT.[159]

You must apply for through the Department of Labour, and only the Commissioner of Labour can approve work permit applications.[160]

Categories of work permits and their requirements are detailed in the table below.

CATEGORY	LENGTH OF WORK PERMIT	APPLICATION FEES[161]	OTHER FEES
Long term work permit	1 year and can be extended up to 4 years	20,000VT	Annual Work Permit Tax - 330,000VT[162]
Temporary work permit	4 months or less	20,000VT	Work Permit Tax - 40,000VT
Exempted work permit	1 month or less	20,000VT	Exemption Permit Tax - 10,000VT

Not covered in detail here are other categories of work permits, including 'religious institution work permits' and 'special category work permits', which are specific to religious institutions and development related work, respectively.

APPLICATION PROCESS

To apply for a work permit to give a non-citizen employment, you must submit the completed application form (available [here](#)) with copies of the following documents:

- advertisements for the position to the position you intend to employ a non-citizen in;
- applications received in response to the advertisement/s; and
- in the case where the employment is under a corporate entity, records of the decision of appointing the successful candidate[163]

[159] Section 18, Labour (Work Permit) Act
[161] Section 5F, Labour (Work Permit) Act

[160] Section 2(2), Labour (Work Permit) Act
[162] Section 3, Labour (Work Permit) Act

You will also need to have 2 photographs of the employee. The Commissioner of Labour will determine whether to approve the work permit taking the following into consideration:[164]

- whether you have advertised the position adequately
- whether there were any suitably qualified citizen applicants for the position
- the protection of local and national interests
- your employment records with the Department of Labour
- qualifications of the non-citizen you are applying for
- any training you are providing to citizen workers to fill this position after the work permit expires

If you have a written employment contract for your non-citizen worker, which is strongly recommended, the Commissioner can issue the work permit for up to 3 years.[165] But note, you must pay the annual work permit tax within 30 days of its due date every year (even if the work permit does not need to be renewed for three years) or the work permit will be cancelled.[166]

If your application for a work permit is refused, you can appeal to the Work Permit Appeals Committee provided you do so within 7 days of receiving the written decision to reject the application.[167] A fee for the appeal is referred to in the Act, but its amount is not known by the Department of Labour at this time.

If the work permit is approved, you as the employer, **must keep a record for each non-citizen worker** with the following information:[168]

- Full name of employee
- Country of normal residence
- Nationality
- Trade, occupation or profession
- Date of commencement of employment
- Date of issue and serial number of work permit
- Period of validity of work permit
- Serial number of immigration entry and residence permit (where applicable)
- Date of termination of employment



[163] Section 3(2A), Labour (Work Permit) Act

[165] Section 2(3), Labour (Work Permit) Act

[167] Section 10E(1), Labour (Work Permit) Act

[164] Section 7, Labour (Work Permit) Act

[166] Section 5G(2), Labour (Work Permit) Act

[168] Sections 13, Labour (Work Permit) Act

CONDITIONS OF EMPLOYING NON-CITIZENS ON WORK PERMITS

The 2018 amendments to the work permit laws have placed requirements on employers to train a citizen worker with the intention of occupying the position that a work permit has been approved for.

However, the Commissioner may exempt you from this training requirement if he or she is satisfied there is no citizen worker available as a counter part to the work permit holder.[169]

The cost of training, which the Commissioner must be satisfied is 'adequate', will be your responsibility.[170] If you are a foreign investor, you must also report to the Commissioner at the end of each financial year the details of the training provided for that year.[171]

Other conditions on work permits may also be imposed if approved.



[169] Section 10, Labour (Work Permit) Act

[170] Section 1(2)0, Labour (Work Permit) Act

[171] Section 5C, Labour (Work Permit) Act

RENEWAL PROCESS AND AMENDMENTS TO WORK PERMIT

If your work permit is approved, it will specify an expiry date for the work permit and you wish to continue employing the non-citizen worker, you must apply to the Commissioner of Labour for the work permit to be **renewed at least 60 days before** the expiry date.[172] The Commissioner must take into consideration the same matters for renewing, extending or changes to a work permit as those required for approving a work permit application.[173]

Since the 2018 amendments, work permits can now only be **renewed for up to 4 years**.[174]

