THE EMPLOYMENT STANDARDS LEGISLATION BILL CAME INTO FORCE ON 1 APRIL 2016

The Bill was passed to amend New Zealand employment law to ensure a response to the modern, dynamic business environment and encourage fair and productive workplaces.

The changes include

- Addressing such issues as “zero hour contracts” and other unfair employment practices
- Extending paid parental leave to more workers and increasing the flexibility of the scheme
- Strengthening enforcement of employment standards

The Bill made changes to the following legislation

- Employment Relations Act 2000
- The Parental Leave and Employment Protection Act 1987
- Minimum Wage Act 1983
- Holidays Act 2003
- Wages Protection Act 1983

ADDRESSING ZERO-HOUR CONTRACTS

The Employment Standards Legislation Bill includes a package of measures to prevent unfair employment practices in the New Zealand labour market, such as “zero-hour contracts".

The changes aim to retain flexibility where it is desired by both employers and employees, but also increase certainty by ensuring that both parties are aware at the beginning of the working relationship of the mutual commitment that they have made.

The changes mean that where the employer and employee agree to hours of work, they will be required to state those hours of work in the employment agreement.

The changes also prohibit these practices

- Employers requiring employees to be available to work for more than the agreed hours without having a genuine reasons based on reasonable grounds
- Employers requiring employees to be available to work for more than the agreed hours without paying reasonable compensation for the number of hours the employee is required to be available
- Employers cancelling a shift without the provision for reasonable notice or reasonable compensation
- Employers putting unreasonable restrictions on secondary employment of employees
- Employers making unreasonable deductions from employees’ wages.

When hours are agreed, these must be stated in the employment agreement

Where the employer and employee agree to set hours of work, they will be required to state those hours in the employment agreement. This includes agreement on any or all of the following:

- the number of guaranteed hours of work,
- the start and finish times,
- the days of the week the employee will work
- any flexibility in the above.

What if there are no agreed hours?

The employer and the employee do not have to agree on hours, times or days, but when they do, anything that is agreed must be recorded in the agreement. This will ensure employers and employees are clear in their commitments to each other.

In cases where no hours were agreed to, the employer must provide an indication of the arrangements relating to the employee's working times. This is consistent with the current law.

Employees will be able to apply to the Employment Relations Authority for a penalty against their employer, if they agreed on hours, but have failed to record these in the employment agreement.

Preventing employers requiring employees to be available without a genuine reason based on reasonable grounds and providing reasonable compensation

The changes will prohibit employers from requiring employees to be available above the agreed hours of work stated in their employment agreement unless employees are reasonably compensated for that availability as agreed in the employment agreement. Employers will not be obliged to offer work that is above the agreed number of hours. Employees will be free to decline extra work unless they agreed to an availability provision and they are provided reasonable compensation for that availability.

What about availability provisions?

Availability requirements and compensation rates will need to be agreed and stated in the employment agreement. An employer can not include an availability provision in the employment agreement, unless there are some guaranteed hours in the agreement.

The employment agreement should also indicate the amount of availability the employer requests.

Employers will also need to have a genuine reason based on reasonable grounds to require employees to be available above the agreed hours. Employers also need to have a genuine reason based on reasonable grounds for the number of hours of availability.

When considering whether there is a genuine reason based on reasonable grounds, employers must consider:

- Whether it is practicable for them to meet their business demands without using an availability provision
- How much availability they're requiring and the proportion of the availability to the number of agreed hours of work.

What is considered reasonable compensation for availability?

When establishing what compensation an employer offers to an employee in exchange for their availability, employers must consider:

- The number of hours they are requiring an employee to be available
- The proportion of the availability to the number of guaranteed hours
- Any specific restrictions the availability provision requires (e.g. must not drink while on call)
- The employee's regular pay rates
- If the employee is paid by salary, the amount of the salary

Cancelling a shift only with reasonable notice or reasonable compensation

Reasonable notice and reasonable compensation for cancelling a shift will need to be specified in the employment agreement. When a shift is cancelled, the employer will need to give either reasonable notice or reasonable compensation before the commencement of the shift. If the employment agreement does not specify these, then the employee must be paid the full amount they would have earned, had they worked the shift.

What is a reasonable notice period?

When considering whether the notice period is reasonable, employers must consider:

- The particular nature of business
- The ability of the employer to control or foresee cancellations
- The nature of the employee's work and the likely effects of a cancellation on employees
- The nature of the employee's employment arrangements including whether they have guaranteed hours and if so, the number of guaranteed hours

What is considered reasonable compensation for shift cancellation?

