

Template Agreement Guidance Notes

October 2023

Introduction

1. Set out below are some guidance notes on specific clauses in the Brewers Guild of New Zealand's (**Brewers Guild**) template agreements. These notes are intended to provide general guidance for members on whether a clause should be used and, if so, in what manner, when entering into employment agreements with employees.
2. Please note that these notes are for general guidance only and not intended to provide legal advice. Members should seek specific legal advice if that is required in respect of the completion of the template. In particular, we recommend that you seek specific legal advice if you are engaging a senior or fixed term employee and/or you wish to consider a restraint of trade provision.
3. Simpson Grierson offers Brewers Guild members 15 minutes of free legal advice each year. This equates to a value of \$125 plus GST. For further information, please contact the Brewers Guild of New Zealand: admin@brewersguild.org.nz.
4. There are seven template agreements available to all Brewers Guild members:
 - (a) salaried employment agreement;
 - (b) full time waged employment agreement;
 - (c) casual employment agreement;
 - (d) fixed-term employment agreement;
 - (e) independent contractor arrangement (individual); and
 - (f) independent contractor arrangement (company).
5. To help determine which template agreement to use, please refer to the template agreement flowchart set out at **Appendix A** to this guide.

Template employment agreements

1. This section provides general guidance notes applicable to all employment agreement templates.
2. **Highlighted Yellow** indicates where information needs to be updated or changed. **Highlighted Green** indicates an instruction for consideration. All instructions should be removed prior to finalising the agreements.

Criminal Background Checks

3. If you would like to obtain a criminal background check, this should be done before an employee starts employment.
4. Employees do not have to disclose convictions that they are entitled to conceal under the "Clean Slate" legislation. You should make it clear to a candidate that it is their responsibility to determine whether they are eligible to conceal any convictions.
5. To meet Privacy Act 2020 requirements, questions during the recruitment process must be in relation to previous convictions that are relevant to the candidate's suitability for the role.

90 day trial period

6. Under the Employment Relations Act 2000, the use of 90 day trial periods are limited to employers who have 19 or fewer employees. However, one pre-election promise made by the National Party was to introduce an ability for all employers to include 90 day trial periods within their first 100 days of governing. We will keep you informed if/when this proposed change is introduced in Parliament, so Brewers Guild can consider whether it wishes to include such a clause.
7. 90-day trial periods can only be used for new employees, and must not be used for any employee who has worked for you before.
8. To be enforceable, a 90-day trial period must be set out in the employee's employment agreement, and the agreement must be signed and agreed to **before** the employee starts work. The employee must be provided with a reasonable opportunity to seek independent advice about the Agreement including the trial period (aim for at least five working days).
9. If the employee verbally agrees to the trial period but starts work before signing the agreement, it is likely that the trial period will be invalid and the employee would not be able to be dismissed in reliance on the clause. To be valid and enforceable, the trial period clause must also state the employees start date (ie, the first day of the 90-day trial period).
10. Please note that under current case law, it is not permissible to pay in lieu of notice where an employee's employment is terminated in reliance on the trial period. The employee should either be permitted to work out the notice period, or placed on garden leave (if their agreement allows for this and they should be given an opportunity to comment on this option first).
11. There are real risks in mistakenly dismissing in reliance on an invalid trial period provision. We therefore recommend seeking advice before doing so.

Probationary period

12. Given that 90 day trial periods cannot be used by employers with 20 or more employees, a probationary period may be used as an alternative. To be enforceable, the probationary period must be specified in writing in the employment agreement.
13. Unlike 90 day trial periods, employees still have the ability to bring a personal grievance for unjustified dismissal if they are dismissed pursuant to a probationary period. Therefore, to justify a dismissal under this clause, you will need to show that you have followed a fair process, and had justified substantive reasons for dismissal.
14. This involves following a performance management process during the probationary period where you regularly review the employee's performance, notify the employee of any concerns, provide the employee with a fair opportunity to improve their performance and provide any necessary support or training to help the employee to improve.

