

THE NEW EMPLOYMENT STANDARDS LEGISLATION BILL – SIGNIFICANT CHANGES TO EMPLOYMENT LAW THAT YOU NEED TO KNOW ABOUT

Janet Copeland
Copeland Ashcroft Law

As of 1 April 2016, a number of changes to the minimum employment framework came into force. “Zero hour contracts” received significant media attention, with other changes less publicised. The main changes and focus from the government relate to strengthening of employment standards, addressing zero hour contracts and modernising parental leave.

Wide reaching changes

Amendments were made to the following employment related legislation:

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

Employment Relations Act 2000

Zero Hour contract restrictions - Zero hour contracts are arrangements with permanent employees who have no guaranteed hours of work, but the employer requires them to be available to work when asked. If no work is made available by the employer then these employees would receive no pay.

Zero hour contracts were common in a number of industries such as tourism, agriculture and hospitality, where businesses struggle to predict the specific workload in advance and require employees to be available to work, without any guarantee of hours. The law change

Notes:

means that this will no longer be permitted, and all employers who currently use zero hour arrangements need to review and revise their employment agreements and staffing arrangements.

The new law refers to these arrangements' availability provisions and has set a number of criteria around the use of these provisions in employment agreements. An availability provision under this new legislation means a provision in the employment agreement under which:

- The employee's ability to work is conditional on the employer making work available; and
- The employee is required to be available to accept any work that the employer makes available.

An availability clause that is not included in an employment agreement is not enforceable against the employee. To include an availability clause in the employment agreement there must be:

- Genuine reason based on reasonable grounds; and
- Guaranteed hours; and
- Specified hours of availability; and
- A payment of reasonable compensation.

In considering whether there are genuine reasons based on reasonable grounds, all relevant factors must be considered including:

- Whether the business needs require this
- The number of hours which the employee would be required to be available
- Proportion of agreed hours of work vs number of hours required to be available.

An employer must guarantee the employee some form of hours to include an availability provision. For example John works a minimum of 12 hours per week, 5.30am to 8.30am, Monday to Thursday, both days inclusive. That is clearly setting out his guaranteed hours.

In addition to the guaranteed hours, the availability provision must specifically relate to defined hours of availability outside or over and above the guaranteed hours. So you have the guaranteed hours, then you have the hours above or over that which an employer requires an employee to be available specified.

The employer must make and include in the availability provision a payment of reasonable compensation. The employer must pay the employee reasonable compensation for making themselves available even if they don't end up working.

If an employee receives a salary, then the employer and employee may agree that the employee's salary amounts to compensation for the employee making themselves available for work under an availability provision.

So for those not on a salary or where the employer and employee do not agree that the salary is reasonable compensation for covering hours of availability, the Act requires you to consider:

- The number of hours for which the employee is required to be available
- The proportion of the hours worked
- The nature of any restrictions resulting from the availability provision (so whether the employee cannot drink, must not go further than 30mins travel time from the workplace)
- The currently hourly rate
- If the employee is remunerated by way of salary, the amount of salary.

An employee who does not have an availability provision in their employment agreement is free to turn down any extra hours offered. However an employee must not be treated adversely if they refuse to perform work requested under these circumstances.

Cancellation of shifts – if shifts were arranged in advance and the employer cancelled the shift, the employee must now be provided with reasonable notice or where the specified notice is not given reasonable compensation.

Shift means a period of work in which periods of work:

- a) are continuous or effectively continuous; and
- b) may occur at different times on different days of the week.

Work needs to be continuous, one employee taking over the other, in order to be considered shift work. The obvious examples are hospitals, rest homes, day shift, afternoon shift and night shift. The work is continuous; the employees are doing similar work to the person before them. It will also be possible to find shift working in the context of hospitality and retail where people start in the morning after taken over from early afternoon. Shift work is not restricted to a 24/7 operation.

In determining a reasonable period of notice the employer must have regard to all relevant factors including:

- 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; and

Notes:

- the nature of the employee’s work, including the likely effect of the cancellation on the employee; and
- the nature of the employee’s employment arrangements, including whether there are agreed hours of work in the employee’s employment agreement and, if so, the number of guaranteed hours of work (if any) included among those agreed hours.

