Employment Relations Amendment Bill 2013

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Caution: This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status.

Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill.

Purpose

The aim of this Bill is to amend the Employment Relations Act 2000 (the Act) in relation to collective bargaining, flexible working arrangements, good faith bargaining, rest break and meal break provisions, and the Employment Relations Authority (the Authority). The Bill also introduces an exemption from certain requirements of Part 6A of the Act (relating to continuity of employment) for small to medium enterprises.

Background

A regulatory impact statement is at: http://www.dol.govt.nz/publications/general/gen-ris.asp

Main Provisions

Good-faith requirements in an employment relationship - confidentiality
The Act currently requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or her employees to provide to the employees affected:

- access to information, relevant to the continuation of the employee’s employment, about the decision; and

- an opportunity to comment on the information to their employer before the decision is made (Section 4(1A)(c) of the Act).
The Act also currently provides that this provision “does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information” (Section 4(1B) of the Act).

The Act currently defines the term “good reason” as “including”:

- complying with statutory requirements to maintain confidentiality;
- protecting the privacy of natural persons;
- protecting the commercial position of an employer from being unreasonably prejudiced (Section 4(1C) of the Act).

The Bill narrows the employer’s obligation under Section 4(1A)(c)(i) to provide access to information where the employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of the employer’s employees. The Bill provides that the obligation does not require an employer to provide access to confidential information (without affecting obligations under the Official Information Act 1982 and the Privacy Act 1993):

- that is about an identifiable individual other than the affected employee;
- that is evaluative or opinion material compiled for the purpose of making a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more employees;
- that is about the identity of the person who supplied that material;
- that is subject to a statutory requirement to maintain confidentiality;
- where it is necessary, for any other good reason, to maintain the confidentiality of the information (for example, to avoid unreasonable prejudice to the employer’s commercial position).

However the employer may provide information contained in the same document as the information described above with appropriate deletions or by way of summary (Part 1, Clause 4, substituting Sections 4(1B) and (1C)).

Duty to conclude collective agreement abolished

Section 33 of the Act currently provides that the duty of good faith requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.

The Bill provides that the duty of good faith does not require those parties in those circumstances “to enter into a collective agreement” or “to agree on any matter for inclusion in a collective agreement” (Part 1, Clause 9, substituting Section 33).

Employer may opt out of collective bargaining involving multiple employers

The Bill provides that where an employer is an intended party to such an agreement and has received a notice initiating bargaining for that agreement, that employer may, not later than 10 days after receiving notice, opt out of bargaining for the agreement by giving a written opt-out notice to all other intended parties identified in the notice that initiates bargaining. The notice takes effect on and from the date that it is given in the notice. When the notice takes effect, the employer is no longer a party to bargaining for the collective agreement and ceases to have any further obligations under the Act in relation to that bargaining (Part 1, Clause 11, inserting New Sections 44A-44C).
Conclusion of bargaining

The Bill allows a party bargaining for a collective agreement to apply to the Employment Relations Authority (the Authority) for a determination as to whether the bargaining has concluded. The Authority may not make such a determination unless it is satisfied that the parties have attempted to resolve the difficulties in concluding a collective agreement by way of mediation and, if applicable, facilitation under the Act, that those attempts have failed, and that further attempts are unlikely to be successful. The Authority may determine that:

- bargaining has concluded, in which case the Authority may make a declaration to that effect; or
- bargaining has not concluded, in which case the Authority may either make a recommendation to the parties as to the process they should follow to resolve the difficulties; or
- decide not to make a recommendation.

Where the Authority determines that the bargaining has concluded, none of the parties to the bargaining may initiate further bargaining earlier than 60 days after the date of the declaration, unless the other parties agree. In cases where the Authority determines that bargaining has not concluded, none of the parties may make another application until the recommended process has been followed or (if no recommendation has been made) until 60 days after the Authority’s determination, unless the other parties agree (Part 1, Clause 12, inserting New Section 50K).

Terms and conditions of new employee who is not a member of a union

The Act currently provides that the terms and conditions of employment for a new employee who is not a member of a union are, for the first 30 days of employment, the same as those in the collective agreement that would apply to the employee if he or she were a union member together with any additional terms and conditions that have been agreed to and that are not inconsistent with the collective agreement.

The Bill abolishes that provision (Part 1, Clause 16, repealing Section 63 of the Act).

Employee requesting variation of work arrangement

The Act at present imposes limits on when an employee is entitled to make a request for a variation of their working arrangements, particularly that the employee must satisfy the criterion that he or she has the care of another person.

The Bill provides that an employee may make a request at any time and the employer must deal with the request within one month (instead of up to three months currently provided for (Part 1, Clause 21 substituting Section 69AAB of the Act; Clause 24, substituting Section 69AAE of the Act).

Continuity of employment if employee's work affected by restructuring

Part 6A of the Act relates to this matter. Subpart 1 of Part 6A has the object of providing protection to specified categories of employees if, as a result of a proposed restructuring, their work is to be performed by another person by giving them a right to transfer to the other person as employees and to negotiate with that new employer for redundancy or have it set by the Authority.