Notice periods

15. The length of notice required to be given by an employee or employer in relation to termination of employment, is by agreement between the parties. A standard notice period is between one and four weeks' notice.

16. The termination of employment section for each template employment agreement provides that if an employee fails to provide the required period of notice, you may deduct remuneration for the balance of the required notice period from their final pay. This will only be enforceable in limited circumstances (such as if you suffer genuine financial loss, which can be quantified and which is directly attributable to the employee not providing the required period of notice. For example, where you have to bring in a temporary replacement at a higher cost than the relevant employee).

Wages employment agreement

17. This template agreement should be used for employees who are paid on an hourly basis.

Rostered hours of work

18. The wages employment agreement, includes two options for you to consider when employing employees on rostered shifts (Option 2 and Option 3 within the Hours of Work clause). Options 2 and 3 of the wages employment agreement are drafted to reflect the prohibition of “availability provisions”. Availability provisions, require employees to be ready, willing and able to work if and when offered work by the employer, but do not provide any guaranteed hours in return. In the absence of a compliant availability provision, an employee is entitled to refuse to perform work and must not be treated adversely for doing so.
19. Options 2 and 3 in the wages employment agreement template, are drafted to comply with the requirements under Employment Relations Act 2000 and the Minimum Wage Act 1983 but are not “availability provisions” (i.e. the clauses do not require employees to work if and when offered work by you). If you wish to include an availability provision in your agreement, contact Simpson Grierson to assist.

Guaranteed hours of work

20. You may wish to provide a set number of guaranteed hours to an employee and any hours in addition to that are worked by agreement only (Option 3).
21. This means you can require the employee to work the guaranteed number of hours each week however, because any additional hours are by agreement, there would be no obligation to provide reasonable compensation to the employee for making themselves available to work in addition to the guaranteed hours of work.
22. Guaranteed hours over peak periods could be greater than guaranteed hours during quiet periods. For example, you could consider guaranteeing hours to some employees over the weekend so that you can require them to work these shifts.
23. However, guaranteed hours do not need to be on set days/times and you may still have the flexibility to roster the guaranteed hours in advance.
24. The risk with this approach is that employees are not required to work more than their guaranteed hours, and you may need to consider whether this could leave you short staffed on some shifts. In contrast, if you set the number of guaranteed hours too high, you are still required to make those hours available for the employee to work. Therefore, you need to carefully consider your business requirements before committing to a number of guaranteed hours of work.

25. If you would like to have the ability to require an employee to work hours additional to their guaranteed hours (without requiring their agreement), you will need to provide reasonable compensation. In setting reasonable compensation, all relevant matters must be taken into account, including:
- (a) The number of hours for which the employee is required to be available;
 - (b) The proportion of the hours referred to in paragraph (a) to the agreed hours of work;
 - (c) The nature of any restrictions resulting from the availability provision;
 - (d) The rate of payment under the employment agreement for the work for which the employee is available.
26. By way of example, if there are five guaranteed hours per week but an employee is required to be available for a further 20 hours, this would require a higher level of compensation than the reverse where there are 20 hours guaranteed and an additional five that the employee must be available.
27. We can provide specific advice on what is reasonable compensation in your circumstances and provide a modified clause to reflect this.

Hours by agreement

28. The wages employment agreement template includes an alternative (Option 2) for you to consider, if guaranteeing hours to all waged employees is not practicable or desirable. We note that including an agreed number of work hours, is more typical than rostering hours by agreement.
29. Option 2 provides that rostered hours are "agreed" between the parties. This means employers have the ability to have no minimum guaranteed hours. The "agreement" must be genuine and employees must be able to request more hours of work and/or decline to work shifts. Therefore, you need to ensure there is a system in place for employees to have some say in their rostered hours of work. For example, you could require employees to notify you of their availability one week before the roster is due to be released, or require employees to immediately notify you if they cannot work a particular shift after the roster has been completed. If employees are genuinely able to turn down shifts, you may wish to consider employing them as casual employees instead.
30. The risk with this approach is that you are not entitled to require employees to work a particular shift, and employees cannot be disciplined if they refuse to work any hours. Therefore, you risk staffing shortages during busy periods and, for example, around public holidays. It may therefore be a better option to provide employees with set hours of work, or rostered hours of work with guaranteed hours (and any hours in addition to those guaranteed hours are by agreement only).

