Fineprint | ISSUE 90
Autumn 2023

Keeping your employees during the 'big quit'

Retention tools and some risks

Since 2021 and the lessening of the effects of the Covid pandemic, many countries have experienced an increase in staff turnover and lost productivity. This is informally referred to as 'the great resignation', 'the big quit', 'brain drain' and 'quiet quitting'.

These trends are concerning as turnover and lost productivity present further challenges to businesses that may already be struggling in a weakening economy.

Employers can implement retention tools to minimise turnover and ensure employee engagement. As with all employment contractual changes, care needs to be taken to ensure that these do not result in unexpected consequences for either party. We look at the most common retention tools that employers might consider along with some alerts when using these incentives.

Incentives are variations to the employment agreement

All incentives are a variation to your employee's individual employment agreement. When considering any form of incentive, you must ensure that all changes are consulted on, and agreed to, by your employee. The agreed changes should be documented appropriately, usually with your lawyer's assistance, and signed by both parties.

You must document and record all changes to employment terms and benefits. When employment variations are made and you don't keep accurate records and act in accordance with those records, you are at risk of a personal grievance claim from your employee. In addition, inaccurate recordkeeping can attract penalties from the Labour Inspector for not complying with the Employment Relations Act 2000 and the Holidays Act 2003.

When considering an incentive for your employee, consultation regarding tax consequences, including fringe benefit tax (FBT), with your accountant or tax advisor is essential.

Cash and performance-based bonuses

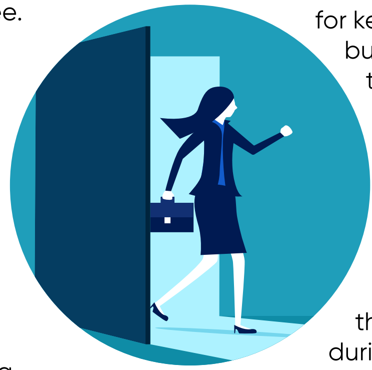
The most commonly used, and arguably most straightforward tool to increase employee engagement and performance short-term, is a cash bonus. This payment can be made as a lump sum for existing performance, or it can be a bonus based on agreed and documented requirements for future performance.

In this issue +

Allen, Needham & Co. Ltd.
BARRISTERS, SOLICITORS AND NOTARY PUBLIC

If you pay a discretionary cash bonus, one costly mistake you could make is to unintentionally increase your employee's 'gross earnings.' If a payment is not correctly identified as a discretionary additional payment, then the increase to their 'gross earnings' can also affect payment required for their other entitlements such as annual leave.

In landmark cases in 2020 and 2021[1], the court considered whether or not a bonus scheme was part of 'gross earnings' for an employee. Originally the bonuses were considered part of the 'gross earnings' and the company had to pay out significant additional annual leave entitlements. On appeal, this was overturned.



Ultimately, the court decided that a primary indicator as to whether a bonus counted as 'gross earnings' was whether the employer retained discretion to **not** pay the bonus, even if the performance targets had been met. Importantly, the law was clear that the payment needed to be a true 'discretion', and merely labelling or titling it as 'discretionary' did not suffice.

Being careful on how this payment is documented and ensuring it is 'truly discretionary' will help prevent unnecessary increased annual leave payments. If it is discretionary, you will need to ensure it's recorded as such in your payroll system.

Retention bonus

Another common tool is a retention bonus where your employee is guaranteed a lump sum cash payment at the end of a retention period (often between 12-36 months).

All agreements should contemplate what happens if your employee decides to leave during their retention period. This could be a resignation, dismissal due to poor performance or, if the market required, your employee's role/position may be made redundant. The nature of the event giving rise to the dismissal will likely determine whether the bonus is paid or not, and if paid, whether partially or in full.

Retention bonuses can also become payable on the occurrence of a prescribed event. Regardless of when payment is made, the impact on annual leave must be considered in the same way as for a performance bonus.

Bonding clauses

Another way to retain your employees is to provide payment for further education or formal qualifications in exchange for your employee staying for a period of time after the training or further education has been completed. If your employee leaves, they might be asked to repay some, or all, of the training costs covered.