The Bill adds a definition to Part 6A, Subpart 1, that of “exempt employer” and sets out the requirements that a new employer or other person must meet to benefit from being an exempt employer. The basic requirement is that the employer or other person, together with any associated person or persons must employ 19 or fewer employees and must provide a warranty to that effect. If a new employer does not provide a warranty under this section, that employer must comply with Part 6A in the usual way (even if the new employer could have qualified as an exempt employer) (Part 1, Clause 30, inserting New Section 69CA).
Obligation of employers in transfer situation

The Bill provides that new employers including exempt employers are liable for service-related entitlements of employees transferring to a new employer (Part 1, Clause 35, inserting New Sections 69LA, 69LB, and 69LC). An employee’s right to elect to transfer to a new employer will now depend, inter alia, on whether the new employer is an exempt employer. The provisions relating to the information that an employer must provide to employees affected by restructuring are changed by specifying when that information must be provided and the time period during which the employee must make an election in relation to transfer to the new employer. The Bill requires the employer to send an election made by an employee to the new employer as soon as practicable and, in any event, not later than 5 working days after the employee’s employer receives the election. Other detailed amendments are made to the transfer provisions including those necessary because of the exempting of certain employers as described above (Part 1, Clauses 31-42, amending Part 6 of the Act, inserting New Sections 69CA, 69LA-69LC, 69OAA and 69OEA; amending Sections 69E-69I, and 69OC; repealing Section 69OL of the Act).

Compensatory measure (for example loss of tea break)

The Bill creates definitions of the term “compensatory measure” which is a measure that is designed to compensate an employee for an employer’s failure to provide rest breaks and meal breaks. It includes (without limitation) a measure that provides the employee with time off work at an alternative time during the employee’s work period, for example, by allowing a later start time, an earlier finish time, or an accumulation of time off work that may be taken on 1 or more occasions (Part 1, Clause 43, substituting Clause 69ZC).

Rest breaks

The Bill provides for an employee’s entitlement to rest breaks and meal breaks, the timing and duration of the breaks, and compensatory measures. An employer must provide an employee with paid rest breaks and meal breaks that:

- provide the employee with a reasonable opportunity for rest and refreshment and to attend to personal matters during the employee’s work period; and

- are appropriate for the duration of the employee’s work period.

The Bill provides that the employee’s entitlement to rest breaks or meal breaks may be subject to restrictions, but only if:

- the restrictions are reasonable and necessary, having regard to the nature of the employee’s work; or

- if not reasonable and necessary, the restrictions are reasonable and agreed to by the employer and the employee (in an employment agreement or otherwise).

Where an employer and employee cannot agree on when the employee is to take his or her breaks or on the duration of the breaks, the employer may specify reasonable times and durations that, having regard to the employer’s operational environment or resources and the employee’s interests, enable the employer to maintain continuity of service or production. Provision is made for compensatory measures.

An employer is exempt from the requirement to provide rest breaks and meal breaks:

- to the extent that the employer and employee agree that the employee is to be provided with compensatory measures; or

- to the extent that, having regard to the nature of the work performed by the employee, the employer cannot reasonably provide the employee with rest breaks and meal breaks.

An employer must provide the employee with compensatory measures if the employer is not required
to provide the employee with rest breaks and meal breaks under the Bill. Compensatory measures must be reasonable. The Bill includes specific clarification as to compensatory measures that involve the employee being provided with time off work (Part 1, Clause 44, substituting Sections 69ZD and 69ZE).

**Strikes and lockouts**

The Bill prohibits strikes and lockouts unless the specified requirements are satisfied. These are that the strike or lockout is lawful under Section 83 or 84 of the Act, that written notice has been given to the relevant employer or employee, and that the strike or lockout does not commence before the time and date specified in the notice as the time and date on which the strike or lockout will begin.

The Bill sets out the circumstances in which the notice requirements do not apply, including in relation to strikes and lockouts in essential services and in relation to certain passenger transport services (Part 1, Clause 49, inserting New Sections 86A and 86B, Clauses 50-56, amending Sections 90, and 91-94 of the Act).

**Partial strike pay deductions**

The Bill enables an employer to make specified pay deductions in relation to partial strikes (i.e. any strike other than a strike that wholly discontinues the employment of the employees, but not including a refusal to work overtime or a ban on call-out work if the employees would otherwise receive a special payment for performing the call-out work) subject to the employer complying with the notice requirements and calculating the amount of the deduction in accordance with the Bill. The Bill sets out the notice requirements that an employer that intends to make a specified pay deduction must comply with. The notice must be given before the deduction is made, within the pay period in which the first deduction is to be made, and must specify the further pay periods during which the deductions will be made. The Bill sets out the process to be followed by the employer in calculating the amount of the specified pay deduction and provides that an employee may lawfully be paid less than the minimum rate of wages if that results from a specified pay deduction or from a reduction in output where the employee is paid by piecework and is party to a partial strike. Certain appeals may be made to the Authority (Part 1, Clause 56, inserting New Sections 95A-95H into the Act).

**Employment Authority**

Changes are made to the jurisdiction of the Employment Authority. Examples of the changes are:

- extending the jurisdiction of the Employment Court to grant injunctions to stop specified pay deductions being made and removing the power to prevent proceedings for such injunctions from being commenced in the District Court or High Court (Part 1, Clause 57, amending Section 100); and

- enabling new employers and employees to apply for compliance orders in relation to individualised employee information (Part 1, Clause 58, amends section 140A (which enables the Authority to make compliance orders in relation to individualised employee information as defined in New Section 69OB(1)).