Clauses

31. The two options in the template for rostered hours of work are:
- (a) Option 2: Your hours each week will be agreed between us in advance and set out in a roster. You agree the days of the week on which your work is to be performed and your start and finish times may vary, in accordance with the roster. There is no guarantee of any minimum number of rostered hours each week; or
 - (b) Option 3: Your hours each week will be notified to you in advance and set out in a roster. You agree the days of the week on which your work is to be performed and your start and finish times may vary, in accordance with the roster. Your guaranteed hours of work are [x] hours per week. You may agree to work additional hours above your guaranteed hours of work.

Cancellation of shift

32. If for any reason you decide to cancel a shift that an employee is scheduled to work, you must:
- (a) give the employee reasonable notice; and
 - (b) if you fail to give reasonable notice, pay the employee reasonable compensation.
33. The employment agreement must expressly state what is "reasonable notice" and "reasonable compensation". You must be able to show that the period of notice and the compensation paid is reasonable. It is therefore important that the notice period and compensation for a cancelled shift is tailored to the particular position. You should think about the reasons for which it has to cancel shifts (if any), and then consider what is reasonable notice in light of those reasons.
34. In determining what is "reasonable notice" for your business, you should have regard to all relevant factors, including the nature of:
- (a) your business, including your ability to control or foresee the need to cancel their shift; and
 - (b) the employee's work, including the likely effect of the cancellation on the employee; and
 - (c) the employee's employment arrangements, including whether there are agreed hours of work in the employee's employment agreement and, if so, the number of guaranteed hours of work (if any) included among those agreed hours.
35. In considering what is "reasonable compensation," you need to have regard to all relevant matters, including:
- (a) the period of notice specified in the employee's employment agreement;
 - (b) the remuneration that the employee would have received for working the shift;
 - (c) whether the nature of the work requires the employee to incur any costs in preparing for the shift.
36. An employee is entitled to be paid reasonable compensation (as determined above and set out in their employment agreement) if you do not give reasonable notice when cancelling his or her shift.
37. If reasonable notice and compensation is not specified in the employee's employment agreement, the employee will be entitled to be paid for their entire shift. You will also be liable to pay an employee for their full shift, if you:
- (a) notify and employee of the cancelled shift at the start of their shift; or
 - (b) cancel the remainder of their shift after it has begun.

Casual employment agreement

38. The casual employment agreement template is to be used only for employees who work on a casual "as required/as available" basis with no expectation of ongoing employment. Casual employees are employed on an intermittent and irregular basis.
39. Employees who perform regular hours of work and/or have a regular pattern of work, even if the number of hours each week varies or the hours are not set, may be considered part-time permanent employees, rather than casual, even if they are employed under a casual employment agreement. Regular inclusion on a roster is usually inconsistent with casual employment.

40. The template casual employment agreement provides that you will give the employee reasonable notice when asking the employee to work, and they may choose whether to accept or decline the work. If the offer of work is accepted, the employee must complete it unless either you or the employee ends the employment relationship. Each time an employee accepts an offer of work it is considered a new period of employment.
41. If an employee is genuinely casual, you can pay holiday pay at the rate of 8% on top of the employee's wages, this must be stated as a specific component of the employee's payslip. A "pay as you go" approach is only permissible if an employee works so intermittently or irregularly that it is impractical for the employer to provide them with four weeks' annual holidays. If it is practical to provide an employee with annual holidays, but you have been using the "pay as you go" approach the employee can potentially double dip by receiving four weeks' annual leave on top of the 8% already paid by you.
42. Employees who start off as casual can become permanent overtime, so it is important to regularly review your arrangements with casual employees and their patterns of work.