While bonding clauses can increase employee engagement as well as enhancing the value of your employee to your business, when considering bonding clauses you should seek specific legal advice to ensure the bonding clause is enforceable. The enforceability is dependent on many factors including fairness to your employee. If the bonding clause is deemed to be unfair, you may not be able recover the training costs already paid when your employee leaves earlier than their bonded term.

Shares or equity in the business

One of the most effective long-term retention tools for key employees is to offer shares in the business. These shares can be restricted so that the value the employee receives for the shares is minimal if they leave within a prescribed period. If they stay longer than the prescribed period, they can sell the shares for their actual value. This is an excellent tool as not only does it provide a good incentive for your employee to stay, but it also incentivises them to grow the value of the business during their tenure.

This process should always be guided by your lawyer; there are several steps and the requirements will be unique to each business. For new shareholders, a shareholders' agreement should be prepared that covers all shareholder rights such as pre-emptive rights for the majority shareholder (the main business owner) to buy back the shares and voting rights of all the parties. Often this process will require a valuation of the business, and there will be significant considerations regardless of the structure implemented.

Meeting the market

Looking at the wider labour market and demands for particular roles will help you identify employees who are most at risk of leaving. Often, if employees are in short supply, the market remuneration will have increased and you should consider meeting the market rates to reduce staff temptation to leave.

Other incentives that can make an employer competitive are increased annual leave, wellbeing payments, health insurance, allowing personal use of work phones or vehicles, flexible working and interest-free or low interest loans (some of which have FBT consequences).

Have a highly engaged culture

Ultimately, retaining staff is a complex area that involves much more than just financial incentives. Ensuring your workplace has developed a highly engaged culture that supports your employees' individual needs and that your employees feel valued will all help with your overall retention strategy.

With the rapidly changing employment market it can be understandably challenging to retain key staff. If you have an employee you think you are at risk of losing, think about what retention tools will mean the most to that person; and remember to talk with us about what steps you should take before offering any incentives. +

1 (*Metropolitan Glass & Glazing Limited v Labour Inspector, Ministry of Business, Innovation and Employment* [2020] NZEmpC 39 and subsequent appeal of that decision in *Metropolitan Glass & Glazing Limited v Labour Inspector, Ministry of Business, Innovation and Employment* [2021] NZCA 560).

INTELLIGENSIA

Guest editorial

Having a cyber resilient business

It's hard to ignore the headlines; the past few years have brought floods, plagues and an unprecedented rise in cyber-attacks. New Zealand businesses have taken the brunt of these events. Some have been pushed to breaking point.

Floods and plagues are tangible events. We can usually see them coming and prepare for the worst. Cyber-attacks are like a bolt of lightning, one minute it's a sunny day, and the next minute your business is on fire and you are scrambling to mitigate the damage.

Cyber resilience is a measure of how well you can manage a cyber-attack or data breach while continuing to maintain business operations effectively. There are some simple steps you can take to make your business more resilient to cyber-attacks.

Step One: Know what you are trying to protect

All businesses have information that, if lost, would compromise the viability of the business. When considering what you need to protect, think of your information as assets in terms of maintaining their confidentiality, integrity and their availability of access. Which ones are the most important for your business to protect?

Knowing what you need to protect makes it easier to determine whether your cybersecurity protections are sufficient.

Step Two: Mind the gaps

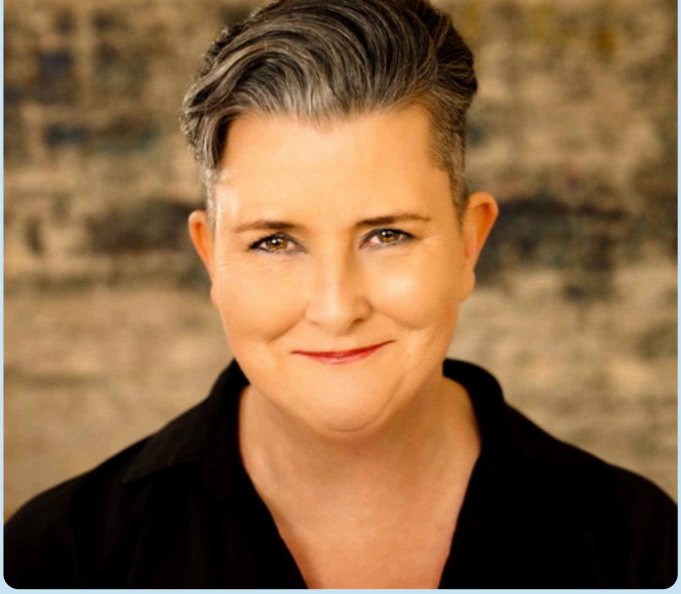
Cyber resilience is more than just having anti-virus installed. Pay attention to the resilience of your people, processes and technology; cyber health checks will identify gaps and recommend improvements. Specialist cyber resilience companies such as Intelligensia provide impartial assessments of your cyber resilience and can liaise with your IT provider to get you the right the level of protection.

Step Three: Know your risk appetite

Know how much risk you are willing to accept for your business. This helps you decide how much you need to invest in cybersecurity protections. For example, if you keep sensitive client information, invest in offline back-ups that can't be compromised if you succumb to a ransomware attack. An investment in off-line backups will not only minimise the loss of information, but also your downtime.

Step Four: Business impact

During the recent floods, power, phones and the internet were disabled for some time. A cyber-attack on your managed IT services provider or software vendor could similarly leave you with no access to your computer systems or information



Jan Thornborough

for extended periods. Think about the business impact if you can't access your customer, financial or bookings information for an extended period. Use a scenario of not having access to vital tools and information for up to a month. During large scale cyber-attacks, your IT providers will be juggling competing demands to get multiple businesses operational again. Check your service level agreements and know the level of support you can expect.

Step Five: Incident response plan

An incident response plan lets you take a methodical approach to deal with a cyber-attack when it occurs. Many businesses think that calling their IT provider to fix the problem is all that is needed. Certainly, they can fix the technical problems, but you have obligations as well. For instance, you may need to notify the Privacy Commissioner if personal information has been stolen. Failing to report information breaches can result in a hefty fine. Informing customers that you've lost their information is another requirement. The way you manage a cyber-attack will determine the impact on your business's reputation and your customers' level of trust.

Essential to be cyber resilient

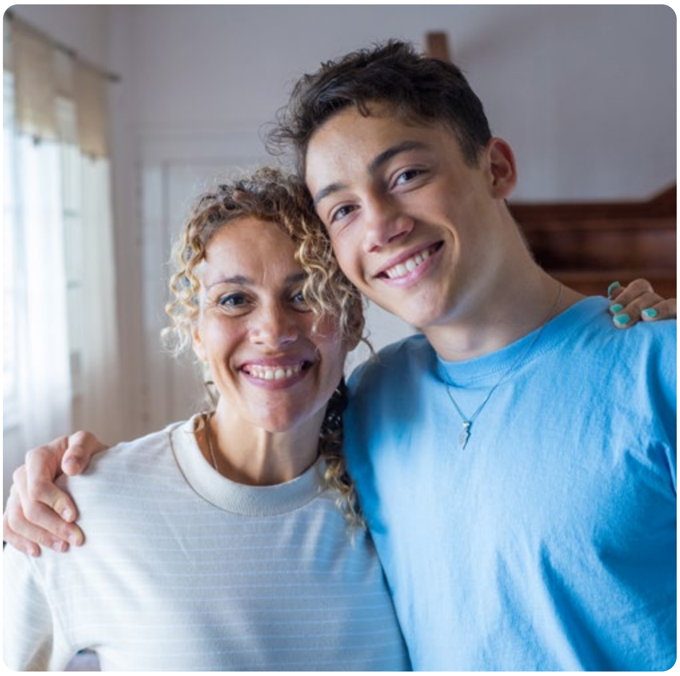
Cyber-attacks are on the rise. They increased 600% during the pandemic; security commentators predict that this year a business will suffer a ransomware attack every eleven seconds. More than 90% are caused by someone clicking on a phishing email. It's not a case of 'if' you get attacked, rather 'when'. Being cyber resilient puts your business in a much stronger position to weather the storm and recover quickly from a cyber-attack.

If you want your business to survive in today's digital economy develop your cyber resilience now. +

Jan Thornborough established Intelligensia in 2021 after realising that although big organisations were dealing with cyber risks, small and medium-sized business and not-for-profits were being left behind. Intelligensia's mission is to bring the same level of expertise enjoyed by large companies and government agencies to smaller organisations.

Previously, Jan was head of the cyber resilience unit at New Zealand's National Cyber Security Centre that helps nationally significant organisations become more cyber resilient.

Bank of children



Children helping their parents

Most of us have heard of the expression 'Bank of Mum and Dad' where parents help fund their children to get onto the property ladder or with another investment.

What happens in the reverse situation, however, where children become the 'bank' and assist their parents financially?

Why would this happen?

In recent years, parents may have assisted their children in allowing their property to be used as security for borrowings by their children, they could have helped fund the deposit for a child's first property or provided financial support in a number of other situations.

Sometimes, the boot is on the other foot when parents retire or have their income reduced. That may be the time for children to repay the favour and assist their parents.

Family-wide discussion

If children are considering helping out their parents financially, we recommend that you have a family-wide discussion on what sort of assistance could be provided.

It is important that the entire family is aware of any proposed arrangements, especially if not all of the children are going to be involved. Those children who are assisting may become part-owners of their parents' property as part of the agreement.

It is important that the entire family is aware of any proposed arrangements, especially if not all of the children are going to be involved. Those children who are assisting may become part-owners of their parents' property as part of the agreement.

There are various family arrangements that could apply but some children may already own their own home. Other children may already be living with or intend moving in with their parents. All of these circumstances will need to be considered.

Contact your parents' lender

Presuming the transaction will be funded by a loan, rather than cash from the children to the parents, the next step is for the parents to contact their lender (usually their bank) to discuss its requirements. The lender may require the current lending for the parents to be discharged and an updated finance application in the name of all of the joint owners with new loan documents. Often, the lender requires the added security and details of a child's income for the application.

See your lawyer

To prevent any future difficulties and dissention in the family, it is important we arrange suitable documents such as a property sharing agreement. This records each party's responsibility for who and how the family will use the property, loan repayments, maintenance of the property, rates, insurance and a sale process for the property should there be a breakdown in the parties' relationship or if one of the parties wish to sell.

A property sharing agreement will be the guiding document for the arrangement. As well as ensuring you have a will in place, the agreement can cover what will happen to the parent's share of the property when they die. The last thing parents want is a falling out between their children.

Other things to consider

Other considerations for both parents and children include:

+ The children's ability to use KiwiSaver funds in the future to purchase their own home
+ Current and future relationships of the children
+ Parents moving into a rest home and how subsidies could be affected
+ The alternative of a reverse mortgage, and
+ Review of wills and enduring powers of attorney.

Conclusion

With increases in interest rates and the rise in the cost of living, more retiring parents may face the difficulty of retaining their family home. Rather than the option of a sale, children may be able to assist with the retention of their parents' home and keeping past memories alive. +

Fineprint | ISSUE 90 Autumn 2023

Driving on a limited licence

Can be done, but strict conditions apply

Driving licences can be suspended for various reasons: excess demerit points, careless or dangerous driving, drink driving, causing an accident and many others.

Generally, if you commit one of the above offences your licence could get suspended for a period of three to 12 months, depending on the severity of the offence.

The question then becomes, what if your livelihood depends on you having a driving licence? Under the Land Transport Act 1998, the law allows you to apply for a limited licence.

Application process

To obtain a limited licence, you must satisfy the court of two factors.

First, you must show that you would suffer extreme hardship; a self-employed person who depends on driving to work is an example. If you cannot drive to work, you cannot earn an income, pay your mortgage, bills and other day-to-day essentials.

Telling the court that not having a licence would be an inconvenience to you is not enough. The devil is in the detail. Evidence must be provided of your annual income; weekly expenses; that taxi fares are unaffordable; why using public transport is not feasible; you (or your business) cannot afford to employ a driver for the suspension period; your friends or family members cannot drive you during the suspension period and so on. Consulting with us will make this process easier.

Second, you must illustrate that the people around you (your family or employer) would suffer undue hardship if you are unable to drive.

'Hardship' (whether extreme or undue) is not limited to financial hardship. The court may grant a limited licence if evidence suggests that a driver may suffer emotional hardship in not being able to drive. For example, an elderly man, who lives alone and volunteers daily at his local sports club (cleans up the sports field, mows the grass, etc) may suffer mental and emotional hardship if he cannot go about his daily routine due to his suspension.

Restrictions of a limited licence

Keep in mind that ultimately the court still seeks to punish drivers who commit traffic offences. A limited licence means just that; it restricts what you can and cannot do during your suspension. You may only drive within a certain area, during a specific time period during the day and may not exceed a specific number of hours per day. Using the elderly man example above, he would only be allowed to drive within an area that includes his home, supermarket and his local sports club between X and Y hours and on Z days. Suspended drivers with limited licenses are supplied with a logbook to record this information.

If you commit a further driving offence or breach the terms of your limited licence during your suspension period, your limited licence will be terminated and your initial suspension will fall back into place.

Every situation is different

Every case has its unique circumstances and each application should be tailored to its facts and merits. If you would like to know more about limited licences and how to apply, please don't hesitate to contact us. +

NZ LAW is a national network of quality, successful and innovative law firms. It has 56 member firms in more than 70 locations. Membership of NZ LAW enables member firms to access one another's skills, information and ideas whilst maintaining client confidentiality.

Members of NZ LAW Limited

- **Allen Needham & Co Ltd** Morrinsville
- **Argyle Welsh Finnigan Limited** Ashburton & Rolleston
- **Aspiring Law** Wanaka, Arrowtown, Christchurch & Dunedin
- **Attewell Clews & Cooper** Whakatane & Rotorua
- **Barden & Co** Waihi
- **Berry & Co** Oamaru, Queenstown & Invercargill
- **BMC Lawyers** Paraparaumu & Porirua
- **Boyle Mathieson** Henderson, Auckland
- **Connect Legal Taranaki** New Plymouth
- **Corcoran French** Christchurch, Kaiapoi & Greymouth
- **Cruickshank Pryde** Invercargill, Queenstown & Gore
- **CS Law** Levin
- **Daniel Overton & Goulding** Onehunga, Auckland & Pukekohe
- **DG Law Ltd** Mt Wellington, Auckland
- **DK Law** Kingsland, Auckland
- **Dorrington Poole** Dannevirke
- **Downie Stewart** Dunedin
- **Edmonds Judd** Te Awamutu & Ōtorohanga
- **Edmonds Marshall** Matamata
- **Gawith Burridge** Masterton & Martinborough
- **Gifford Devine** Hastings, Havelock North & Waipawa
- **Gillespie Young Watson** Lower Hutt, Upper Hutt & Wellington
- **Greg Kelly Law Ltd** Wellington
- **Horsley Christie** Whanganui
- **Innes Dean Lawyers** Palmerston North & Pahiatua
- **JR Legal** Tauranga
- **James & Wells Intellectual Property** Hamilton, Auckland, Tauranga, Christchurch, Brisbane & Melbourne
- **Kaimai Law Bethlehem** Tauranga
- **Knapps Lawyers** Nelson, Richmond & Motueka
- **Lamb Bain Laubscher** Te Kūiti
- **Law North Limited** Kerikeri
- **Le Pine & Co** Taupō, Tūrangi & Putāruru
- **Lowndes Jordan** Auckland
- **Mactodd** Queenstown, Wanaka & Cromwell
- **Malley & Co** Christchurch
- **Mike Lucas Law** Manurewa, Auckland
- **Norris Ward McKinnon** Hamilton
- **David O'Neill, Barrister** Hamilton
- **Parry Field Lawyers** Riccarton, Christchurch, Rolleston & Hokitika
- **PJ Magee Lawyer** Whangārei
- **Price Baker Berridge** Henderson, Auckland
- **Purnell Lawyers** Thames, Coromandel & Whitianga
- **Rejthar Stuart Law** Tauranga
- **Rennie Cox** Auckland & Whitianga
- **RSM Law Limited** Timaru & Waimate
- **Sainsbury Logan & Williams** Napier
- **Sandford Wall** Rotorua
- **Sheddan Pritchard Law** Gore
- **Simpson Western** Takapuna, Auckland
- **Simpson Western North** Silverdale
- **Sumpter Moore** Balclutha & Milton
- **Thomson Wilson** Whangārei
- **Wain & Naysmith Limited** Blenheim
- **Welsh McCarthy** Hāwera
- **Wilkinson Rodgers** Dunedin
- **Woodward Chrisp** Gisborne & Wairoa