Work permits can only be approved for occupations that are not on the reserved occupation list (see 'reserved occupations' below). If you wish to change the occupation of your non-citizen worker on the work permit, you must apply to amend the existing work permit with the Commissioner of Labour. You are also required to apply for an amendment to a work permit if you are employing a non-citizen worker that has been working for another employer on that work permit.[175]

CANCELLATION OF WORK PERMITS

The 2018 amendments also introduced new powers for the Commissioner of Labour to cancel a work permit if your employee on the work permit fails to train a citizen worker, fails to comply with any condition in the work permit, or mistreats other employees. It is suggested in the act that 'mistreating' a citizen worker includes verbally or physically assaulting another person, but it is not limited to this.[176]

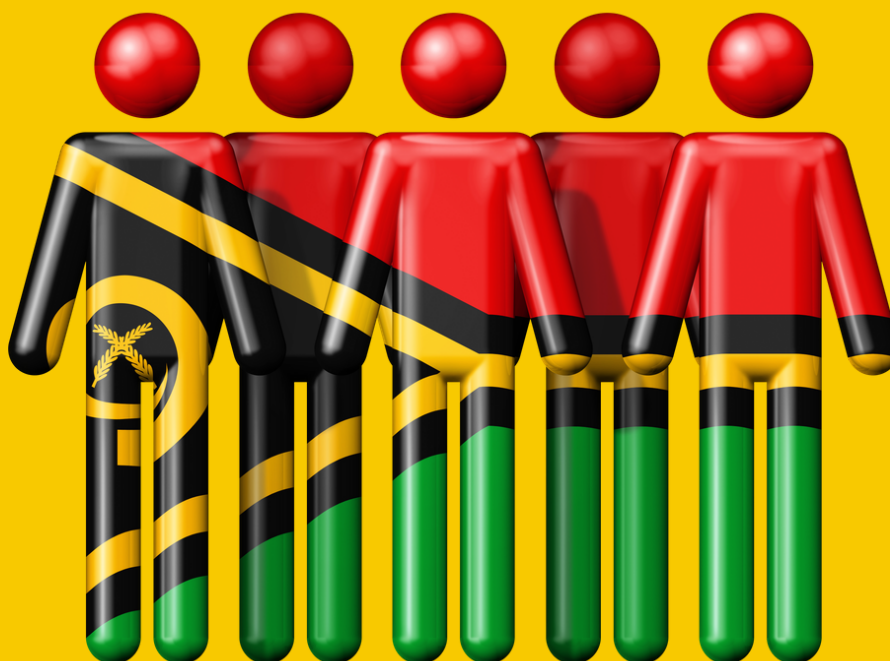
It is important to note here that the Commissioner only need be 'satisfied' that any of these things occurring. There are no objective criteria to assess whether training is adequate, or what other forms of mistreatment could 'satisfy' the Commission that the work permit should be cancelled.

However, if your work permit is cancelled, you can appeal the decision to the Appeals Committee within 7 days of receiving the written cancellation notice.[177] The procedures are detailed in Section 10E of the *Labour (Work Permit) Act*.

RESERVED OCCUPATIONS

The Minister of Internal Affairs has power to declare certain occupations as 'reserved occupations' for ni-Vanuatu citizens only.^[178] It is also possible for a maximum number of non-citizen workers to be set for reserved occupations.^[179]

The current list of reserved occupation is available on the VCCI website. The current Minister of Internal Affairs has proposed another 33 occupations be added to this list and the consultation period for this will end in November 2020.



^[172] Section 5, Labour (Work Permit) Act

^[174] Section 5(3), Labour (Work Permit) Act

^[176] Section 5G(1A), Labour (Work Permit) Act

^[178] Section 9(1), Labour (Work Permit) Act

^[173] Section 7, Labour (Work Permit) Act

^[175] Section 4, Labour (Work Permit) Act

^[177] Part 10E, Labour (Work Permit) Act

^[179] Section 9(2), Labour (Work Permit) Act

GLOSSARY

A number of special terms are used in this guide. These terms and their meanings are presented in the following Table that explains how particular words are interpreted and used in employment law and employment practice. You will find these words italicized throughout the guide.