When considering whether the compensation is reasonable, parties must consider:

- the length of the notice period stated in the employment agreement
- the remuneration the employee would have received for working the shift
- likely costs incurred by the employee in preparation for the work

Prohibiting unreasonable restrictions on secondary employment

Employers will be prevented from restricting secondary employment for employees, unless they have a genuine reason based on reasonable grounds to do so. Those grounds won't be prescribed but will be related to:

- the risk of loss to the employer of knowledge, property (including intellectual property) or competitive reputation.
- Preventing a real and unmanageable conflict of interest

Employers must not restrict employees to a greater extent than is necessary. They should consider whether particular cases warrant restrictions instead of putting blanket restrictions on secondary employment.

Prohibiting unreasonable deductions from employees' wages

The current law already requires employee consent to deductions from wages. The new legislation will mean the employer must consult with the employee on each specific deduction, even where the employee has given general consent to lawful deductions in their employment agreement. This obligation does not extend to lawful deductions for things like Kiwisaver or student loan repayments etc.

The changes will also mean that even where there is consent, a deduction must not be unreasonable. For example a deduction to cover losses caused by a third party through breakages or theft may be unreasonable, particularly if the employee had no control over the third party conduct.

MODERNISING PARENTAL LEAVE

As part of Budget 2014, the Parental Leave and Employment Protection Amendment Bill (No 2) was passed to extend the duration of paid parental leave from 14 to 18 weeks by 1 April 2016.

The Employment Standards Legislation Bill introduced further changes to the parental leave scheme that came into effect on 1 April 2016.

These changes aim to better reflect current work and family arrangements, provide more flexibility and choice, and support parents' attachment to work. They include:

- Extending parental leave payments to non-standard workers and those who have recently changed jobs.
- Extending entitlements to a wider group of primary carers(new term) than biological and formal adoptive parents.
- Enabling workers to take unpaid parental leave – more flexibility
- Introducing "keeping in touch" hours in the parental paid leave period
- Extending unpaid leave to workers who have been with their employer for more than six months but less than 12 http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/employment-standards-legislation-bill/modernising-parental-leave - unpaid
- Allowing workers to resign and still receive payments
- Increasing the penalty for fraud
- Providing additional parental leave payments for parents of pre-term babies

Extending parental leave payments to non-standard workers and those who have recently changed jobs

The changes extend parental leave payments to people with non-standard working arrangements. This includes casual, seasonal, temporary and fixed-term employees and workers with more than one employer. Also, workers who recently changed jobs are now entitled to parental leave payments, provided they meet the other work-related criteria.

Eligible workers who have multiple employers can combine their hours and income from each job to maximise their payment (up to a maximum cap).

Parents still have the option of choosing the parental tax credit instead of paid parental leave.

Extending entitlements to a wider group of primary carers than just biological and formal adoptive parents

Parental leave payments and leave entitlements have been extended to primary carers such as Home for Life parents, whāngai, grandparents, and other primary carers. A "primary carer" is a person who takes permanent primary responsibility for the care, development and upbringing of a child under the age of 6 years. It does not include people with part-time or temporary responsibility such as a childcare provider or a temporary foster carer.

To be eligible, primary carers need to meet the same work-related criteria as birth mothers and adoptive parents.

Enabling workers to take the unpaid parental leave flexibly

In the past all parental leave had to be taken full-time and in one continuous block. When the employee returned to work they lost any remaining parental leave entitlements.

The changes under the Bill allow eligible employees to take the unpaid leave flexibly, or return to work for a period of time and take the remainder of their unpaid leave later in the year, provided there is mutual agreement with the employer.

For employees who have been with their employer for at least 12 months, the end date of unpaid parental leave will be on the child's first birthday (or one year after becoming the primary carer of the child). This applies whether leave was taken flexibly or not.

For employees who have been with their employer for more than six but less than 12 months, the end date of unpaid parental leave will be when the child turns six months (or six months after the date on which the employee becomes the primary carer).

Introducing "Keeping in Touch" days

The changes also allow workers to work up to 40 hours during the 18 weeks of paid leave. For example, these hours could be used to keep up with skills development or training or completing a work handover, and can help the parent ease back into work.

Keeping in Touch hours are not compulsory and must only be used by mutual agreement between the employer and the employee. They also need to agree on the terms of work and the type of work to be undertaken.

The baby will need to be at least four weeks old before the Keeping in Touch days can be used. This is to protect the baby's and the birth mother's health.

Parents of preterm babies are eligible for additional Keeping in Touch hours – up to an average of three hours per week for each week the baby was born prior to the 37 week gestation period. E.g. if the baby was born at 35 weeks, the parent can work up to six hours, in addition to the 40 hours.

Parents of preterm babies don't need to wait for the baby to be four weeks old before using the Keeping in Touch days.