Postscript

Minimum wage increased on 1 April 2023

The adult minimum wage increased to $22.70/hour on 1 April 2023.

This is a significant increase, up from $21.20, and aligns with the 7.2% rate of CPI inflation in the year to 31 December 2022.

Also increased on 1 April were the training and starting-out minimum wage rates that are increased to $18.16/hour; this is 80% of the adult minimum wage.

For an employee who works 40 hours/week, the minimum wage rise to $22.70/hour means they earn an additional $60 each week before tax.

The government says it will review the minimum wage rate later this year.

Renew your employees' pay rates

If you haven't done so already, you should review your employees' pay rates to ensure you are compliant with the new minimum wages. For employees on a wage this is a straightforward process as you only need to ensure that their wages are at least $22.70/hour. This is not the case for all employees, however, as it includes those on a salary whose current pay rates may be sufficient when they work overtime.

During busy times, salaried employees often work hours over and above their regular employment agreement hours. You should check the pay of these employees every pay period to ensure their pay divided by the actual hours they worked meets minimum wage requirements. If not, your employee's pay must be topped up to at least the minimum wage, regardless of whether any term in their employment agreement says otherwise.

Failing to keep accurate time records could lead to a penalty under the Employment Relations Act 2000 or Holidays Act 2003.

You should also take the opportunity to ensure your time recording systems are accurate.

Improving the sustainability of your supply chain

All businesses in New Zealand should be working towards making their supply chain more sustainable – we all have a responsibility to help save the planet.

The Ministry of Business, Innovation & Employment states that about 70% of your business's sustainability impact comes from your supply chain – so this is a good place to start.

Launched in February 2023, Docket provides a free (and short) online assessment, and practical tools and guides for you to see how well your business is caring for the environment and your team. Docket was created by the Sustainable Business Network in partnership with the government and the private sector.

To find out more, go here: **https://sustainable.org.nz/docket/** +

Allen, Needham & Co. Ltd.

BARRISTERS, SOLICITORS AND NOTARY PUBLIC

DIRECTORS

Rod Needham LLB Notary Public
Grant Summerell BA LLB Dip Dairy Tech
Nicola Needham BA LLB

ASSOCIATE

Pawandeep Singh LLB, BMS

SOLICITOR

Kozett Guise LLB

REGISTERED LEGAL EXECUTIVES

Kristy Reid
Jennifer Coxon

LEGAL SECRETARIES

Sonya Van Vugt (Estates)
Pam Laird
Jackie Pirihi
Megan James
Carleen Adams

ACCOUNTS

Lesley Allen

ADMINISTRATION

Kelly Holmes (AML)
Jenny Gerrand (Deeds)
Karen Bartlett (Receptionist)

PRACTICE MANAGER

Maryanne Key

MORRINSVILLE OFFICE

52 Canada Street
P.O. Box 12, Morrinsville 3300
DX GA24001, E law@anco.co.nz
T 07 889 5062, F 07 889 5369

WEBSITE

www.allen-needham.co.nz

NZ LAW Stronger Together.

Fineprint is printed on Advance Laser Offset, a paper produced using farmed eucalyptus trees and pulp from Well Managed Forests – manufactured in an ISO14001 and ISO9001 accredited mill.