Exercise Association of New Zealand

Representing the Exercise & Fitness Industry

Common Industry Issues Resources

REPs NZ Register of Exercise Professionals

FitEX The Science & Business of Fitness & Exercise

HAUORA Yoga Conference

New Zealand Exercise Industry Awards

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Introduction

This resource contains various information resources ExerciseNZ has prepared over the years on topics related to running health & fitness centres.

Further printed copies of the document entitled ***Staff at Fitness Centres Pays in Two ways*** can be obtained from ExerciseNZ on request. These can be used as a part of corporate information packs sent to businesses in your area.

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Disclaimer

This information is in this resource pack is provided as a guideline to assist Exercise New Zealand members.

While all information is checked before publication, the resources may contain errors or omissions. Given the wide variety of businesses that operate in the fitness/exercise industry, it is not possible to ensure all possible scenarios are covered. Specifically, there may be scenarios relevant to your situation which the enclosed resources do not cover.

The enclosed resources are not a replacement for independent professional advice. We recommend on all matters to obtain independent specialist advice on any matter that in relevant to your business. This may include legal advice, advice from a relevant broker (for insurance) or other professional services.

Where ExerciseNZ has used external parties to help produce information, these parties also are subject to this disclaimer.

Further Resources

The following additional resources are available to Exercise New Zealand members. Many of these resources are free or provided at a highly subsidised price.

Free resources

The following resources are available free to all ExerciseNZ members:

Best Practice for Membership Agreements

A detailed analysis of the best practices for construction and use of a membership agreement and supporting documents for fitness centres. This document is distributed in hard copy, with sample copies of a membership agreement and various freezing and transferring policies available electronically in word format.

Employment Information Resource

Information on common issues for all employers, written for the fitness industry. Includes employment advise, health & safety, redundancy, dismissal, and discrimination / harassment.

Sunbed Compliance Kit

New Zealand has a voluntary standard for operation of Solaria for Cosmetic Purposes that sets out a range of requirements for sunbed operation. The standard is set by Standards New Zealand/Standards Australia. There is no statutory requirement to follow it, however in New Zealand, OSH takes into consideration voluntary standards. This kit contains information on the standard as well as sample signage and forms required to meet it. All signs are in word format, so easily customisable.

Free to Gold & The Works Members / small charge to others

The following resources are available free to all Gold Members of ExerciseNZ. To enquire more about the benefits of gold membership, please feel free to contact ExerciseNZ on 0800-66-88-11.

Minors (under 18) Forms **$195 / FREE***

These forms are designed for those aged under 18 (i.e. legal minors) when entering into a membership agreement. There are two separate forms – one for those aged under 16, and one for those aged 16/17. Full instructions for use is included.

Group Exercise Contract **$295 / FREE*** (also see note 1)

A sample contract between an exercise facility and group exercise instructors.
Note: This is a contractual relationship not an employment agreement.
Full instructions for use are included with this agreement, which is in word format, so customisable.

Personal Training Contract **$295 / FREE*** (also see note 1)

A sample contract between an exercise facility and personal trainers using a weekly rental contract arrangement.
Full instructions for use are included with this agreement, which is in word format, so customisable.

Annual ExerciseNZ Survey **$295 non participants / Free****

The National Industry survey compiled by ExerciseNZ, includes data on average pay rates, numbers of members per square Meter, Average number of members per club, KPI information and information on equipment/services at clubs.

ExerciseNZ Survey Summaries **$199 / Free*** (see note 2 also)

Summarised results for Auckland, Wellington, Christchurch and Non Metro areas.
Key information from data supplied by other clubs in your category (Metro/Non Metro)

Retention Resources

The following resources on membership retention are available to ExerciseNZ members to purchase:

2001 FIA Research Parts 1 to 6 **$99**

In 2001 the Fitness Industry Association (FIA) in the UK commissioned the first comprehensive research into retention in the world. This six part series documents the research, analysis and findings. This research sold in the UK for $600.

2005 FIA Research Update **$199**

In 2005 the FIA further researched retention, with more focus on qualitative data analysis. This research involved interviewing members of facilities and analysing the pricing, induction strategies, and customer service experienced by members.

ExerciseNZ 2006 Research on Retention in New Zealand **$995 / Free****

In 2006 ExerciseNZ released the first ever quantitative and qualitative research into retention in New Zealand. The research involved over 50 clubs, and 60,000 members, and includes details analysis of retention in New Zealand, including identifying demographic groups that have higher and lower retention rates, and also makes recommendations about what steps clubs can take to improve retention.

IHRSA document "Why Members Quit" **$99 / FREE***

A booklet with detailed analysis of why members leave clubs. Data was combined by the International Health Racquet Sports-club Association (IHRSA).

Notes

* = Free to gold members *** = Free to those who took part*

Note 1: PT and Group Exercise Contracts available together for $495+gst (or $295 each).

Note 2: Only participants can request this item on its own, if you did not participate in the survey both the annual survey and the summary can be obtained for the discounted price of $450

All prices exclude GST. All electronic documents are in pdf format unless otherwise noted

Further free web resources

The ExerciseNZ members' only area of the web site contains access to an employment agreement builder.

Access to the members' only area of the ExerciseNZ web site requires a member log in and password. For more details email info@exercisenz.org.nz

Childcare

Background

The area of childcare regulations within exercise facilities has been an ongoing issue for our industry for many years. ExerciseNZ and NZRA (the NZ Recreation Association) have been actively pursuing this with the Ministry of Education (MoE). After the closure of several exercise facility's childcare in late 2007, and an extensive lobbying campaign by ExerciseNZ and NZRA , there was significant media coverage on the issue. As a result the MoE agreed to review the regulations with a view to introducing a special license to meet our industry's needs. However the new regulations ended up being just as problematic for facilities.

After several further years of negotiations, in 2010 the Government finally changed the law, and granted **an exemption to fitness centres/recreation centres** from the onerous red-tape around getting a licence. This exception only applies to childcare offered where the parent/caregiver remains on site (i.e. in the building).

There is still the options to get a full licence for a childcare operation inside a fitness centres, and in such cases the childcare is treated the same as any other operation, with the same requirements for licenced/qualified teachers, along with the dozens of other steps and processes required. This is quite an onerous process, and not recommended for the majority of fitness facilities. For more information on this process, contact your local office of the Ministry of Education.

Exempt facilities

A facility that meets the following criteria is NOT required to obtain a licence to operate from the Ministry of Education:

- no child attends for more than two hours on any day
- a parent or caregiver is in close proximity and able to be easily contacted and to resume responsibility for their child at short notice.

There is also a requirement for any person who supervises children to be policed checked. Employers may choose to do this themselves (ideally prior to employment) or through ExerciseNZ (this service is provided free by ExerciseNZ to members, and is often much quicker than applying directly through the Police).

Finally, the licence exemption is only exempting Ministry of Education licence requirements. It does NOT exempt rules or regulations of any other agency such as Occupational Safety and Health (OSH) or Ministry of Health. So the area children use, as well as the facility in general still needs to meet all other obligations required by law.

What does this mean for facilities?

If you want to offer childcare of any sort, ensure you either meet the criteria for exemption, or obtain a licence.

The Disputes Tribunal

This article is designed to give you a general overview of the role of the Disputes Tribunal and how it may impact upon the operations of fitness centres/health clubs.

What is the Disputes Tribunal?

The Disputes Tribunal (D/T) is a low cost and informal means of resolving smaller disputes where the value of the dispute is up to $7,500 or up to $12,000 with the agreement of both parties. A decision of the D/T has the same power as a decision of the District Court. There are no lawyers or judges involved (or in fact allowed) in a D/T hearing. A Referee looks at the substantive issues involved, and the fairness and reasonableness of each parties claim. ***The Referee is not bound strictly by law and will look at the merits of each party's claim and will make a decision based on the legal principle of "balance of probabilities", along with what is fair and reasonable***. What this means is that the basis of judgement by the Referee is more liberal and based on this the Referee will determine, based on probability, what is the true and correct position of the events. Unlike most legal decisions, those made by the D/T cannot be relied upon as a precedent for future hearings due to the fact that the decision has not been based purely on the law so the outcome could vary from hearing to hearing.

How it works

Some examples of common uses of the disputes tribunal for fitness/exercise facilities:

(1) A member of your club is not satisfied with your services and files at the D/T for either a refund of fees or a "denial of liability claim". This is a claim requesting the balance of a contract term be cancelled.

(2) A member of your club claims defence from completing their contract because they were a "minor" at the time of joining. A Minor is a person under the age of 18 at the time of signing a contract. Refer to the Minors Contracts Act for further details. Copies of all New Zealand legislation can be viewed at the New Zealand Government website at –
http://rangi.knowledge-basket.co.nz/gpacts/actlists.html

(3) You have used the services of a tradesperson at your club to paint your premises and the tradesperson has completed a substandard job and is still demanding full payment.

(4) A member of your club refuses to pay the balance of your contract because you don't have a spa pool, yet you never had a spa pool at the time of joining and you never made any promises or undertakings to provide any pool. You could file a case at the D/T to have your membership contract enforced if the member has stopped making their payments.

How much does it cost?