Extending unpaid leave to workers who have been with their employer for more than six months but less than 12

Workers who have been with their employer for more than six but less than 12 months, are now able to take unpaid leave in addition to the their paid leave, up to a total period of six months. For example, if the employee takes 18 weeks paid leave, they can also take eight weeks unpaid leave.

This aligns with the World Health Organisation's recommendation of exclusive breastfeeding for six months.

Employers can choose to give their employees longer unpaid leave, if they wanted to.

Allowing workers to resign and still receive payments

The changes allow workers to resign, if they wish, and still receive payments. This gives more choice to employees and more certainty to employers. Employers will be able to recruit a permanent replacement, rather than a temporary replacement, in a situation where the employee does not intend to return.

Increasing the penalty for fraud

The penalty for people who make a false statement, or intentionally mislead the relevant agencies has increased from $5,000 to $15,000.

This penalty better reflects the increased maximum parental leave payments a person can receive and aims to deter people from committing fraud.

Providing additional parental leave for parents of preterm babies

The new law also extends the period of parental leave payments for parents of preterm babies. These parents can receive additional weekly payments – up to a maximum of 13 weeks – for each week the baby was born prior to the 37 week gestation period.

STRENGTHENING ENFORCEMENT OF EMPLOYMENT STANDARDS

The Employment Standards Legislation Bill included a package of measures to strengthen enforcement of employment standards.

Employment standards are requirements such as the minimum wage, annual holidays and written employment agreements. They protect vulnerable workers and help to ensure workplaces are fair and competitive.

The measures came into force on 1 April 2016. They target the worst transgressions of employers without imposing unnecessary compliance costs on employers in general. They include:

- Tougher sanctions
- Clearer record keeping requirements
- Increased tools for Labour Inspectors
- Changes to the Employment Relations Authority's approach to employment standards cases.

Tougher sanctions

- For the most serious breaches, such as exploitation, cases will now be heard at the Employment Court and carry maximum penalties of $50,000 for an individual and the greater of $100,000 or three times the financial gain for a company. Previously the maximum fine was $10,000 for an individual and $20,000 for a company.
- Employers will be publically named if the Employment Relations Authority or Employment Court finds they have breached minimum standards.
- Individuals also face the possibility of being banned as a manager if they commit serious or persistent breaches of employment standards, or are convicted of exploitation of migrant workers under the Immigration Act.
- Persons other than the employer – such as directors, senior managers, legal advisors and other corporate entities – will now also be held accountable for breaches of employment standards if they are knowingly

and intentionally involved when an employer breaks the law. These cases can be pursued even if the employer ceases to exist.

Who other than the employer will be held accountable for breaches of employment standards?

- These provisions only apply to 'officers' of the company, being directors and other individuals who occupy positions where they exercise significant influence over the management or administration of the business.
- Persons other than the primary contravener will only be accountable if they are knowingly and intentionally involved in a contravention of the employment standards provisions.
- A person would not be liable if they took reasonable and proper steps to ensure the employer complied or if they reasonably relied on information supplied by another person.
- For example, a senior payroll manager, under direction from the company's director, who has set up the payroll system in such a way that employees do not receive their full holiday entitlements, could be caught by these provisions because they could meet the definition of an 'officer' of the company. However, a more junior payroll clerk would not be covered.
- The accountability provisions can also potentially cover individuals or other companies in a contractual relationship with the employer (for example, a legal advisor who aids the employer to manipulate corporate structures to avoid paying entitlements).

Are there costs for employers to comply with the new requirements?

- For most businesses there will not be any increase in compliance costs resulting from these changes.
- The focus of the changes is on businesses that are not currently meeting their obligations. They will face minor compliance costs to become compliant and risk facing financial penalties if they don't (with serious breaches resulting in significantly higher penalties).

How do you determine what breaches are serious?

The new law also provides an indicative list of factors for the Employment Court to consider when determining whether a breach of minimum standards is serious, such as the amount of money involved, how long the breach has gone on for and whether it was intentional or reckless.

What are the penalties for less serious breaches?

The penalties at the Employment Relations Authority for minor to moderate breaches would remain at $10,000 for an individual and $20,000 for a company.

Clearer-record keeping requirements

- Record-keeping requirements for wages, time, holidays and leave have been made consistent across all employment legislation.
- There is flexibility around the format for records, so long as they can show compliance with the law.
- Infringement notices have been introduced for clear-cut breaches of these obligations with a penalty of $1,000 per breach with a cap of $20,000 if there are multiple breaches in a three month period.

Why were changes to record keeping requirements needed?