Fixed term employment agreement

43. To be enforceable, a fixed term employment agreement must meet certain requirements. These include that an employer and employee must agree that employment will be for a fixed term ending:
 - (a) at the close of a specified date or period; or
 - (b) on the occurrence of a specified event (which may be appropriate where it is difficult to determine the date on which the conclusion of a specific event will be); or
 - (c) at the conclusion of a specified project (which may be appropriate where it is difficult to determine the date on which the conclusion of a specific project will be).
44. A fixed term employment agreement will only be enforceable if:
 - (a) You have genuine reasons based on reasonable grounds for specifying that the employee's employment is to end in that way;
 - (b) You advise the employee of when or how the employment will end and the reasons for the employment ending in that way; and
 - (c) the employment agreement states the way in which the employee's employment will end and the reasons for the employment ending in that way.
45. Genuine reasons include:
 - (a) to cover for another employee on leave (such as parental leave);
 - (b) where employees are required to work on a project: particular care must be given to clearly specify the reasons why an employee's employment will end on the particular date;
 - (c) With complex projects, as there may be different work streams and an employee may only be working on one part of it, you will need to be specific about what exactly triggers termination of the employment;

- (d) Alternatively, it is possible to specify an end-date which is expressly linked to a relevant project milestone and note that while the overall project may end at a later date, a fixed end-date has been agreed for the specific role so that there is certainty for both parties;
- (e) In most cases, it will not be sufficient to merely state that the reason an individual's employment will end on a particular date is because the project will end. You need to go to the extent of spelling out that the employee's services will not be required after the expiry of the fixed term and the reasons why.
46. Even when there are genuine reasons for entering into fixed term agreements, the employee needs to be clearly told about the reasons and they must be specified in the agreement for the fixed term to be valid.
47. If you do not comply with these requirements, it may not be able to rely on the clause which provides for the termination based on the fixed term. This would mean an employee could elect to be treated as a permanent employee and any attempt to terminate their employment based on the fixed term agreement would be unjustified.
48. A fixed term cannot simply be rolled over/extended. It is important that, before the expiry date, there is a further agreement that meets the requirements set out at paragraph 43 above.
49. Please see the further information on preparing a fixed term agreement set out in **Appendix B** to this guide, and example fixed term clauses below.

Example Clause

- (a) Parental leave

The terms and conditions of this agreement will come into force from [*date of commencement*] and will end on [*date*] (**Expiry Date**) because you are employed to provide temporary cover for an employee who is taking parental leave. Your employment will be ending on the Expiry Date because this is the date that the employee's parental leave is expected to end and there will no longer be a need for you to cover their absence and we will not have any further work for you. The term of this agreement is subject to the termination clause in this Agreement.

Under section 48 of the Parental Leave and Employment Protection Act 1987 an employee on parental leave may elect to end his or her parental leave early and return to work in certain circumstances, being:

- If the child is miscarried; or
- If the child is stillborn or dies; or
- If the employee or the employee's spouse has consented to the adoption of the child and some other person has the care of the child with a view to its adoption; or
- If the employee ceases to have care of the child; or
- If the Company consents.

If the parental leave employee elects to end his or her parental leave by returning to work early in the above circumstances, you will be given notice or payment in lieu as we will no longer need you to cover once their parental leave ends and will have no further work for you at that stage.

For the avoidance of doubt, your fixed term employment will end when the employee's parental leave period ends even if the employee decides not to return from parental leave, as we will need to recruit at that point for a permanent replacement for the employee.