TERM	MEANING
Bonus rate/Penalty rate	Rate per hour that is normally paid in addition to current rate per hour for working hours additional to normal working hours.
Casual (employment)	Where an employee is employed as and when and if needed, as per the needs of the organisation and where there is no particular expectation of continuing.
Commission based payments	Payments made that are additional to salary payments and is subject to completion of certain tasks.
Common Law	(also known as case law or precedent) Law that is developed by judges through decisions of courts and similar tribunals.
Constructive Dismissal	When an employee decides to terminate their contract with or without prior notice, due to the conduct of the employer.
Continuous employment (annual leave)	Where an employee has unbroken service/employment with an organisation since initial appointment. His/her annual leave entitlement is calculated from the date of that initial appointment.
Continuous employment (severance allowance)	An employee's unbroken service/employment with an organisation since their initial appointment. Their eligibility for severance allowance is calculated from the date of their initial appointment. They should be in continuous employment for a minimum of 06 years to be eligible.
Domestic worker	A worker within the employer's household. Domestic workers perform a variety of household services for an individual or a family, from providing care for children and elderly dependents to cleaning and household maintenance and housekeeping.
Employment Grievance	A dispute concerning terms and conditions of employment.
Fixed term contract	A contract that is valid for a pre-determined time. There is a clear starting and end date of contract.
Force Majeure	Unforeseeable circumstances that prevents someone from fulfilling their contracts.

GLOSSARY

TERM	MEANING
Frustrated (Contracts)	When unexpected events arise which make a contract impossible to be performed, entitling the frustrated party to rescind the contract without paying damages.
Full time (employment)	Employment in which the employee works the number of hours as determined by the employer. This would normally be up to 44 hours a week, 6 days a week or 8 hours per day.
Gratuity	Gratuity is a part of salary that is received by an employee from his/her employer in gratitude for the services offered by the employee in the company.
ILO/International Labour Organisation	The International Labour Organization (ILO) is a United Nations agency dealing with labour issues, particularly international labour standards and decent work for all. 185 of the 193 UN member states are members of the ILO.
In lieu	In place of or instead of.
Labour Officer	An employee of the Ministry of Labour that is responsible for proper administration of Labour laws and issues.
Legal Tender	A medium of payment allowed by law or recognized by a legal system to be valid for meeting a financial obligation. Paper currency and coins are common forms of legal tender in many countries.
Maternity Leave	A period of approved absence for a female employee granted for the purpose of giving birth and taking care of infant children. Maternity leave may last anywhere from several weeks to a period of months depending on the organization.
Minimum wage	The lowest wage permitted by law to be paid to any employee.
Nursing allowance	Time allowed for mothers to nurse their infant children up to the age of 2 years old. Time allowed is 1 hour, twice a day.
Open ended contract	Contract that does not have end dates. The contract will continue until it is changed by termination or quitting. The contract remain in force by the will of the parties involved.
Oral contract	An agreement that is not in writing and is not signed by the parties but is a real existing contract as agreed to verbally.
Orders	Regulations or instructions that cascade from the main Act or Legislation.
Overtime	Time worked in addition to scheduled or normal hours.
Part time (employment)	Working at set hours and days per week that may not be full time hours.

GLOSSARY

TERM	MEANING
Parties	Those that are signatories to a contract and are therefore legally binded by the terms and conditions of that contract.
Probation period	The process or period of testing or observing the character or abilities of a person in a certain role, for example, a new employee.
Remuneration	Reward for work or service.
Repatriation	Returning to one's home country.
Salary	Salary is usually used to refer to payments to employees that are not directly related to the number of hours worked, but are an agreed payment per year or month.
Salary Advance	Employees request for an advance payment of their salaries. This is normally paid back at agreed intervals with some form of fee and interest.
Sick leave	Leave of absence granted because of sickness.
Subsidiary legislation	Law made by an executive authority under powers given to them by primary legislation in order to implement and administer the requirements of that primary legislation. It is law made by a person or body other than the legislature but with the legislature's authority.
Temporary (contract or employment)	Contracts that have shorter tenures, normally 6 - 12 months and benefits and conditions may slightly vary from a full time contract.
Time off in lieu	Taking time off instead of receiving overtime payments.
Trade Union Membership Fees	Dues paid to a Trade Union organisation to enable membership privileges and enjoyment of services that the organisation has to offer.
Usual hours of work	The agreed hours of work determined by laws or regulations, collective agreements or arbitral awards.
Wage	Wage is usually used to refer to payments to employees that are calculated based on the number of hours worked.