- The past requirements did not ensure that compliance with minimum entitlements could be assessed in all circumstances and was, in some places, inconsistent across the legislation. For example, the Employment

Relations Act and Minimum Wage Act had different requirements for recording time worked and this has led to difficulties in assessing whether low salaried and piece workers (workers who are paid by the number of products they create or tasks they complete) were receiving adequate pay.

- The changes require all employers to have a record of the hours their employees work each day and the pay they receive for those hours.
- For employees who work regular hours each day for regular pay, to which they already agreed to with the employer, a statement of the regular hours and pay is all that is needed to comply. It could be set out in the employment agreement, for example.
- However, if employees do not work these 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.
- 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 being met.

What are the costs for complying with record keeping requirements?

- For most employers there will not be any costs associated with complying with the new record keeping requirements. This is because compliant employers will already be recording the necessary information.
- The key requirement is that employers can produce a record of the number of hours worked each day in a pay period, and the pay for those hours, in an easily accessible form on request from the employee or from a Labour Inspector.

What is the aim of the infringement notices for failure to keep records?

- Infringement fees are an additional tool for Labour Inspectors and commonly used in other sanction regimes.
- Labour Inspectors will use infringement fees for clear-cut breaches of the obligations to keep employment agreements and the prescribed records.
- This will reduce the need for proceedings at the Employment Relations Authority or Employment Court.

Increased tools for Labour Inspectors

- Information sharing: The new law sets out a framework for how information will be shared with other regulators such as Immigration New Zealand, the Companies Office and Inland Revenue to improve the ability of Labour Inspectors to identify and investigate alleged breaches.
- Information requests: Labour Inspectors will now able to request any record or document from employers that they consider will help them determine whether a breach has occurred – for instance financial records or bank statements.

What protections will accompany the new information sharing powers for Labour Inspectors?

- All information shared (both business and personal) will continue to be subject to the protections of the Privacy Act. Memoranda of Understanding and Approved Information Sharing Agreements (AISAs) will outline the necessary checks and balances for how Labour Inspectors and other regulatory parties with whom they share information are required to handle both business and personal information.
- Only in very specific circumstances in which there is an Approved Information Sharing Agreement (AISA) between Labour Inspectors and another regulator, would the Privacy Act's information sharing principles be modified or overridden to allow for specific personal information to be used or disclosed. However, an

AISA must specify the safeguards to ensure that any interference with an individual's privacy is minimised. The Office of the Privacy Commissioner will work with MBIE on the development of AISAs.

Why do Labour Inspectors need more information from employers?

- Labour Inspectors may request further records and documents from employers when they need to obtain supporting evidence to substantiate an alleged breach – for example, when the required wages and time records are incomplete or not evident.
- Labour Inspectors will need to have a reasonable belief that the records and documents they request will assist in determining whether or not a breach of employment legislation has occurred.

CHANGES TO EMPLOYMENT RELATIONS AUTHORITY'S APPROACH TO EMPLOYMENT STANDARDS CASES

- More employment standards cases, particularly those that involve more serious and systemic and/or intentional breaches of employment standards will be resolved at the Employment Relations Authority or Court, rather than being automatically directed to mediation services in the first instance as was previously the case.
- If it wishes, the Authority will continue to be able to send standards cases to mediation if they are mixed up with other employment relationship problems, or if it considers that mediation will contribute constructively to addressing the problem (for example, through clarifying the facts of the case).
- Employees are now able to seek penalties at the Employment Relations Authority for any minimum entitlement breach – previously this was only possible for breaches of the Wages Protection Act.

Why has the role of mediation been reduced for standards cases?

- For many employment standards cases, particularly those that involve more serious and systemic and/or intentional breaches, mediation is not appropriate because:
    - alleged standards breaches are matters of fact to be determined, as opposed to other employment relationship problems for which mediation between the employer and employee is more suitable
    - it cannot provide the enforcement outcomes sought (i.e. sanction/deterrence)
    - it can result in the case being prolonged if mediation cannot determine the breach as the case will end up back at the Authority
- The statutory obligation to direct standards cases has been removed and instead the Authority is now required to consider them.
- However, the Authority retains discretion to send standards cases to mediation if they are mixed up with other employment relationship problems, or if it considers that mediation will contribute constructively to addressing the problem (for example, through clarifying the facts of the case).

Why can employees seek their own penalties at the Employment Relations Authority?

- Employees have already been able to seek penalties under the Wages Protection Act. Extending this right to the Minimum Wage Act and Holidays Act is consistent with the 'self-enforcement' nature of the employment legislation.
- Employees are also able to seek penalties relating to the employer's obligations regarding individual employment agreements.
- It means that the opportunity for the Authority to penalise employers is no longer dependent on who brings the case (i.e. an employee or a Labour Inspector).