BUDDLEFINDLAY
NEW ZEALAND LAWYERS

EMPLOYMENT STANDARDS LEGISLATION UPDATE

The Employment Standards Legislation Bill, now split into five amendment Acts, came into force 1 April 2016. The Acts make several changes to New Zealand employment law, with the goal of making workplaces fairer and more productive for both employers and employees. Some key changes are summarised below.

The requirements for record keeping apply to all employees from 1 April 2016. The amendments relating to zero hour contracts, shift cancellation, secondary employment and wage deductions apply from 1 April 2016 to all new employment agreements. For existing employment agreements, they will not apply until 1 April 2017, giving employers time to amend their existing agreements accordingly. For existing collective employment agreements, these amendments will not apply until a new collective agreement is entered into.

1. RECORD KEEPING

1.1 Amendments to the Employment Relations Act 2000 ("**ER Act**") have been introduced to increase compliance with minimum employment standards through tougher sanctions, increased powers for labour inspectors and more prescriptive record keeping requirements.

1.2 The amendments are designed to target the worst transgressions of employers, without imposing unnecessary compliance costs on employers in general. Employers who already comply with minimum standards should be generally unaffected.

1.3 Record keeping requirements are now more stringent. Employers must be able to produce a clear record of the number of hours worked each day in a pay period, and the pay for those hours. This must be in an easily accessible form on request from an employee or labour inspector.

(a) For employees who work regular hours each day for regular pay, for which they have already agreed to with the employer, a statement of the regular hours and pay is all that is needed to comply. The record keeping obligation may also be met if the usual hours are stated in the employee's wages and time records, the employment agreement, or in a roster or other similar documentation. This documentation must also be easily accessible.

(b) However, if employees do not work usual hours (or have no usual hours) an accurate record of the hours worked each day and the pay received for those hours will be required.

(c) Additional hours worked by employees on salaries do not generally need to be recorded, as long as they are in accordance with the employment agreement. However, employers will still need to record additional hours worked by salaried employees if this is needed to show that minimum employment entitlements are met.

1.4 Labour inspectors can issue infringement notices (on the spot fines) for breaches relating to record keeping and individual employment agreements. The infringement fee will either be $1,000 or for an amount specified in regulations for an infringement offence. The fees will be capped at $20,000 per three month period.

2. TOUGHER SANCTIONS

2.1 Employment standards or minimum entitlements are requirements such as minimum wage, annual holidays and written employment agreements. They are standards designed to protect vulnerable workers and help ensure workplaces are fair and competitive. The Bill provides tougher sanctions for breaches of minimum entitlements. These include:

(a) Penalties for serious breaches of minimum entitlements have increased significantly. Maximum penalties have been increased to $50,000 for an individual and the greater of $100,000 or three times the financial gain for a company and should act as an effective deterrent for employers. Employers are not able to insure against these fines.

(b) An employer, officer, or person involved in hiring employees can be banned from employing individuals if they commit serious or persistent breaches of minimum entitlement requirements.

(c) Officers who are “involved in a breach” may also be liable for that breach, even if the employing entity itself has ceased to exist. “Officers” include directors, partners and those who hold positions of significant influence over the management or administration of the business. (This definition of “officer” is different from that in the Health and Safety at Work Act 2015 as it does not exclude those who merely advise or recommend and applies to the administration of a business.)

3. ZERO HOUR CONTRACTS

3.1 The ER Act is amended so as to eliminate 'zero hour contracts', which is where an employer does not guarantee an employee a minimum number of hours, but requires them to be available to work. Zero hour contracts are not the same as 'casual' contracts, where an employee is able to turn down any work offered.

3.2 Employers are now required to include "agreed hours of work" in all employment agreements. "Agreed hours" includes any or all of the following:

(a) the number of guaranteed hours of work;

(b) the days of the week on which the work is to be performed;

(c) the start and finish times of the work; and

(d) any flexibility in (b) or (c).

3.3 Availability provisions (requiring an employee to be on call with no guarantee of work) are now unenforceable, unless:

(a) the employment agreement provides for a number of guaranteed hours;

(b) the employer has a genuine reason based on reasonable grounds for including the availability provision; and

(c) the employment agreement provides for the employee to receive reasonable compensation for their availability.

3.4 What constitutes a "genuine reason based on reasonable grounds" the employer must have regard to whether it is practicable for the employer to meet the demands of the business without including the availability provision, the number of hours the employee is required to be available for, and whether that number is proportionate to agreed hours of work in the employment contract.

3.5 An employee will be able to refuse to perform certain work additional to their guaranteed hours if their employment agreement does not contain an availability provision which provides reasonable compensation for their availability. If they are treated adversely for doing so, this will form the basis for a claim of unjustified disadvantage.

3.6 This provision is not targeted at genuine on-call arrangements, such as doctors and nurses. However, these employers may need to amend their employment agreements, to make the reasons for needing the employee to be on call clear, and that part of the employee's salary can be regarded as reasonable compensation for being on-call.

4. CANCELLATION OF SHIFTS AND COMPENSATION

4.1 Where an employee does shift work, the employer will not be able to cancel a shift without reasonable notice or reasonable compensation. An employment agreement will need to state the necessary notice required before a shift is cancelled and the compensation payable if this notice period is not complied with.

4.2 "Reasonable notice" is to be determined with regards to:

(a) the nature of the employer's business, including the employer's ability to control or foresee the circumstances that have given rise to the proposed cancellation;

(b) the nature of the employee's work, including the likely effect of the cancellation on the employee; and

(c) the nature of the employee's employment arrangements, including the number of guaranteed hours of work.

4.3 "Reasonable compensation" is to be determined with regards to:

(a) the notice period in the employment agreement;

(b) the remuneration the employee would have received; and

(c) the nature of the work, including any costs incurred by the employee in preparation of the shift.

4.4 If employers do not amend their employment agreements to determine how much notice they are required to give an employee or the compensation for cancellation, then the employer will need to pay the employee for the entire shift upon cancellation.

4.5 Employers will also need to pay employees for an entire shift if the employee is not told of the cancellation until the commencement of the shift, or if the remainder of the shift is cancelled after the shift has begun.

4.6 For many employers, this will mean they will have to start rostering more efficiently, as they no longer have the ability to cancel shifts at will, or send employees home early when they find themselves overstaffed.

5. SECONDARY EMPLOYMENT

5.1 An employer will not be able to prohibit or restrict an employee from undertaking secondary employment, or undertaking secondary employment without the employer's consent, unless there are genuine reasons based on reasonable grounds for doing so, and these reasons are set out in the employment agreement.

5.2 Genuine reasons may relate to:

(a) protecting the employer's commercially sensitive information, intellectual property rights, or commercial reputation; or

(b) preventing a real conflict of interest that cannot be managed without including a secondary employment provision.

5.3 It is already common for employment agreements to contain provisions restricting employees from undertaking other work which is a conflict of interest. These provisions are valid under the ER Act. However, employers may need to amend their employment agreements if they wish to prevent employees from undertaking secondary employment for other genuine reasons, such as for fatigue or health and safety reasons.

6. WAGE DEDUCTIONS

6.1 Amendments to the Wages Protection Act 1983 prohibit employers from making "unreasonable deductions" from wages. This section has been designed to prevent employers making deductions for damage or loss caused in circumstances outside of the employee's control- particularly the conduct of third parties.

6.2 Many employment agreements contain provisions allowing employers to deduct money from employees' wages for debts owed to the employer. We do not expect these to be considered "unreasonable".

6.3 General deduction clauses will still be lawful, but employers must now consult with employees before a specific deduction is made (which may allow an opportunity for employees to withdraw their consent to the deduction).

7. PARENTAL LEAVE

7.1 Amendments to the Parental Leave and Employment Protection Act 1987 extend parental leave and payment entitlements to a wider group of "primary carers" (e.g. grandparents), recognising the diversity of modern work and family arrangements, and improving the flexibility of the scheme. Now, anyone who takes primary responsibility for the care, development and upbringing of a child under the age of 6 years old (in a non-temporary role) will be eligible provided they meet the same work-related criteria as biological and adoptive parents. However, parental leave and extended leave can still only be taken in the first six or 12 months (depending on the employee's entitlement) following the date of birth (in the case of a newborn) or the date on which the employee becomes the primary carer of the child (in any other case).

7.2 People with non-standard working arrangements, such as seasonal workers, and those who have recently changed jobs are now eligible for parental leave payments.

7.3 Paid parental leave will increase from 16 to 18 weeks for all eligible primary carers.

7.4 Additional parental leave will now be available for primary carers of preterm babies. For each week the baby was born prior to 37 weeks gestation, the primary carers will receive additional weekly payments up to a maximum of 13 weeks. Receiving a preterm baby payment will not affect a primary caregiver's entitlement to the regular parental leave payments. Additionally, a biological mother of a preterm baby will continue to receive the preterm baby entitlement even if she is no longer the primary caregiver.

7.5 The introduction of "Keeping in Touch" days allows primary carers to work up to 40 hours during their 18 weeks paid parental leave without "returning to work" and foregoing the remainder of their entitlements. This allows people on parental leave to keep up to date with work and training, making their eventual transition back into work easier. Keeping in Touch days must be arranged in agreement between employee and employer and cannot take place within the first 4 weeks of the child's life.

7.6 Extended unpaid leave of 26 weeks is now available for employees who have been with their employer more than six months but less than 12 months. Employees are also now permitted to take their extended leave entitlements over more than one period. This gives partners or spouses who are splitting extended leave entitlements greater flexibility.

7.7 The penalty for fraud in relation to paid parental leave will increase from $5,000 to $15,000 to better reflect the new maximum entitlements.

7.8 New regulations have been introduced to reflect these changes. The Parental Leave and Employment Protection Regulations 2016 replace the 2002 Regulations of the same name. The Regulations prescribe the process for applying for parental leave, and what information primary carers must provide, including evidence from non-biological parents of the child being placed in their custody.

7.9 Please let us know if we can be of any assistance.

FOR FURTHER INFORMATION, PLEASE CONTACT:

Hamish Kynaston
Partner
DDI:64 4 462 0439
hamish.kynaston@buddlefindlay.com

Joss Opie
Senior Associate
DDI: 64 4 498 7334
joss.opie@buddlefindlay.com

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