In determining reasonable compensation the employer must have regard to all relevant factors including:

- The period of notice
- The remuneration that the employee would have received for working the shift
- Whether the nature of the work requires the employee to incur costs in preparing for the shift.

The IEA must set out:

- Notice timeframe for cancelling a shift i.e., what the reasonable period of notice is
- Compensation rates if the above notice is not given i.e., reasonable compensation

This is unlikely to have too much impact on the agriculture industry where it is not particularly common to see shift work occurring. However, if an employee has agreed to perform work at the employer’s request and the employer either cancels that work or sends the employee home early, the employee would have a legitimate expectation to be paid for the agreed period of work or the portion of the work unworked.

Secondary employment - an employment agreement must not prohibit an employee from working a second job unless the prohibition is for "genuine reasons based on reasonable grounds". Such reasons must be included in the employment agreement.

Some listed examples of justifiable reasons are set out in the Act, and include protecting commercially sensitive information or intellectual property, or preventing a conflict of interest. We anticipate our agricultural clients may want to agree to a prohibition on secondary employment in relation to fatigue, resulting in health and safety concerns.

Enhanced labour inspector – Labour Inspectors have the new power to enforce minimum entitlements through declarations when there has been a ‘serious breach’. A declaration of breach could result in a range of orders including:

- *Banning orders* – a person can be banned from entering into an employment agreement for a specified period of time up to 10 years.
- *Compensation orders*- an order that the person who is the subject of the breach be compensated for a breach for any loss that they have, or are likely to have, suffered.
- *Pecuniary penalty orders* - this carries a maximum \$50,000 penalty for an individual, or for a company, the greater of \$100,000, or three times the financial gain made by the breach. It is unlawful to insure against these penalties. You cannot insure against these fines.

Having said that, don't let these penalties scare you. They are intended for employers who commit serious breaches of the standards. Whether a breach is serious depends on:

- The amount of money involved
- Number of instances and time over which they occurred
- Intentional/reckless breach.

Record Keeping – Obligations have been amended so that they are consistent across legislation. At the moment there are some inconsistencies between the Employment Relations Act (ERA), the Holidays Act and the Minimum Wage Act in terms of employer's obligations around keeping records of wages, hours worked, holidays and other leave – so this has been streamlined.

Section 130 of the ERA has been amended to include the requirement that wages and time records must be either written or in a manner that can be easily converted into a written form (which is an existing requirement already for holiday and leave records under the Holidays Act – it is now a requirement for wages and time records). This is so if a Labour Inspector wants to look at these records or an employee – they are easily accessible. If an employee or an inspector asks for these records you are required to hand them over – that is an existing obligation.

These changes are not intended to be really onerous on the employer – there is flexibility around the format of the record, for example if you have set hours and pay in an employment agreement for example and those are the hours actually worked you don't need to write out a separate record of hours and pay – the “record” can be the employment agreement.

The Parental Leave and Employment Protection Act 1987

There have been a number of amendments to extend parental leave and the related entitlements to more workers and increase the flexibility of the scheme to modernise the legislation.

Increased paid leave – Paid parental leave entitlements have increased from 16 weeks to 18 weeks. This was the second step of the increases announced in early 2015 (paid parental leave increased from 14 to 16 weeks on 1 April 2015).

Notes:

Extended parental leave eligibility – Paid parental leave has been extended to a wider class of employee. This includes casual, fixed term employees, employees with more than one employer and those who have recently changed jobs. Previously these groups of workers were not eligible for paid parental leave.

Introduction of ‘keeping-in-touch-days’ – the employee can return to work up to 40 hours of paid work during their paid leave. Previously the moment an employee returns to work for even one hour during their paid leave, they forfeit the rest of their paid leave entitlement from the government. So this allows the employee to return to work for a short stint which could be for training or to attend an important meeting, be paid for that work and continue to receive their paid leave entitlements.

A keeping in touch day can only be used:

- if both the employee and the employer consent
- only after the baby is 4 weeks old
- no more than 40 hours in total during the 18 weeks of paid leave.