The D/T has a schedule of fees based on the value of the claim. The 2008 fees are:

Claims under $1,000	$ 30
Claims from $1,000 to $4,999	$ 50
Claims $5,000 to $12,000*	$100

* If a claim is above $7,500 written approval is required of the other party (or limit the claim to $7,500).

How are decisions made?

A Disputes Tribunal application is filed at the local District Court will include a brief summary of the claim and the date and location of the hearing. If you are unable to attend the hearing on that date, you should contact the court immediately, as the D/T Referee will make a decision as to whether the date can be changed based on your reasons for being unable to attend. If you simply do not show up, the hearing will proceed regardless in your absence and a decision made without hearing your side of the claim.

A hearing is held at the local Disputes Tribunal offices where each party will present its evidence to the Referee. The hearing is very relaxed and each party can present its evidence in any form it so wishes. The party who filed the claim (The Applicant) presents their case first. The party being made claim against (The Respondent) then is given the opportunity to present their side of the case.

Following the presentation by each side there is a discussion and the Referee may ask questions of either side.

If you bring a witness they may present evidence but they will NOT be able to stay in the hearing room for the duration of the hearing (i.e. they are only brought in as needed). A person may bring a support person, but this person cannot speak at all during the hearing. **An individual cannot be a support person and a witness at the same hearing.**

Critical points

The following is a list of some critical points to improve your chances of being successful at a Disputes Tribunal hearing:

(1) **Arrive Early**: Ensure you allow yourself plenty of time to arrive at the hearing. If you are delayed or do not attend, the hearing will proceed in your absence and a decision will be made without any of your evidence being presented. The Referee will only allow an adjournment in exceptional circumstances.

(2) **Contracts, Documents and Copies of Legislation:** Always take the original copy of any contract/membership agreement to the hearing together with any other evidence which support your case. All evidence must be presented to the Referee at the time of the hearing. In other words if you forget your documents on the day, you cannot later ask that these be considered in the decision. Pieces of evidence may also include copies of correspondence, your file notes, witnesses that can provide a verbal statement at the hearing to support your claim, written statements from witnesses who are unable to attend the hearing on the day, copies of legislation that support your case e.g Fair Trading Act, Consumer Guarantees Act, Minors Contracts Act, copies of the Exercise New Zealand code of ethics.

(3) **Written Statement:** It is good practise to always prepare a written statement of your side of the case which you will read at the hearing. This ensures your summary of events is clearly expressed and you do not forget parts of your case. Often the other party will not be well prepared and will rely on verbally presenting their case without any structured notes. Ensure you take extra copies for the Referee and the other party which will speed up the process as the Referee will not have to take as many notes.

(4) **Stay Calm and Professional:** The Referee is likely to be swayed more in your favour if you remain calm and professional in the way you present yourself at the hearing. It is best to stay to the facts and not allow the hearing to become a 'slinging match'. You have to present yourself as someone professional who has good systems and procedures in place at your club. It will also go in your favour if you have documented records of all discussions with your members, which accurately reflect the conversations which have taken place. If the dispute involves a membership contract, it will be critical for you to show that the contract was clearly explained to the member before they signed. It is always good practise to provide your member with a copy of the contract signed at the time of joining for their future reference. The clearer the contract terms and conditions, the better the chance you will have of success at the hearing. The Referee will be trying to ascertain any matters in doubt between the parties, so clearness and accuracy of your contract information is critical.

(5) **Be Prepared to Negotiate and Compromise:** Be prepared to be open minded in resolving the dispute at the hearing. Although your position may be perfectly clear and correct in your own mind, there is always the risk that the Referee will consider the merits of your case differently and make an award not in your favour. Once a decision is made there is very little scope for appeal, other than if you believe the Referee did not conduct the hearing in a procedurally correct manner or did not consider an act/legislation you presented as evidence. You cannot appeal because you simply did not like the Referees decision, or even if the Referee made an error in law. The Referee will give both parties the opportunity to reach an agreement between them. In most cases, it is highly beneficial to reach an agreement at this point rather than have the Referee make a decision.

For example, in the case of a member wishing to cancel the balance of a contract, based on the evidence presented by the member, you should consider whether some consolation is made in the interest of reaching an agreement, before the Referee makes the decision for both parties. There are many goodwill gestures you can make if you feel this is appropriate, such as a reduction in the remaining term of the contract, allowing the contract to be restarted from now so the member has not been charged for time when not attending during the period of this dispute, freezing the membership free of charge for a period until they have another person to transfer their membership. The list of ideas is endless and will be based on how weak or strong you feel your chance of success will be based on the evidence you have heard at the hearing. If you do not wish to make any counter offer or goodwill gesture, then you are perfectly entitled to allow the Referee to make a decision which will be binding on both parties to the hearing.

If the Referee makes a decision which does not go in your favour, you will now be bound to this decision. It should be noted that the Referee would not take into consideration any offers put on the table during the hearing between the parties when the Referee makes their decision. The Referees decision will be based totally on the way the Referee viewed the evidence and statements of each party.

When will the Referee make the decision?

Subject to the level of detail of the hearing, and the technical nature of the evidence, in many cases the Referee will make a decision at the end of the hearing. In other cases, the decision is posted to the parties usually within a week of the hearing outlining the decision and the reasons for it. Where a payment is due as part of the decision, the payment is usually to be made within 28 days. Once the written decision is received that is the end of matters. The decisions of D/T's tend to differ in each region around the country so it is not possible to form any hard rules as to the way a D/T makes decisions. Each D/T will have its own 'culture' as to how it views issues and dispute resolution in its own part of the country.

How can Exercise New Zealand help?

If you wish to take someone to the D/T or are being taken to the D/T, feel free to contact ExerciseNZ for advice on how to proceed. In addition we can provide members with letters confirming "standard practice" in the industry. This is useful in circumstances such as when a member is wanting to cancel because they are moving out of town - we can confirm that almost all centres in NZ do not terminate contracts for such reasons, showing that you are not unreasonable.

Further information on Disputes Tribunal

The Disputes Tribunal has its own web site, which provides general information on the process and how to complete the application form. http://www.courts.govt.nz/tribunals/disputes_tribunals.html.

This article has been prepared based on experience of using the Disputes Tribunal on many occasions as both the applicant and respondent. This article is provided for general information purposes only and is not intended to replace specialist legal advice.

Broadcasting on Radio Frequencies

e.g. re-broadcasting TV audio in cardio areas, and use of aerobics mics

Background

In New Zealand there are regulations that control broadcasting signals on any radio frequency. These regulations also cover frequencies commonly used for low-powered transmissions, such as those associated with cordless phones, wireless microphones and all other cordless/wireless devices (such as computer wireless networks). **For fitness centres, the two areas that this would most affect are re-broadcasting of TVs in cardio areas, and group exercise wireless microphones.**

The regulations themselves are very detailed and specific about what is, and what is not, permitted. They also include clear rules of permitted uses, and power output for various frequency ranges. This document is designed to give an overview of these regulations, focusing on the two areas that would most commonly be in place in a Fitness Centre.

It's important to be aware that using frequencies other than those listed here, or using power outputs larger than those permissible is very likely to be breaching the regulations governing such transmissions, and could result in prosecution and/or large fines. The regulations are overseen by the Radio Spectrum Management Group, part of the Ministry of Economic Development.

The regulations

FM Transmitters

Common Use: Re-broadcasting TV audio in cardio areas

What is permitted:

1. The frequency range you should be using for re-broadcasting TV audio is 107 – 108 MHz.
2. If you use this frequency range, you may transmit using a power of up to 25mW (0.025 of a Watt).
3. You should be able to verify the power output from your transmitter by consulting the manufacturers technical specification information on the transmitter. As a guideline, your broadcast is expected to remain 'in-house'. Excessive range beyond this may indicate that your power output is exceeding 25mW.

Useful Tip: Placing the aerial clear of any physical barriers, especially metallic ones, will help in maximising the effective range of your broadcast.

What is not permitted:

1. *Transmissions on the frequency range 88-107 MHz (the majority of the International FM Broadcast band) is limited to 0.0002mW, and is far too low a power level to be used in a commercial setting (so don't use this frequency range).*
2. *Exceed 25mW on the 107-108 MHz range*

Notes

(1) There are other general usage licences on specific FM frequency ranges, but they are only permissible for "Radio Station" like broadcasts, and require several extra steps to be taken, such as broadcasting clear identification of your business every three hours. For these reasons, these licences would generally be unsuitable for use in Fitness Centres.

(2) No fee is payable to Radio Spectrum Management to operate a radio licences under the provisions outlined above, but both PPNZ and APRA require you to pay for an annual license to broadcast music (or anything with music in it, such as TV stations) on a radio frequency.

Wireless Microphones Transmissions

Common Use: Wireless microphones used in group exercise studios.

What is permitted:

The frequency ranges that can be used for this are:

174 – 230 MHz

646 – 806 MHz

The power out allowed is up to 10mW (0.01of a Watt)

Based on our observation, in most cases, the power output on wireless microphones will be well under 10mW, but it's possible the frequency that your microphone(s) use may be outside these ranges (and therefore breaking the regulations).