Independent contractor agreement

50. The independent contractor agreement is designed to be used between a company and an individual contracting in their personal capacity. If you require an agreement for a contract with a company, there is also a template contracting agreement available.
51. We note that the templates are intended to be basic, short-form agreements, and we recommend a tailored contract if the contractor will be undertaking significant or important work (such as developing intellectual property). If you intend to enter into any contracting arrangement, we also encourage you to please seek specific legal advice.
52. An independent contractor may be considered an employee by the Employment Relations Authority and the Employment Court if, in reality, the relationship between you and the contractor is an employment relationship. There may be serious consequences of a finding that an independent contractor is an employee including, the employee's right to bring a personal grievance, tax responsibilities and holiday pay requirements.
53. The fact that a worker has entered into an independent contract agreement with you is relevant, however, not determinative of the true relationship between the parties.
54. The Court has set out various tests to consider when determining the nature of the working relationship between the parties. Before you engage a worker as an independent contractor, you should consider the terms and conditions of the contract, the way in which the relationship operates in practice, the control you have over the employee (ie, regulating the time and days of their work, holidays, lunchbreaks etc), how integral their role is to the business (for example, your receptionist is unlikely to be considered an independent contractor) and how integrated they are into your business (ie, business email address, business cards, uniform etc).
55. Other relevant factors you should consider are:
 - (a) whether they are working in business on their own account;
 - (b) whether they provide services to other companies;
 - (c) the treatment of tax (an independent contractor should be responsible for their own tax obligations);
 - (d) payment methods (ie, invoicing the company); and
 - (e) industry practice.
56. If looking at the situation objectively, the worker engaged is being treated the same as, or very similarly to your employees, then you should employ the person using the appropriate employment template agreement.

57. Where you engage in a contracting relationship with another company, you should be aware of any “*triangular employment relationships*” that arise between you and the other company’s employees/key personnel.
58. A triangular employment relationship is where an employee is employed by one organisation (i.e. the contracting company) but performs work for the benefit of, and under the control and direction of another organisation (i.e. your organisation), called a ‘controlling third party’. Employers and/or workers in a triangular employment relationship can apply to the Employment Relations Authority to join the controlling third party to proceedings to resolve the personal grievance.
59. In order to mitigate the risks related to triangular employment relationships (and similar to some of those factors as set out in clause 55 above), we recommend that:
- (a) The overall control and direction over the worker and their work should be exercised (as much as possible) by the employer, not your organisation. For example, allocation of tasks and any disciplinary or performance concerns that arise while performing services for you should be referred to the employer to investigate and take action. There may be some exceptions to this, such as if you need to deal directly with an immediate health and safety risk;
 - (b) all payments should be made to the worker, by their employer, not your organisation. There should not be any payment to workers directly from your organisation (including any allowances/reimbursements of expenses);
 - (c) The employer should be responsible for all of the worker’s PAYE and KiwiSaver etc;
 - (d) All written communications such as pay and other terms, and the nature of the work required, should be between the employer and the worker;
 - (e) Your organisation’s policies that the worker is expected to comply with, should be limited as far as possible (e.g. to health and safety and security policies);
 - (f) Applications for leave should be made by the worker to their employer (not your organisation);
 - (g) You take care with the extent to which the worker is integrated into your business (e.g. provision of a uniform, email address etc).

Likely Future Changes to Keep In Mind

90-day trial periods

60. National is likely to reinstate 90-day trial periods to cover all businesses.

Change in contractor space

61. There is a currently a case before the Court of Appeal which will decide whether Uber drivers are employees or contractors. The decision is likely to have significant implications on the legal definition of a contractor. We will keep Brewers Guild informed on any relevant impacts once the decision is released.