Resignation allowed and paid leave – Employees are now able to resign and still receive parental leave payments from the government. Previously, an employee was required to confirm they will return to work at the end of their parental leave in order to qualify for the paid entitlements from the government (currently 18 weeks). This led to employees informing their employer they intended to return, regardless of their true intention, so they did not forfeit their paid entitlements.

Practically, this change favours both employers and employees. If an employee does resign, the employer is free to hire a permanent replacement rather than hiring temporary staff to cover the period of parental leave. This change creates more certainty for employers.

Pre-term entitlements - parents of pre-term babies will now be entitled to extended paid leave entitlements, above the standard 18 weeks. Pre-term is anything prior to 37 weeks. If the baby is born six weeks pre-term the employee taking the leave is entitled to an extra six weeks paid leave. This additional pre-term baby payment is up to a maximum of 13 weeks. This reflects the extra and unexpected time parents of pre-term babies spend in hospital with the baby and away from work.

Extend entitlements to primary caregiver – Parental leave entitlements have been extended to anyone who takes permanent primary responsibility for the care, development, and upbringing of a child, for example Home for Life parents, whangai, grandparents and other permanent guardians – i.e, the main person taking day to day care of the child. So the parental leave entitlements are no longer restricted to biological or adoptive parents, assuming the primary caregiver meets the prescribed eligibility criteria.

Flexibility with unpaid leave – There is increased flexibility in relation to the taking of unpaid parental leave. Previously the unpaid leave had to be taken in one continuous block. The

new law allows employees to return to work for a period then continue to take their unpaid leave after that but only up until the child is a year old.

So for example you could have an employee who is off for their 18 weeks paid leave, then returns to work for a month then takes 6 months unpaid leave. There could be various reasons why it would suit both the employer and the employee to take the unpaid leave later so it just allows for that increased flexibility.

Extension of unpaid leave eligibility - The new law will enable workers who have been with their employer for more than 6 months but less than 12, to take a period of unpaid leave in addition to paid leave, for a total of six months. Previously employees who had been with an employer between 6 and 12 months were entitled to the paid parental leave but not period of unpaid leave. They are they are now entitled to six months unpaid leave on top of their 18 weeks paid leave.

Penalty increased – The penalty for misleading or making a false statement to a government department in relation to paid parental leave has increased. The increase was from \$5,000 to \$15,000.

The Wages Protection Act 1983

In order to deduct moneys from an employee's wages there must be written consent to do so. The new legislation confirms that this written consent can be contained in a deduction clause in a signed employment agreement.

Now as well as the signed written consent to deduct, the employer must also consult with the employee if they propose to make a deduction from the employee's wages. Consultation involves more than merely notifying your employees; you must provide your employees with an opportunity to comment and respond in a meaningful way. Employers are then expected to make a genuine effort to accommodate the views of their employees. Ultimately, however, consultation does not equal agreement.

Unreasonable deductions from wages are now also specifically prohibited.

Notes:

The Minimum Wage Act 1983

As of 1 April 2016 the minimum wage rates increased.

- Adult minimum wage is **\$15.25 per hour**; which is:
 - \$122.00 for an 8 hour day or
 - \$610.00 for a 40-hour week or
 - \$1,220.00 for an 80-hour fortnight
- Starting-out and training minimum wage rates are **\$12.20 per hour**; which is:
 - \$97.60 for an 8 hour day or
 - \$488 for a 40-hour week or
 - \$976.00 for an 80-hour fortnight.

Janet Copeland

Copeland Ashcroft Law

Disclaimer: Copeland Ashcroft Law produced this Paper and supporting materials to provide a brief summary of employment law issues and developments affecting employers and their businesses. Although we have taken care to ensure accuracy, details may be omitted that may be directly relevant to you. This Paper, supporting materials and the information contained within them do not purport to be and should not be used as specific legal or professional advice and we accept no responsibility for any errors or omissions or for any loss or damage resulting from reliance on or use of same. We recommend that you obtain legal advice specific to your situation before proceeding and would be happy to help in this regard.

© Copyright Copeland Ashcroft Law 2016