Note: The frequency ranges above cover frequencies that are used by commercial TV stations. In all cases TV stations have priority, so if a microphone's use interferes with a TV station's reception, you will be required to change the frequency the microphone uses. In such cases it is also likely that you would get interference on the microphone from the TV station, so you will generally know if you are using a TV station's frequency very quickly.

Wireless Internet / Cordless Phones

The frequencies for wireless internet and cordless phones is not regulated. While these items can interfere with each other, standard power output items purchased in New Zealand do not require any license.

Summary – what to do from here

(1) Check to see you only broadcast any audio from TVs etc using the 107-108MHz range, if not get this changed.

(2) Check to see the power output from any broadcast for TVs etc is under 25mW (0.025 of a Watt). If not, get it changed.

(3) Check to see all your aerobics mics are within the permitted ranges (if they are not then stop using them until they are changed). If they are within the permitted frequencies, then it is unlikely you will need to do anything.

For further information

Visit the Ministry of Economic Development's web site on this topic
www.med.govt.nz/rsm/licensing/guls.html
The two most applicable areas on this page are the page on **Short Range Devices** and the two pages on **Radio Microphones**. Both of these can be found under the first heading **Short Range Devices**. If, after having looked at the Ministry's web site, you still have questions, then please contact Radio Spectrum Management Group's Call Centre on toll free 0508 776 4636 for further assistance.

Important: This document has been produced by ExerciseNZ to give an overview of the regulations relating to broadcasting using a radio frequency, but not a replacement for the regulations. Given the diversity of fitness centres it is not possible to cover every possible situation, and this document focuses on the more common cases of such broadcasting. In all cases you should ensure you keep yourself informed of such regulations, and review the full details available from the Ministry of Economic Development. You should also ensure any suppliers of transmitters (FM or microphone) are made aware of these regulations, and that they follow them.

OSH and Industry Standards

Overview

Like any workplace, health & fitness centres, PT Studios and exercise facilities in general need to ensure they follow all health & safety law, and specifically have a safe workplace for both employees, and visitors (i.e. the public). While much of health & safety law is generic to all workplaces, there are several areas that are quite specific to the exercise industry, and are outlined below.

The Occupational Health & Safety (OSH) is a division of the Department of Labour (DoL) and has responsibility for providing information on, and enforcement of, health & safety standards in the workplace. OSH rules work on many levels including:

(1) Items specifically itemised in a relevant law (eg HSE Act 1992) – these are strictly applied
(2) Regulations made under the law – these are strictly applied
(3) Approved Codes of Practice – the courts accept these as best practice
(4) Industry Practices – the courts take regard to these as best practice

Whenever OSH investigates a workplace incident/accident they will consider all of the above items. As there are no industry specific approved codes of practice for the exercise industry, the final level (that of industry practice) may have a significant bearing on any investigation OSH. The most significant of these are outlined on the following pages.

OSH & The New Zealand Register of Exercise Professionals

The New Zealand Register of Exercise Professionals (REPs) was set up in 2001 as a partnership between Sfrito (the Sport Fitness and Recreation ITO) and ExerciseNZ (the industry association). REPs has now progressed to be a standalone non profit company that is the New Zealand representative on the International Confederation of Registers for Exercise Professionals (ICREPs).

REPs administers the standards for exercise professionals to give out exercise advice in New Zealand, as well as registering facilities and academic institutions. REPs in effect acts as an ***independent quality check*** for employers, members of the public, and other bodies (such as OSH). It is important to note that REPs is the industry's own registration body – and the standards REPs uses are those that have been set by the fitness industry.

ExerciseNZ strongly recommends that all exercise facilities in New Zealand ONLY use the services of registered exercise professionals when giving exercise advice (gym instructors / PTs etc) or demonstration (e.g. group exercise).

If OSH was investigating an accident in a workplace they will take regard of any industry practices. As REPs has a large number of exercise facilities (around 125) and exercise professionals (almost 2,000) registered with it, REPs standards would be regarded as an accepted industry practice. A workplace would need to demonstrate why it didn't follow this industry practice.

Should an accident occur in an exercise facility which had staff that were not registered with REPs (i.e. they have not been independently verified as meeting the industry standards) then OSH could view this as one of the "causes" of the accident. It should be noted that having a staff member "qualified" is not sufficient, as qualification is one off and does not show currency nor does it show that the particular qualification covered was required to perform the job the person was undertaking. REPs registration does show currency (as it is annually renewed) and also is given at a specific level, including what the person can and can not to (i.e. a scope), giving an employer (and OSH) clear guidelines as to their abilities. REPs also has requirements for ongoing education to ensure exercise professionals kept their knowledge up to date.

For full information on how to get a facility and/or staff/contractors registered with REPs, contact REPs via info@reps.org.nz or 0800-55-44-99.

Children in Exercise Facilities (those under 18)

There are guidelines for children (those under 18) in exercise facilities. The guidelines contain specific reference to the standards needed for a person to prescribe or demonstrate exercise to a person under the age of 16, along with specific activities suitable for various age groups, and recommended supervision ratios.

The guidelines would be regarded by OSH as an industry practice. ExerciseNZ recommends that these guidelines are followed by all exercise facilities that have members or users under 18 years of age.
To obtain a copy of these guidelines visit www.ExerciseNZ.org.nz or contact ExerciseNZ.

OSH & Music Volume in Group Exercise Classes

This falls into a specific code of practice from OSH. It is the responsibility of every workplace to ensure their employees, and also visitors to the facility are not put at risk by any loud sounds (which include music).

OSH has many publications and guidelines that assist in managing noise in the workplace, and these can be access from the OSH web site – www.osh.govt.nz and using the search function at the top of the page.

Measuring Volume - Decibels

Decibels are the measure of volume. It is important to understand that the decibel scale is not linear, and a three decibel increase means a 100% increase (doubling) of volume. So 88 decibels is twice as loud as 85 decibels, conversely 82 Decibels is half as loud as 85.

The specific guidelines for music volume are as follows:

- Peak noise must ever exceed 140 decibels, while it is highly unlikely that this would be the case in a fitness/exercise facility, one should be aware of this number.
- Background noise over an eight hour period must not exceed 85 decibels. So background noise (such as music) for persons working an 8 hour shift should not exceed 85 decibels on average.
- For durations or less than eight hours, the decibel rating should be increased by three (i.e. double in volume) and the time halved. So for four hours duration the maximum exposure is 88 decibels. For two hours duration 91 Decibels, and one hour (a typical group exercise class): 94 decibels.
- For group exercise classes, it is likely that some staff will teach more than one class in a day (rare, but does happen) so the 91 decibels may be appropriate.

Testing

Decibel meters are relatively cheap to purchase these days (around $250). Once NZ supplier of these is Simpower, who may be contacted on 0800 746-769 (Note: ExerciseNZ has no association with Simpower). TradeMe also has a number of units for sale, but their quality is unknown. Commercial decibel meters can be hired, but often cost several hundred dollars a week for an industrial quality meter, so purchasing one may be more cost effective.

Readings should be taken around the room in various places (e.g. instructor stage, right next to the speakers, at the back of the room etc) and the maximum level recorded. This maximum volume should be set in such a way that it never exceeds 94 decibels on average for the class. Instructors should be aware of the areas that have the highest volume so they can advise members to avoid this is they prefer a quieter class, and also so that the instructor can do a quick check before a class using that point as a reference.

The challenge in doing such testing is that the actual music volume for a class will vary depending on which music sources (CD, iPod etc) is used, along with the actual CD/track (as this does vary considerably). For this reason it is advisable to do regular checks so that instructors and other staff get a "feel" for what 94 decibels is like.

Our Advice

We recommend undertaking regular volume checks of your facilities and using a decibel meter . This should be completed for all areas of the club, but especially group exercise rooms. Amplifiers should either be limited to they can not exceed the guidelines above, or at the very least have various marks put on the volume control to ensure those using it are aware of the correct level.

The speakers should be set up in such a away that the peak music volume occurs away from the instructor and/or other staff. This is because it is likely they will be exposure to any music more frequently. Instructors should also be aware of where the loudest and quietest parts of the room are, so they can suggest to participants where they can get lower volume music, and also do self checks before each class.

Best Practice: Some facilities have systems in group exercise rooms that measure music volume and warn the instructor when it goes above a certain volume via flight flights or similar system. Also many facilities offer ear plugs for persons who wish to take part in classes but have more sensitive ears (or just prefer a lower volume) – we believe this is both good practice form a health & safety perspective, and also offers customers the choice of how loud they want music by them self limiting it.

Policing

Music volume is policed by both OSH (as a health & safety issue) and local councils (as a nose control issue). Both have significant powers of both action and prosecution.

It should be noted that OSH and local councils view noise from different perspectives (one health & safety, one from a announce point of view), and as a result use different criteria. Following the rules of one may not meet the requirements of the other.

Advice on Minors

(Those under 18 years of age)

*This article covers issues to do with membership agreements with those under the age of 18. We recommend you also refer to the recourses **Children in Exercise Facilities** for a comprehensive document covering exercise guidelines, supervision ratios and other important considerations for those under 18.*

Prima facie, any agreement (or contract) with an individual aged under 18 years of age is unenforceable. However, if a court (Disputes Tribunal) finds that the contract was both fair and reasonable, then it can make an order that the agreement be enforced.