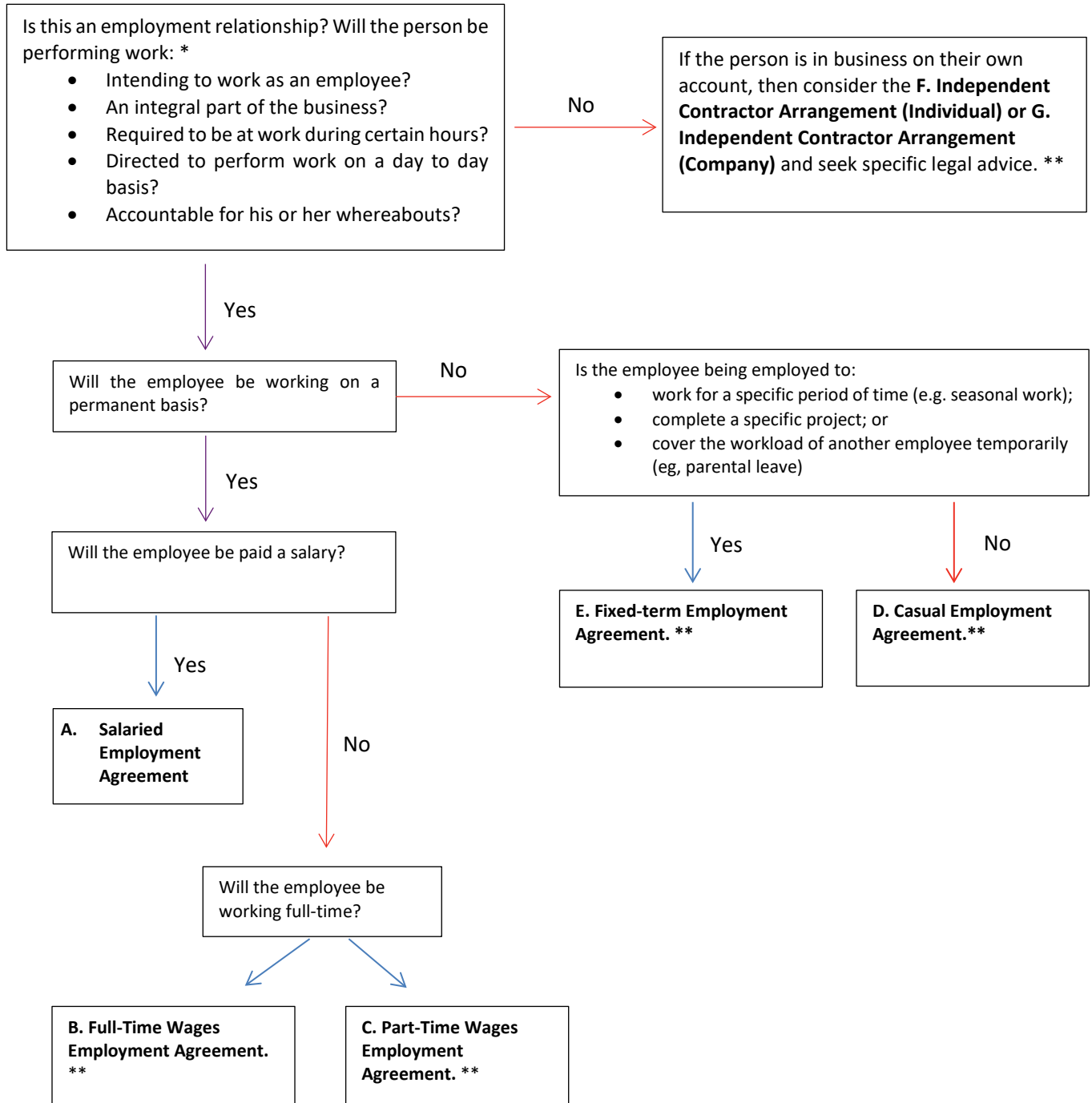
Parental leave

62. National has indicated that it will modernise parental leave entitlements by allowing parents to choose how they divide their paid leave: by taking it at the same time, one after the other or in overlapping instalments.

Holidays Act

63. While new Holidays Act legislation was expected this year, a Bill was not introduced before the parliamentary term and its future remains uncertain.

Appendix A: Guide for determining which template agreement to use



* refer to practice guidance notes on factors to consider in considering an independent contractor agreement or an employment relationship.

** refer to our practice guidance notes.

Appendix B: Fixed Term Agreements

Preparing the fixed term agreement:

