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update

EMPLOYMENT

EMPLOYMENT LAW APPROACHING THE ELECTION

AUGUST 2008

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Employment law is anything but static and in this update we summarise potential changes to certain aspects of employment law in the build-up to the election.

The right to breaks

The bill which gives employees rights to regular breaks is set to become law. The Employment Relations (Breaks and Infant Feeding) Amendment Bill will require employers to provide employees with rest and meal breaks, and with appropriate facilities and breaks for those who wish to breastfeed. This is the first legislation which provides for minimum entitlements to breaks in the workplace, and while these are often written into individual employment agreements and nearly always included in collective agreements, the bill would require all employers to provide these minimum entitlements to their employees (although an employer can provide greater entitlements).

Employees will be entitled to a minimum of one paid 10 minute rest break if they have worked between two and four hours, an additional 30 minute unpaid meal break if they have worked more than four but less than six hours and two paid ten minute and one 30 minute unpaid break if they have worked for over six hours. The same pattern continues for work in excess of eight hours.

When breaks are to be taken is to be agreed between the employee and employer or, if agreement cannot be reached, breaks should be evenly spaced throughout the work period.

The bill also requires employers to provide appropriate facilities and unpaid additional breaks for employees who wish to breastfeed "so far as it is reasonable and practicable in the circumstances." In determining what is reasonable and practicable, employers can take into account their operational environment and resources.

In practice this means businesses will be required to provide facilities to accommodate breastfeeding mothers. "Facilities" will likely extend to the provision of a private space to allow a mother to breastfeed or express breast milk (for example, a "family room" or facility similar to a "first aid room"), and facilities in which to store breast milk (for example, a separate refrigerator). The exact extent of an employer's obligations is likely to be explained by a Code of Practice which will be issued in support of the Act, and which may resolve some practical questions for smaller workplaces.

Shift worker's public holiday dilemma

The Holidays (Transfer of Public Holidays) Amendment Bill, which amends the Holidays Act 2003, addresses the situation where a shift is worked over two days and crosses into a public holiday.

Since the decision of the Supreme Court in *New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated* v *Air New Zealand Ltd* (14 November 2007 SC 91/2006) it has been unlawful to transfer a "public holiday" from a specified public holiday to another day (which had been agreed between Air New Zealand and the Pilots' Association in their collective agreement). Put simply, the effect of the decision was that a "public holiday" could not take on the status of a normal day by agreement.

The purpose of the bill is to enable shift-based businesses to have flexibility around organising night shifts, and to allow 24 hour operations to provide their employees with certainty around working hours and public holidays.

The bill aims to rectify this issue in part by ensuring that when a shift spans two days (ie crosses midnight) where at least one of which is a public holiday, an agreement can be reached for the "public holiday" to be transferred to cover one whole shift. Employees would therefore be paid time and a half for that shift and given an alternative day's holiday. Any further shifts worked on the same "day" but not on the agreed "public holiday" are paid normally.

There are additional policies that have been announced by the Government, but that have not yet made it to the legislative stage. These are outlined below.

KiwiSaver concern about employer's contribution

Labour Minister Trevor Mallard has recently announced that the Government is planning to amend the Employment Relations Act as a result of reports that some KiwiSaver members are being treated differently to non-members.

The Minister's contention is that employers are reducing member employees' pay by one percent to pay for the employer's compulsory contribution to KiwiSaver, while at the same time collecting the $20 per week tax credit provided to them by the government. He has also suggested that KiwiSaver members are offered reduced pay rises to compensate for the employer's one percent KiwiSaver contribution.

The changes proposed are, in essence, that KiwiSaver employer contributions will be on top of any remuneration. The changes will only affect employment agreements entered into after the date the amendments come into force.

This is a hotly debated issue, one that has already generated a lot of press, and it is likely that such an amendment would pass.

Greater rights for casual employees

Trevor Mallard also announced in June the Government's intention to strengthen employment protections for temporary and casual workers. The proposed changes to the Employment Relations Act have followed research carried out by the Department of Labour in 2007.

The proposed amendments will allow employees and employers to determine whether they should be classified as an "employee" or "casual employee" by assessing how regular the employment is, how much autonomy the employee has and whether the employee is genuinely free to

accept or reject offers of employment (a similar test to one proposed by the Employment Court).

New powers will also be given to Labour Inspectors to allow them to determine whether an employee has a fixed term, casual or permanent agreement. This will simplify the process as, at present, only the Employment Relations Authority or the Employment Court can make this decision.

As a result of the research showing a general lack of knowledge in this area a Code of Employment Practice for Casual and Non-Standard Employment will also be developed to make it easier for employees and employers to understand their obligations and rights.

Changes are also proposed in relation to employees whose services have been contracted to a third party. In this situation employees who belong to a union that is a party to a collective agreement in respect of that workplace would be entitled to terms and conditions at least as favourable as those enjoyed by unionised workers employed directly by the employer.

KiwiSaver – transferring savings between New Zealand and Australia

As part of the Single Economic Market (SEM) initiative, which was introduced as part of the shared goal to promote trade and movement of people between New Zealand and Australia, a deal is aimed to be finalised by the end of October which would allow private retirement savings to be transferred across the Tasman.

At present, personal savings accumulated in Australia cannot be taken to New Zealand before retirement. This was historically due to New Zealand not having an equivalent retirement savings scheme. This has been seen as one barrier which has discouraged people from moving.

Now that KiwiSaver is in place this is no longer an issue. Retirement savings will be able to be transferred between the countries with funds being separated into their country of origin to allow country specific rules to be applied (for example, Australian funds will not be able to be used to purchase a first home, as this is not currently in Australian legislation).

The Employment Relations (Protection of Young Workers) Amendment Bill

A new members' bill has been announced by Labour MP Darien Fenton which relates to protecting working children . The bill would require that all children aged 15 and under must be employed under an employment agreement and cannot be employed as independent contractors. This would ensure children would not be expected to pay their own tax and ACC. A survey of children's work in New Zealand conducted late last year by CARITAS also stated that an important step to improving children's working experiences would be to require their employment status to be that of employees rather than contractors.

Child labour in New Zealand at present is mainly regulated by a combination of education and health and safety legislation. Children are required to attend school under the age of 16 and therefore cannot be employed during school hours or when it would interfere with their attendance at school. There are also restrictions on hiring children under the age of 15 to do certain work such as logging, construction and manufacturing - or any other work that is likely to cause harm. There is no minimum wage currently for employees under the age of 16.

Mrs Fenton has indicated she intends to push for these changes both in the lead-up to, and after the election.

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