Section six of the Minors' Contracts Act states that any agreements with persons under the age of 18 are, in the first instance, unenforceable. It then goes on to state the circumstances that such agreements may be considered enforceable by a court. One of the key principals of this act is *fairness and reasonableness* of the agreement, and this must be proven by the fitness centre (i.e. it is up to the fitness centre to prove this is the case).

This means unlike regular agreements, which are by default enforceable (i.e. they have to be proven illegal or in some other way unenforceable for the other party to get out of their obligations) agreements with minors are only regarded as enforceable if a court has reviewed the agreement and says that it is. In almost all such cases the relevant court is the Disputes Tribunal, and below is a summary of the experience fitness centres have had on this topic, along with our advice.

It should be stressed that this is one area where it is extremely important you ensure that your policies meet all the requirements listed here, as well as systems to ensure your policies are followed in all cases. The Disputes Tribunal will rarely enforce an agreement where one or more of the recommendations below are not followed, and even then may still find a unique reason not to enforce the agreement.

- Was the agreement fully explained at the time of joining and in doing so did the member FULLY understand the obligations (remember for many persons under 18, a fitness centre membership may be the first agreement of this type they have every signed)
- Does the minor have adequate income to meet their payments? (if they do not, then the contract will be unenforceable – this is very important)
- The age of the minor (see below that we do not recommend entering into ANY agreement with those under 16 unless it is guaranteed by someone 18 years of age or over)
- Was there a fair process of establishing if the minor could afford the membership payments (this is not normally something a fitness centres does with those aged 18 or over, so requires additional processes to ensure it happens)
- An opportunity is given to the minor to seek independent advice before signing any agreement

All of the above should be documented and be able to be proven. Remember the onus is on the facility to prove this for a court to uphold the membership agreement. Furthermore, depending on the age of the minor we recommend the following:

Those under 16 years of age

There are two basic options here:

- Only accept memberships that are pre-paid in advance (i.e. "lump sum). In such cases parental consent would still be advisable
- Have another person 18 or over guarantee the payments of the membership agreement

ExerciseNZ does not recommend that you enter into payment agreements with anyone under 16 without a guarantor.

Those aged 16 or 17

If a person is over 16, but under 18 (i.e. 16 or 17) agreements are possible, but once again the onus falls on the facility to prove the fairness and reasonableness of any agreement.

In this case, there are three options:

(1) have a guarantee by the another person (18 years of age or older) or
(2) accept memberships that are pre-paid in advance (i.e. "lump sum) or
(3) use an amendment to the membership agreement that gathers detailed additional information from the minor.

The amendment to the membership agreement should establish how the minor intends to pay for their membership, if their circumstances are likely to change in the future (i.e. their ability to pay), if they are living at home or not (a 17 year old in full time paid employment is far more likely to have the membership agreement upheld by the Disputes Tribunal than a 17 year old still at school who relies on an allowance from their parents to pay for the membership). Perhaps most importantly this amendment should clearly establish the minor's understanding of what they are signing. Our recommendation is to make sure this form is not simply signed at the bottom, but has a series of questions that the prospective member must complete that shows understanding of the main membership agreement, its length and general payment conditions.

Affordability matters

Unlike most other circumstances, in the case of a minor, the Minors Contract Act is very clear that if a minor can not afford to make the agreed payments then this is grounds for cancelling the agreement. This is unlike most situations where affordability and liability are seldom linked. It is highly advisable for the facility to ensure that the minor has both the ability to make the payment both now, and into the future (i.e. will their circumstances change). This means if a minor loses their job, and that was how they are paying for the membership, they are likely to be able to cancel. For this reason we also do not recommend entering into agreements with those under 18 for longer than 12 months.

ExerciseNZ is aware of a disputes tribunal ruling that suggested a 36 month contract was too long for a minor. While disputes Tribunal cases do not set legal precedents, it provides useful info.

ExerciseNZ has produced a guarantee form (essential for those under 16, recommended for those 16 & 17) and also a contract extension form (recommended in the case of 16 & 17 year olds). These forms are free to Gold members of ExerciseNZ, or available for purchase for only $195+ gst (for both forms). This can be ordered from the ExerciseNZ web site or call us on 0800-66-88-11.

Calculating Retention of Members

Most clubs are very aware of the need to focus on retention of members. However worldwide there are dozens of different methods of measuring retention. Rates of 10% to 90% for retention are often quoted by clubs, but as there are so many different methods used to calculate retention, often there is little ability to compare retention with other facilities without understanding how each number was first calculated.

Perhaps most importantly, if measuring retention in a facility and trying to measure the facility's performance over time, it is less important how it is measured, but more important that the same measure is used consistently. Just as a personal trainer may say to a client "Weigh yourself every day at the same time on the same set of scales" even when the scales are out by 2kg, as the ***change*** in weight is what is most important not the **actual** weight. Similarly the change in retention over time is often of more interest than what the actual number is. However there are significant benefits in not only being able to measure retention with the club, but also to other comparable facilities, or even the national average. For this reason using a universally accepted method provides much more value.

Definitions

Here are some definitions of terms used that relate to membership retention measures.

Retention: The percentage of members that are still at a club after a certain length of time. So a 60% retention after 12 months means that of 100 members at the start of the year, 60 are still members at the end of the year (and 40 are not).

Attrition is the inverse of retention. So using the above example, the club has a 40% attrition rate over 12 months.

Retention is often used over a 12 months period referring to what percentage of members stayed, where as attrition is often referred to as a monthly figure (i.e. what percentage of members are leaving each month). When calculating retention/attrition for the same period they will also add to 100 (if a percentage) or add to 1 (if a ratio).

> e.g 12 month retention is 45%, then 12 month attrition is 55% (100-45)
> Monthly attrition is 4%, then monthly retention is 96% (100-4)

It is extremely important to note that **both attrition and retention are over a period of time.** Therefore when comparing one retention or attrition rate with another it is important to ensure the time period is the same. A retention rate of 81% may sound quite high, however if this is over a 3 month period this may in fact be low, as losing 19% every 3 months means the 12 months retention rate is likely to be around 25%.
A shorter period of time will always result in a retention result that is equal to or higher than that for a longer period is using the same members.

Average Lifetime Value

It can be argued that **Average Lifetime value** is a more measure than retention. This is because Average Lifetime Value shows the actual (average) dollar value of each membership sold, and calculated based on how long a member actually stays (as opposed to retention that mealy measures what % of members stay or leave). Lifetime

value is calculated by taking the average length that a member stays at a facility multiplied by the average payment for the period.

Formulae for Average Lifetime Value

Average length of members stay x average cost per period (x adjustment if both are measured for diff time periods)

e.g. The average member stays 18 months and pays $17 per week then the average value is:
18 (months) x 17 (dollars per week) x 4.33 (weeks in a month) = **$1,325**

This formulae shows that the way to increase the value from a member can be to charge more and/or extend how long they stay. Using the same numbers, if average length of membership increased by only 6 weeks, the average value of a membership would increase to

19.5 (months) x 4.33 (weeks in a month) x 17 (dollars per week) = **$1,435**

If the club has 750 members then this 6 week increase in average length would result in an $82,500[1] increase in revenue.

The reason that lifetime value is such as useful measure is that it focuses on the key issue: What is the average value of the member to the facility and the key factors that affect it – how long someone stays, and how much they pay. While measuring retention/attrition is useful, the formulae itself doesn't give such a direct indication of how to improve it.

The challenge for calculating Lifetime Value is that the first piece of data (average length member stays) is often not simple to calculate

ExerciseNZ recommends to measure both retention AND average lifetime value.

[1] Calculated as ($1435-$1325) x 750

Retention / Attrition Formulas

A reminder that both retention and attrition are for a period. So it is correct to refer to a "12 month retention rate" or a "6 month retention rate" (and note that the six month retention rate will always be higher).

The two simplest and accurate options for measuring retention are:

Option 1: A simple retention formula

Example: A club has 2175 members at the start of the period, 550 new members join during the period, and the club ends up with 2500 members at the end of the period.

Formulae	**Numbers**
$\frac{\text{\# of members at the end of a period}}{\text{\# of members at the start + members joined}}$	$\frac{\text{2500 members}}{\text{2175 + 550}} \times 100 = 90.9\%$

Result: A retention rate of 90.9%. To convert to an attrition rate, 100 – 90.9 = 9.10%

Option 2: An attrition formulae used by IHRSA

Example: A club has 150 members at the start of a period, 30 new members join during the period, and the club ends up with 175 members at the end of the period .

Formulae	**Example**
$\frac{\text{\# at start of period- (\# at the end – sales for period)}}{\text{\# of members at the start}} \times 100$	$\frac{\text{150 - (175 – 30)}}{\text{150}} \times 100 = 3.3\%$

Result: An attrition rate of 3.33%, or or 96.7% (100-3.3 %) retention.

By comparison if the same numbers were used in option one, then the results would be 97.2% retention.

Note: While both examples are with made up data, in the real world results of anywhere near 90% or above retention are likely to be from short periods (such as a month or so). Annual retention rates vary from between 30% and 75% for the majority of facilities.

The differences between option 1 and option 2 are relatively subtle. They are measuring very similar things in a very similar way, just from two different perspectives. Option 1 works out "Of the members that could have been here at the end, how many are here" (so uses the end figure as the basis for comparison) where as Option 2 works out "of the members that were here at the start, how many have left" (so uses the start figure as the basis for comparison). The key difference between the two is that option one includes members that joined within the period where as option 2 does not. It is perhaps more accurate not to count them when calculating retention over a short term (say monthly), so option 2 may be more accurate. However, if measuring over a longer period, say 12 months, it's very possible that a member that joined 12 months could stay or leave, so option 1 could be regarded as having a more up to date figure.

A reminder again that either method can be used on any time frame, so attrition can be calculated over various periods. Whichever method is used, the key is to continue to use the same measure over time to enable comparison.

Insurance

Info Sheet Produced by Exercise New Zealand in conjunction with Abbott Insurance Brokers, Christchurch

So you arrived to your gym after being called by the fire service – your centre has burnt down and will be out of action for 3 months – ok so you have insurance for your chattels but do you have **ALL** the possible risks covered? **Read on and you may be surprised at the other potential losses.**

Insurance no longer simply insures you against fires and theft, but a whole range of possible liabilities

Over recent years we have seen significant change in the business environment that we work within, including the increased litigious exposures faced. In most instances insurance can be used as the vehicle to protect your business against these perceived and real risks.

Detailed below are the types of cover that must be considered within a comprehensive insurance programme:

Material Damage – protects business assets against accidental, sudden loss or damage e.g. Fire, Burglary, Earthquake. This is what some people incorrectly consider to be the only area requiring insurance cover.

Business Interruption – provides cover for reduction in turnover, or profit, following damage to the business assets or buildings. After a fire you may still be liable for payments of leases, wages and other expenses which must still be paid whether you are able to trade or not. Cover can also be arranged for temporary premises while your building is repaired and for additional advertising to let the public know when you will be back in business again. There is also likely to be issues with cancelling and refunding memberships and the resultant loss of income likely to arise.

Public Liability – covers the business for liabilities following third party personal injury or property damage arising from the operation of the business. For example, your building fire may also result in your neighbouring building being burnt down and the fire was a result of a negligent action by one of your employees.

Statutory Liability – covers the cost of a fine, and related defence costs, following an unintentional breach of an act of parliament. For example, Occupational Health and Safety following an accident at you premises, Fair Trading and Consumer Guarantees Act for Advertising and sales procedures. As further new legislation affects our industry, the risk of a potential fine or costs continues to climb and can be into the hundreds of thousands of dollars. Occupational Safety and Health will continue to be a major issue of the future and insuring this cost will be critical before a breach occurs.

Employers Liability – covers the business against civil liability following an employee suffering a workplace accident that is either not covered by ACC or when the employee does not feel fully compensated by ACC

Professional Indemnity – provides cover for a breach of professional duty resulting in a civil liability case being taken against the business. For example, a member may take an action following injury during the use of a programme developed by a personal trainer.

Directors & Officers Liability – protects the directors and officers of the company against personal liability following a failure of the directors, or officers, to act with reasonable skill and care. This policy can also be extended to cover Employment Disputes. The Companies Act places greater personal responsibilities and obligations on the Directors of companies.

Commercial Motor Vehicle – protects the vehicles against accidental sudden loss or damage or alternatively third party property damage or personal injury. Did you realise that if you use a vehicle for business use and it is only insured as a private motor vehicle, that an insurance company may refuse to pay out on any claim.

Fidelity Guarantee – covers a loss resulting from theft of money, or property, by employees of your club. Often employee theft is not detected until substantial sums of property or cash have been stolen.

Machinery Breakdown – provides cover for loss resulting from the breakdown of electric or mechanical motors. For example your club's fridge motor burns out (does not cover normal wear and tear).

Technology Liabilities – provides cover for loss resulting from the use of email or internet. An example would be passing on a virus, which results in system failure, when sending an email to a client, or allegation of breach of copyright when using a web page.

Brokers v Dealing direct

With business insurance policies, you have the option of either dealing directly with insurance companies yourself, or by dealing with an insurance broker who will contact several companies on your behalf to get the best policy, rates and coverage for your particular business. Using an insurance broker also has the advantage of being able to access insurance companies that only deal with brokers and do not deal directly with the public. Using a broker may not be more expensive, yet offers the advantage that the broker does the "running around" for you.

While Exercise New Zealand does not recommend any particular insurance broker, Scott Sheridan of Abbott Insurance Brokers Ltd Christchurch would welcome the opportunity to provide members of Exercise New Zealand Inc with a free analysis of their existing insurance policies including recommendations on areas where improvement may be required. Scott can be contacted on 03 366-7536 or mobile 021 366-100 anytime. If you are outside of the Christchurch area, Scott will be able to put you in contact with a broker in your area if necessary.

Corporate Wellness Program Resource

The following page contains an information sheet that may be useful for clubs to include in packs sent to businesses to encourage the uptake of a corporate membership or similar.

Copies of this page may also be obtained from ExerciseNZ (info@exercisenz.org.nz or 0800-66-88-11).

Copy the following page and use it as a part of a information you send to businesses showing then the value of their staff joining a fitness centre

Staff at Fitness Centres Pays in Two Ways

Benefits of Having a Corporate Wellness Programme

Xerox reports a Five to One return on its investment

Despite the prevalence and popularity of corporate wellness programs in America, documentation regarding their effectiveness has managed to remain a bit elusive. Now there is a growing body of evidence to support the fact that such programs are doing exactly what they're intended to do - reduce healthcare costs.

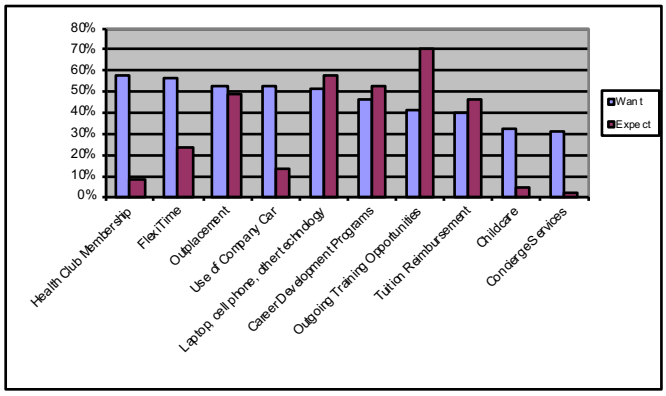
A new study conducted at a Xerox Corp. manufacturing complex in Rochester, New York, has found **that employees who participate in a corporate wellness program can significantly reduce the frequency, seriousness, and corresponding costs of work-related injuries**. Summarising the findings of the study, lead researcher Shirley Music, of the University of Michigan Health Management Research Centre, told the Associated Press, "Those people who are healthier have fewer injuries."

The study, published in the Journal of Occupational and Environmental Health, examined on-the-job injuries of over 3,000 Xerox workers between 1996 and 1999. Approximately one-third of the workers had taken part in the company's health-risk appraisal program, a key component of its wellness plan. Of those who took part in the appraisal, only 5.6% made workers compensation claims, compared with 8.9% of the non-participants. The former group also had a lower average cost per injury $6,506 versus $9,482 for non-participants.

"**Over a two-year period, we realised a 5:1 return on investment**," noted Deborah Napier, the health management director for Xerox and a co-author of the study. According to an estimate by the National Safety Council, in 1999, on-the-job injuries cost the American economy $125 billion, including $62 billion in lost wages and productivity and 19.9 billion in medical costs, or approximately three times as much as the cost of workers compensation insurance for that year (US Figures in $US).

Health Club Membership Most Desired Perk by Employees[2]

It's wonderful to be wanted: A survey conducted recently by Lee Hecht Harrison (LHH), the world's largest international placement firm, reveals that a health club membership is the perk that job seekers desire most. "Given a wish list of discretionary benefits, including use of a company car, concierge services, and tuition reimbursement, the greatest number of respondents (58%) indicate they'd like to have a health club membership." Reports Bernadette Kenny the CEO of LHH.



But, when asked what they actually expect to receive, just 8% of the respondents (1,058 outplaced managers) said they thought a membership might be in the offering. LHH, based in Woodcliff Lake, New Jersey, suggests that **employers can differentiate themselves and acquire top talent in a tighter labour market by offering benefits that job applicants want but don't expect.** "By the same token," adds Kenny, "companies should begin, or continue, to offer things, such as laptops, cell phones, and other technology that job seekers both want and expect".

Compiled by Exercise New Zealand, Source IHRSA[3]

IRD, Contractors and Employees

When is a contractor regarded as an employee by IRD or the courts?

Introduction

Over the years, many ExerciseNZ members have enquired about how to determine if a person is a contractor or an employee, and in particular when is a contractor regarded as an employee by the Inland Revenue Department (IRD) for the purposes of paying tax.

In most cases, determining if a person is an employee or a contractor is not a simple process, and there are many things to take into account, some of which are detailed below. To give you an idea of the complexity of the issue, when IRD examine a potential employment relationship they utilise a checklist of over 40 items. Of course IRD are primarily looking at the issue from the income tax perspective. The Employment Court (and the resultant appeal courts) also make decisions related to the nature of employment/contractor relationships. While often the Employment Court and IRD decisions are consistent, they use a slightly different set of criteria.

A reminder that the consequences of having a person whom you have treated as a contactor later deemed to be an employee means that you (the employer) become liable for back payment on PAYE not deducted from the persons wages (deducting PAYE is the responsibility of the employer, not the employee). Also all of the standard provisions of employment law come into play – ACC premiums, holiday pay, sick pay, time and a half for working a public holiday etc. Perhaps most importantly, should a disgruntled individual that you treat as a contactor have their contract terminated, and then later they be deemed to be an employee, then they could easily file a personal grievance claim for unfair dismissal.

While there has been much written on the subject, and as said above it's rarely a black and white issue, there are some very simple things you can check to ensure you are doing this right. In fitness centres / health clubs there are two more common groups, which have quite different contractual relationships with the fitness centre they are based at. They are both covered below.

Group Exercise Instructors / Gym Instructors.

This is the group that has more potential to be regarded as employees as the relationship is one of "supply of services/time in exchange for payment", which is on a similar basis to how an employee is paid for their time. As mentioned above, IRD uses a 40+ point check list, and the table over the page gives examples of some of the things to consider. Remember, no one item determines if an individual is a contractor or an employee, nor is it a "count the ticks" type exercise – as some of these items are more significant than others. If a lot of the items are under the "employee" category, you should carefully review how you are treating your contactors (and get legal advice on it). For the purposes of this table the term ***Instructor*** is used to indicate the potential employee/contactor and ***Facility*** to indicate the fitness centre/potential employer.

[3] Source: *Club Business International*, February 2002 (Publication of IHRSA www.ihrsa.org), Page 21 and 22

You may also wish to review the IRD document that can be found here
http://www.ird.govt.nz/resources/file/ebefee46b387001/ig0009.pdf

Areas to consider when determining the employee/contactor relationship

Item	More likely to be an employee if	More likely to be a contactor if
Who sets the hours or work	Set by mutual agreement, but ultimately the facility says when work takes place	The instructor says when the work will take place
Sickness – who ***finds*** the replacement (when no one else can)	Facility ultimately responsible to find replacement	Instructor ultimately responsible to replacement
Who pays for training	Facility	Instructor
When the instructor is sick or on holiday, who ***pays*** the replacement	Facility	Instructor
Instructor is sick – are they paid by the facility?	Yes	No
Instructor is on holiday – are they paid by the facility?	Yes	No
Is the instructor required to provide any equipment e.g. microphone?	No	Yes
Does the instructor operate through their own company?	No	Yes
How is payment made for work undertaken by the instructor	Direct payment every pay period	On invoice (1)
What happens if the instructor doesn't perform	"Employment like" disciplinary process followed	Contract outlines terms, such as financial penalty clauses, or termination clauses
Can the instructor work at other facilities (competitors)	No	Yes (2)
Who does the ***customer*** pay?	The customer pays the facility, who then pays some of this to the instructor	The customer pays the instructor, who then pays some of this to the facility (3)
Is there a written agreement that sets out things such as breaks, overtime rates, reporting sickness etc	Yes	No

(1) **Warning Sign:** If the only difference between your staff (employees) and contractors is that contractors give you an invoice, then it is very likely that they would be regarded as employees by IRD.

(2) Remember more than this item is taken into consideration when determining employment/contractor relationship. Many contractors are restricted from working at other facilities (for good reason) but this is a factor considered by IRD.

(3) If the instructor collects money for a class and passes it ALL on to the facility, and the instructor is just acting as the "collector" for the facility, then it would indicate an employment relationship.

Personal Trainers

Firstly, if a personal trainer pays a facility a periodical rental (such as $x a week) then it is highly unlikely they would be regarded as an employee, this is because employees are paid to do a job (employees don't pay employers). While it's not an absolute rule, it would be extremely unlikely for such a relationship to be regarded as "employment" if a rental (particularly if it is not a nominal rental) is being paid. However, the contractual relationship applies to the task, not the person. So, for example, if the person pays rental as a PT, and also teaches aerobics classes for which they are paid a class rate, it could well be determined that they are a contractor when a PT, and an employee when a group exercise instructor.

If a personal trainer is paid on a per session basis by the facility (i.e. the client pays the facility and the facility then pays some of this to the trainer) then it's very possible that this would be deemed to be an employment relationship. In this case, the factors that would be affect this would include all those listed under the Group Exercise Instructor/ Gym Instructors list at the top of this page. Conversely, if the PT charges the client directly for the session and then pays part of this to the facility, then they are highly likely to be considered a contractor because the facility is not paying the PT for the service.

Music License Fees

Most fitness centres and health clubs use music in some way or form, either as a part of classes, or in the background to enhance the atmosphere of the club. Using music in these ways requires a payment to the owners of the music. Below is a summary of the research ExerciseNZ has undertaken in this area, along with details of what payments are required.

Update July 2011: ExerciseNZ has negotiated with PPNZ for a fair rate for the industry, and just entered into similar negotiations with APRA. For the most up to date information, please refer to your communications from ExerciseNZ. For current licencing rates please visit onemusicnz.com
For more information visit www.ExerciseNZ.org.nz/music

Background

When music in purchased, in the vast majority of cases, the payment includes the right to play, and listen to the music in a private setting. Broadcasting the music as a part of a service for which people pay for (such as a class, or gym or PT studio) is regarded as "public performance" and requires a licence from two organisations (APRA and PPNZ), which are outlined below. Note this licence is in addition to paying for the music in the first place. The idea of paying for public performance is not new, and has been in place for many years now in NZ, as well as most western countries.

A major issue for our industry

In Australia there has been a lot of publicity in this area. This was highlighted in 2007 when PPCA (whose equivalent is PPNZ here) first proposed $30 per group exercise class as the new licence fee. Later that same year they amended the claim to $4 per member per month. So for even a small club of 500 members this would be $24,000 per year (and remember there are two bodies that collect fees – so it could be up to $48,000!). The first reaction of many in the industry to these figures is "they would never do that" or "I just won't pay it". That was the reaction of many in the night club industry in Australia, and as a result they now pay tens of thousands of dollars more per business than they were in 2006. Those that do not pay have legal action taken against them which is enforceable in the courts. We can state very confidently that those that own the copyright to music are very clear on their right to collect the fees once set – so we should take their claims very seriously.

Australia is presently fighting this issue through legal channels, at a cost of millions of dollars. Many watching this issue internationally are viewing Australia as a test case, and should the increases be confirmed then it is likely that this will roll out around the globe.

It is very clear that copyright holders intend to increase the process they charge for use of their music worldwide. New Zealand will not be immune to this. Fortunately both APRA and PPNZ (the two organisations responsible for music licenceing in NZ) have verbally indicated to ExerciseNZ that they do not intend large price increases in the immediate future, but do intend to charge a fair price for music, and expect those using it to pay.

ExerciseNZ's approach is to support Fitness Australias fight through legal channels, while also obtaining legal advice in NZ to prepare for any potential issues here. ExerciseNZ will keep members updated on this as it progresses.

The NZ situation (July 2011) – APRA and PPNZ

In New Zealand there are two organisations that licence music use, Phonographic Performances (PPNZ) and Australasian Performing Right Association (APRA).

PPNZ and APRA represent the two types of music copyright owners for the New Zealand territory – PPNZ collects the sound recording copyright fees, and APRA the composers copyright fees. Under New Zealand law both are entitled to ask for licensing for the use of public performance of their members music, and both are entitled to be paid.

Common sense may ask "why don't they get together and charge one fee". The answer is that the two types of rights have different and distinct representations and parameters, and are legally separate in order to ensure all facets of copyright are protected. This situation is not unique to New Zealand with Australia, Ireland, Canada, the UK – most countries in fact - have the same set-up (i.e. one body for the composer copyright, and another one for the sound recording copyright).

So what do I have to pay for?

You need to pay for the *pubic performance of music* regardless of whether you have purchased the music legally and regardless of the format it is in.

APRA charge an annual fee for clubs/centres and additionally for aerobics classes. PPNZ charge an annual fee calculated by the total membership number and the option of paying for background music only, group exercise or both. In the case of PPNZ, ExerciseNZ acts as its agent for the fitness industry and administers its licence system

APRA fees also cover music performed via TVs and Radios. PPNZ's fees do not charge for broadcasts so long as it is in areas freely open to the public, but they do charge for broadcast use if it is in areas of the gym that would require a fee to access it. Both agencies also charge for broadcasts and music that may be used for telephone 'on-hold' systems.

I buy pre-recorded aerobics CD/DVDs– does that help?

In a nutshell, no. Any aerobics CD/DVD compilation organisations get a special compilation Licence from PPNZ & APRA – this allows them to compile songs from various sources and then on-sell them (they pay a lot to have this right). But this does NOT licence the end user for public performance. A public performance licence is still required to use any music purchased.

In Summary

You do need both an APRA and a PPNZ licence if you use any form of pre-recorded music or music videos in the running of fitness centres, gyms and aerobic classes.
You may be required to licence multiple areas or multiple uses such as music on-hold.

Licences provide the right to publicly perform music (not copy it or sell it).
If in doubt – ask. Both agencies have toll-free numbers and are happy to assist with any enquiries:
APRA 0800 69 2772, PPNZ 0800 88 77 69.

Information on PPNZ licences can be found at www.ExerciseNZ.org.nz/music

The current NZ situation – OneMusic

OneMusic is a collaboration between PPNZ and APRA who now collect a single music licence.

The current structure allows for an annual CPI adjustment but no major changes to the structure is envisaged.

Fees and structures can be found on www.onemusicnz.com

Discounts for ExerciseNZ members

- OneMusic offer a prompt payment discount

Membership Agreements and Credit Contracts

In April 2005 the law relating to credit contracts changed, and the *Credit Contracts Act* (CCA) was replaced with the *Credit Contracts and Consumer Finance Act (CCCFA or "the Act".* The new Act imposes a greater responsibility for fairness of contracts, and also has a new concept called a ***Consumer Credit Contract*** that has significant extra requirements.

We have obtained a detailed legal opinion on this area, and they have confirmed that fitness centres members are covered by the Act, and that the provisions concerning disclosing cost of credit do apply[4].

As an overview, there are some very clear points that have come out of our investigation:

(1) Every fitness centre membership with monthly/weekly payments is very likely to be regarded as a ***Credit Contract*** (yes ALL of them), regardless of how much you charge (see note 1)

(2) If you charge more for your monthly/weekly payment memberships than for the equivalent lump sum memberships then it also very likely means that the membership agreement will also be regarded as what the Act refers to as a ***Consumer Credit Contract.*** This means you need to disclose lots of additional information, including the cost of credit and interest rate charged.

The above two points have significant implications.

In all cases, since most monthly/weekly payment type memberships will be regarded as a Credit Contract, this means provision of the Act relating to fairness of penalty clauses, and the courts having to take regard for "harshness" of contracts come into effect. This means, for example, a clause that says "if you miss a payment of $10 you pay $50 extra" the Disputes Tribal could use the Act to say that clause is harsh and unfair, and not apply it.

More importantly, if there is a different rate for your monthly/weekly payment memberships than for the equivalent lump sum memberships, then this means that extra provisions of the Act come into play. **This includes the requirement to disclose the total cost of the contract, any cost of credit (the difference between the lump sum and weekly price over the same period), and also disclosing the rights to cancel the contract and replace it with one that is paid in full.** We are not aware of ANY fitness centre membership in New Zealand that fulfils these requirements. This means it's very possible that any memberships entered into after 1 April 2005 that charges more for weekly/monthly memberships than for the equivalent lump sum memberships will be in breach of the Act. **This in turn means that all of these memberships are effectively non-enforceable, and can be challenged and completely cancelled by the Disputes Tribunal.** It could also mean that the fitness centre offering such memberships could be fined by the Commerce Commission (it's not our intention to create unnecessary fear here, but its important to understand the potential consequences).

[4] Note: Throughout this document memberships are either referred to as either "lump sum" or "monthly/weekly payment" memberships. The lump sum refers to whenever the membership is paid in one payment. Whenever there is any payment over time (weekly, monthly, or even "½ now, ½ next week" arrangement) then the conditions relating to monthly/weekly payment memberships apply.

We are aware of a recent Disputes Tribunal decision where a membership agreement was ruled as a consumer credit contract even though the prices for lump sum and weekly memberships were identical, so its clear the Disputes Tribunal are applying the new law to membership agreements. (See the disputes Tribunal section of this resource booklet for more information on the Tribunal).

The options

Option One: Best Practice (we recommend this)

Charge the same amount for any monthly/weekly payments than you do for lump sum (so if weekly is $20 a week for 12 months, then annual lump sum should be 52 x $20 = $1040).
Note: This was the same advice we gave back in 2003, but it has now changed from 'advisable' to, in our opinion, 'essential' to do this.
Ensure all your penalty and cancellation clauses are fair and reasonable and consistent with standard business practice
Get your membership agreement/contract reviewed to check that it complies with the Act

Note: You can charge **more** for lump sum than the equivalent weekly/monthly price for the same term but just not **less**.

Option Two (has some moderate risk, not recommended)

If monthly/weekly prices are higher than the equivalent lump sum price AND the member receives benefits of extra products/services equal to/more than the difference in price then it could be argued that the lump sum and weekly/payment are two different products, and that the underlying membership cost is the same.
e.g. if the weekly price is $18.95 for 6 months ($18.95 x 26 = $492.70), and the lump sum for six months is $395 then as long as the weekly monthly member receives extra services to the value of at least $97.70 ($492.70-$395), say two personal training sessions worth $60 each, then the it's possible to argue the underlying membership cost is the same/lower for those paying the membership off.

Note: Using this approach still has some risk, and we do not recommend it, but it is far lower risk than option four. You can not also claim that the extra services are "free" as there has been an additional charge added to the base membership price to get to the weekly/monthly payment

Option Three (no risk, but not recommended)

If you wish to have a different price for weekly/monthly payment memberships and lump sum memberships, then you could do so as long as you fully disclose the cost of credit as a per of the membership agreement. Doing so involves a lot of information (which would likely add several paragraphs to the membership agreement) and includes but not limited to the information below.

Example: If a club charges $495 for a 12 month membership, and also charges $12.95 a 12 month membership paid weekly (i.e. full cost is $12.95 x 52 = $673.40) then the disclosure should be as follows:
Cost of membership: $495
Cost of Credit: $178.40
Finance rate on credit: 60.84%

NB: The above figures are real, and show the actual finance rate for the example. The CCCFA requires far more disclose than just the figures above. If you wish to follow option three please obtain further legal advice.

Option Four: Illegal

Having a lump sum price less than the equivalent weekly/monthly price, and having no difference in the products is quite simply illegal, and unless option three is followed (i.e. full disclosure) then this is both illegal and highly risky from a business perspective.

You should also review the booklet from the Commerce Commission entitled "The Credit Contacts and Consumer Finance Act. What you need to know". Copies of this booklet are available from ExerciseNZ and the Commerce Commission.

Increasing Prices of Memberships

Background

Over the last 10 to 15 years the fitness industry has undergone a period of significant growth. At the same time there has been a significant increase in both price of memberships and also the quality of facilities/services offered to members and users in general. Whereas 10 years ago it was not uncommon for many facilities to be charging several hundred dollars a year for a full membership, now most memberships of fitness centres are closer (if not above) a thousand dollars a year.

This has resulted in a situation that members that joined up many years ago and are paying by installments (e.g. weekly/monthly payment) will very likely be paying significantly less than the current market rates for that facility. In some cases this is as much as a 400% difference (we are aware of a facility that charges over $20 a week for a new member, yet some members are paying as little as $5 a week).

Note: For the sake of brevity, throughout this document, the term ***historical members*** will be used to describe those members that are paying lower than market rates on a weekly/monthly payments.

The issues

The price disparity identifies two key issues:

(1) ***Current Situation:*** How to address the price disparity that may exist between current members, and those historical members

(2) ***New Processes:*** Suggestions on processes to ensure the situation does not arise again

While the vast majority, if not all, fitness and recreation centres offering some sort of weekly/monthly membership payment option will have this issue, very few have actually done anything to address it. Unfortunately the longer this issue is left, the greater the disparity between the current and historical prices becomes. As a result any increase will need to be larger, resulting in possibly greater member cancelation and concern. This is not a situation unique to New Zealand, and is something that is an issue around the world.

It is also important to realise that this situation is not something that many would have foreseen. With the benefit of hindsight, we are able to now make recommendations on how to ensure it no longer eventuates, however 15 years ago, even the most commercial savvy facilities had nothing in place to ensure this situation did not arise.

(1) Current Situation

For facilities that wish to address a current price disparity (and this is certainly something ExerciseNZ recommends takes place), the following outlines the issues that should be considered:

- Document historical prices, and compare with current prices for both the facility, and the rates of other similar facilities in the area.
- Decide on what approach to price increases will take place. Options include:
    - Annual increase of x% until member's fees reach new members rate (or are within a certain percentage of them).
    - All members are increased to a certain rate (either equal to the new members rate, or the new members rate less a discount).
    - Set a minimum fee – anyone below this is increased to the minimum, those above it are left where they are.
- Decide on both a process and new rates that brings historical members' pricing closer or equal to new members' rate. Factors that may influence how close the adjusted rate for historical members' is to the new members' rate include:
    - The size of the gap (i.e. very large gaps of a hundred percent plus may need to be phased in)
    - The commercial/community focus of the facility. Commercial facilities may chose to bring historical members equal to new members on the basis of fairness, and be prepared to lose a certain percentage of members in the process, where as not for profit facilities may chose to take a more conservative approach.
- Communicate any increases to members, along with an explanation of why this is happening. It is important to realise that for many members the increase will appear sudden, as they well be unaware of charges in prices for memberships over time, even if the new rate is fair (i.e. equal to or lower than new members).
- Put in place the new processes document below, to ensure the above situation does not arise again.

(2) New Processes

As has already been articulated, the situation of large price disparity between historical and new member is not something that many had predicted, and one that none had attempted to prevent.
To ensure this situation does not happen again in the future ExerciseNZ recommends the following:

- All memberships that are being paid by weekly/monthly payments should have a regular price increase clause contained in them. This clause could be a CPI adjustment clause, and should take place at the same time every year. Example wording:

  The member's payments will increase on 1 January each year by an amount equal to the consumer price index (CPI) as recorded by the NZ Department of Statistics for the 12 month period preceding 30 September the previous year. No increase will take place during the first 12 months of membership.
- Ensure a clause that gives the facility the right to increase memberships in addition to the above clause (this means if memberships have risen significantly more than CPI, then a one off adjustment can be made). The clause should contain a notice period. Example wording:

  Once outside the initial term[5], the facility may increase the membership fee by giving the member 28 days notice to the member.
- Review the current and historical rates every five years, and make adjustments if the gap between these reaches a certain threshold (for example 30%).

The first two above items should be made clear to the member on joining (i.e. pointed out to the member before the sign their membership agreement), and also contained in any Members Information Guides provided to members.

It is important to stress that ExerciseNZ does NOT recommend doing nothing about this issue. It is fair to say that the vast majority of facilities do not have any such process in place as outlined in ***(2) New Processes***, nor have they every instigated any of the items contained in ***(1) Current Situation*** to address the current price disparity.

[5] ***Initial Term*** refers to the term during which the member has agreed to pay their membership for and cannot cancel. Normally this term is between six and thirty six months.

Intellectual Property & Trademarks

Over the last 10 years there have been several items in the area of intellectual property/trademarks that have affected the fitness/exercise industry, which are outlined below.

Intellectual property law (which includes copyright law, trademarks etc) is a relatively complex area of law. This section is designed to give advice on how to help minimise the likelihood of infringing on someone else's rights.

Fitness recommends that any business or individual that wishes to protected their own intellectual property through trademarks or similar mechanisms should engage the service of a specialist lawyer in this area.

Tae Bo®

In 2001 there was a rapid increase in the number of clubs using martial arts type moves in classes. Various forms of these classes were developed, some of which included reference to Tae Bo® or close derivations of this name.

In 2002 dozens of health clubs in New Zealand were sent letters threatening legal action by the trade mark owners of Tae Bo®. In the letter several claims were made about class names, and also the use of martial arts moves in classes.

We have obtained a legal opinion on the matter, and our advice is as follows:

The name Tae Bo® (and close derivations or intentional mis-spellings etc) should not be used to name or describe any group exercise classes. This includes combinations that sound like, or use parts of "Tae" or "Bo" that could reasonably be regarded as 'Tae Bo®.
The big one to watch for is a breach of the Fair Trading Act by "passing off" your martial arts type programme as Tae Bo®. This could happen if someone asked you, or one of your staff, if you had Tae Bo® and you replied "yes, we have something similar and its called kick and fit". We strongly recommended avoiding this.
Martial arts moves in general are not copyrighted and hence can be used in your class.

To reiterate:
Do not use the name Tae Bo® (or any derivation using "Tae" "Bo" or anything close)
If asked if you have Tae Bo® classes say "no". **You can say you have something better** !
You can use martial arts moves in classes, but not direct copies of Tae Bo® sequences.

SPIN, SPINNER, and SPINNING®

Mad Dogg Athletics, Inc., through its New Zealand agent NZ Blue Ltd, has been working cooperatively with Exercise New Zealand to develop a set of clear guidelines governing the use of the words SPIN, SPINNER, SPINNING, and variations of these words. We outline the agreed guidelines below.

(1) SPINNING®

SPINNING® is a registered trade mark in New Zealand. This means that Mad Dogg Athletics Inc (the owners of this trademark) have the exclusive rights to use the trade mark SPINNING, in New Zealand on exercise equipment and exercise classes.

Use of the name SPINNING® on exercise equipment, or as the name of an exercise class, will breach various intellectual property laws unless you have permission from Mad Dogg Athletics, Inc.

Our recommendation is that you do not use the word SPINNING® on exercise equipment or exercise classes unless you have written permission from Mad Dogg Athletics, Inc. This includes intentionally misspelling the word SPINNING® or using the word SPINNING® in combination with other words.

(2) SPINNER

SPINNER is not a registered trade mark in New Zealand. However Mad Dogg Athletics Inc has exclusively used the word SPINNER on its exercise cycles in New Zealand and around the world. Mad Dogg Athletics, Inc. believes it has the exclusive right to use the word SPINNER on exercise equipment in New Zealand and around the world.

This means that Mad Dogg Athletics, Inc does not believe you can use the name SPINNER unless you have written permission. Mad Dogg Athletics Inc has indicated they will rely on their reputation to stop any unauthorised use of the word SPINNER. Mad Dogg Athletics, Inc. also believes the SPINNER name is similar to the registered trade mark SPINNING®.

We agree. We believe there is a real risk that any use of the word SPINNER on exercise equipment, or as the name of an exercise class, will breach various intellectual property laws. Our recommendation is that you do not use the word SPINNER on exercise equipment or exercise classes unless you have written permission from Mad Dogg Athletics Inc. This includes intentionally misspelling the word SPINNER or using the word SPINNER in combination with other words.

(3) SPIN

SPIN is not a registered trade mark in New Zealand. However Mad Dogg Athletics, Inc has used the word SPIN for its indoor cycling classes in New Zealand and around the world. Mad Dogg Athletics, Inc. believes it has the exclusive right to use the word SPIN for indoor cycling classes in New Zealand and around the world. This means that Mad Dogg Athletics, Inc does not believe you can use the name SPIN unless you have written permission. Mad Dogg Athletics, Inc also believes the SPIN name is very similar to the registered trade mark SPINNING®.

Mad Dogg Athletics, Inc has indicated they will rely on their worldwide reputation, and the SPINNING® trade mark registration, to stop any unauthorised use of the word SPIN. Mad Dogg Athletics, Inc does not believe you can use the name SPIN unless you have written permission. Any use of the word SPIN on exercise equipment, or as the name of an exercise class, is likely to result in a legal action from Mad Dogg Athletics, Inc arguing this use breaches various intellectual property laws.

We do not recommend you use the word SPIN on exercise equipment, or as the name or description of an indoor group cycling class. For example, you should not use the phrase “our ABC Cycle Class is an excellent spin class”. Our recommendation is that you do not use the word SPIN on exercise equipment or exercise classes unless you have written permission from Mad Dogg Athletics, Inc. This includes intentionally misspelling the word SPIN.

(4) SPIN in combination with other words

As already identified, SPIN is not a registered trade mark in New Zealand. However Mad Dogg Athletics, Inc. believes it has the exclusive right to use the word SPIN as a trade mark, and similar trademarks, on indoor cycling classes in New Zealand and around the world. This means that Mad Dogg Athletics, Inc does not believe you can use the trade mark SPIN in any format, including use in conjunction with other words, unless you have written permission.

We have received a clear indication from Mad Dogg Athletics, Inc that legal action will be taken against any unauthorised use of the word SPIN on exercise equipment or exercise classes. This includes use of the word SPIN in combination with other words. For example, use of SPIN-FAST or RIDE-ASPIN.

Advice we have received from our lawyers which shows a different picture, and is less clear. Some clubs have even registered classes with the word SPIN within it. It would appear that this is therefore a grey area, and it may be possible to use SPIN in conjunction with other words in some contexts, however this does not stop costly litigation from occurring. To avoid any legal action, we recommend you do not use any names, brands, or trademarks including the word SPIN on exercise equipment or exercise classes.

SUMMARY

For a number of reasons, we recommend not using the words SPIN, SPINNER, or SPINNING® in association with exercise equipment and/or exercise classes without permissions from Mad Dogg Athletics, Inc. While it may be possible to successfully argue that SPIN plus other words can be used legally in some contexts, this would likely result in significant legal costs and for that reason, we suggest staying away from it.

When introducing an indoor group cycling class, we recommend calling these classes an "indoor group cycling programme" or something of that nature. If you develop your own program, and give it a special name, you may wish to consider registering it. Many clubs have done this already – well known examples include Les Mills with their programs such as RPM®, Bodybalance® etc, many smaller clubs have also registered classes and name of various programs they offer. If you wish to register a trade mark, we recommend you contact a specialist intellectual property lawyer.

For more information on SPINNING® licenses, contact NZBLUE LTD at spinning@nzblue.com

General Advice

If there is a new group exercise class or new piece of exercise equipment advertised on TV then it is very likely that the name of this will be a registered trademark, this means you cannot use it without the owners permission. Even if the name is not registered, if any business (including the club down the road) has built up a class type or product using a unique name then our advice is do not use that name, or close derivations of it (ie misspelling it). Unless the concept is totally new, it is likely you can still use the idea of the group exercise class, so if for example you see a dance class that also uses indoor cycling bikes you can develop your own class type based on this idea, but cannot copy the name that someone else used. The only exception to this is when the name is regarded as a generic describer – so for example "Step" and "Pump" are now so common as to be regarded as simply describing the class, and not regarded as a unique name.

Disclaimer: *Intellectual property law is relatively complex area of law. If you are considering developing your own name or brands, please get advice from a specialist lawyer in this area. The information provided on this information form should be used as a guide only, and is not designed to replace legal advice.*

POST: Po Box 22114
Christchurch Mail Centre
Christchurch 8140
PHONE: 0800-66-88-11
EMAIL: info@exercisenz.org.nz
WEB: www.exercisenz.org.nz

Exercise Association of New Zealand

Representing the Exercise & Fitness Industry