

Departmental Disclosure Statement

Employment Relations Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

17 January 2018

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Part One: General Policy Statement

Introduction

The purpose of this Bill is to implement the Government's post-election commitments to restore key minimum standards and protections for employees, and a suite of changes to promote and strengthen collective bargaining and union rights in the workplace. The changes are intended to introduce greater fairness in the workplace between employees and employers, in order to promote productive employment relationships.

The amendments require amendments to the *Employment Relations Act 2000* (the Act).

Collective bargaining and unions

The Amendments in Part 1 of the Bill include a number of proposals designed to strengthen collective bargaining and union rights in the workplace in order to secure improved terms and conditions for their members, while supporting workplace productivity.

The amendments to Part 4 of the Act will enable unions and their representatives to more effectively carry out union activities and support members by:

- removing the requirement for a union representative to gain consent from an employer before entering a workplace;
- requiring employers to allow union delegates reasonable time during working hours to perform their duties in respect of the employees of that employer.

The amendments to Part 5 of the Act will strengthen unions' rights in the workplace and support successful collective bargaining by:

- reinstating the principle that the duty of good faith in section 4 requires parties to conclude a collective agreement, and repealing the provisions that enable the Employment Relations Authority (the Authority) to determine that bargaining has concluded;
- reinstating the ability of unions to initiate collective bargaining 20 days before an employer;
- repealing sections 44A to 44C which allow employers to opt out of multi-employer collective bargaining once bargaining has been initiated;
- requiring that collective agreements must contain rates of pay and that rates of pay must be agreed during collective bargaining;

Sections 95A-95H of Part 8 of the Act are also repealed to remove an employer's ability to deduct pay as a response to partial strikes.

The amendments to Part 6 of the Act will improve employees' ability to make an informed choice about whether to join a union by allowing them appropriate time and information to consider their options. The amendments intend to achieve this by:

- requiring that new employees are afforded the same terms as conditions as the applicable collective agreement relating to their work for the first 30 days of their employment;

- requiring employers to provide the applicable collective agreement, union contact details and the option to join the union at the same time they provide an intended individual employment agreement to an employee;
- requiring that employers provide information about the role and function of the applicable union when the intended employment agreement is given to prospective employees;
- encouraging an active choice by a new employee on whether to join the union, or whether to provide their name and choice to join to the relevant union;

The amendments to Part 9 of the Act are intended to protect union members from unfair treatment by an employer because of their involvement in a union by:

- extending the grounds for discrimination to include an employee's union membership;
- extending the timeframe under section 107 for which an employee's union activities may be considered to contribute to an employer's discriminatory behaviour from 12 months to 18 months.

Restoring key minimum standards and protections for employees

The amendments to Parts 6, 6A and 6D of the Act reintroduce minimum standards and protections that are intended to make vulnerable workers more secure in their employment while still allowing flexibility for employers. These include:

- removing the exemption for employers with fewer than 20 employees from the current rules about business transfers, which will allow employees of these employers to elect to transfer to an incoming employer;
- extending the timeframe for employees to elect to transfer to an incoming employer and placing information and notification requirements on employers in respect of their employees' personal information;
- reinstating the right to prescribed rest and meal breaks, with limited exceptions;
- restoring reinstatement as the primary remedy in unjustified dismissal cases, where the employee requests it and where practical and reasonable;
- limiting trial periods to employers with fewer than 20 employees.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>The Bill covers a range of issues in employment law and all have been subjected to public policy debate by a range of stakeholders, academics and political parties. A review of Part 6A of the Act was conducted in in 2009/10 and 2012, focusing on whether the policy of providing special protections for a defined set of employees was still relevant and desirable, the report was released in 2012 and is available at: http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/pdf-library/report-on-the-review-of-part-6a.pdf</p> <p>A MBIE review in 2014 of the 2010 amendments to the Act assessed the impact of the notice and consent requirements for union representatives' access to workplaces. The review also evaluated the impact of trial periods, which at the time were limited to employers with fewer than 20 employees. The review is available at: http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/pdf-library/short-term-outcomes-2010-changes-era-and-ha.pdf</p> <p>In 2016, Motu Economic and Public Policy Research evaluated the 2009 amendments which introduced trial periods, and their effect on firm hiring behaviour. The report is available at: https://motu.nz/our-work/population-and-labour/individual-and-group-outcomes/the-effect-of-trial-periods-in-employment-on-firm-hiring-behaviour/</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
<p>The Bill will provide a positive contribution to New Zealand's compliance with International Labour Organisation (ILO) Convention 98 on the Right to Organise and Collective Bargaining. This includes employees making an informed and free choice, preventing discrimination based on union membership and providing a fairer framework for collective bargaining to take place.</p>	

2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	NO
<p>New Zealand ratified ILO Convention 98 in on 9 June 2003. The Ministry of Business, Innovation and Employment (and previously the Department of Labour) report regularly on New Zealand's compliance with the Convention.</p>	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
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The Regulatory Impact Statements can be found at:

<http://www.mbie.govt.nz/publications-research/publications/employment-and-skills/ris-100-day-commitments-in-Employment-Relations>

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?

YES

The Regulatory Impact Analysis Team at the Treasury reviewed the Regulatory Impact Statement “Employment Relations Bill” produced by the Ministry of Business, Innovation and Employment and dated 30 November 2017 and 18 January 2018. The reviewers considered that the information and analysis summarised in the RIS met the quality assurance criteria (based on the revised expectations for RIS’s covering 100-day play priorities).

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?

YES

While broad impacts on the labour market and employment relations were assessed in the RISs, limited analysis was undertaken on the cumulative impact of the proposals caused by their interaction with one another. This was due to the time constraints involved in developing the Bill to give effect to the proposals.

The cumulative effect of the proposals may alter the bargaining positions of unions and employers to a greater extent than an individual proposal. For example, proposals that require parties to remain in bargaining (such as the duty to conclude bargaining and removing the opt out provision for multi-employer bargaining) combined with proposals that guide the content of collective agreements (such as the requirement to include rates of wages and salaries in collective agreements).

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?

NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:

(a) the size of the potential costs and benefits?

NO

(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?

NO

The RISs sets out the broad costs and benefits of the proposals. No specific estimates of the costs and benefits are available due to the timeframes involved in developing the proposals.

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:

(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>The nature and level of regulator effort in New Zealand's employment relations system is determined in part by the role of unions in reporting non-compliance, as unions have an interest in ensuring employers fulfil their statutory obligations.</p> <p>For those aspects of the Bill that relate to employment standards – including prescribed rest and meal breaks, and restoring the protections in Part 6A - the costs and benefits relate to the level of compliance with the provisions. Compliance may be impacted by the work of the labour inspectorate and the Authority in securing compliance.</p> <p>For the amendments that relate to the provision of information about the role and function of an applicable union, and the provision of a mandated choice about whether to join a union, these may also be impacted by compliance and non-compliance. Here the proposed penalties for a breach and the extent of Authority enforcement action are relevant factors in compliance.</p> <p>The aspects of the Bill that relate to strengthening collective bargaining (including covering new employees under consistent terms and conditions as the collective agreement and with the bargaining process) are less likely to be subject to non-compliance relative to the other proposals since any breaches are likely to be identified by the relevant union and reported to the Authority.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The Ministry of Business, Innovation and Employment's Employment Relations team assessed the policies against the International Labour Organisation Convention 98 – Right to Organise and Collective Bargaining.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Te Puni Kōkiri was consulted during policy development and did not identify any inconsistency with the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

The Ministry of Justice has undertaken an assessment of whether the Bill is consistent with the Bill of Rights Act and has provided advice to the Attorney-General. Advice provided to the Attorney-General is generally expected to be available on the Ministry of Justice's website upon the Bill's introduction.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

YES

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

YES

The Bill alters the jurisdiction and penalty provisions of the Authority (and the Employment Court in relation to challenges) in the following ways:

- removes the ability to penalise an employer for unreasonably withholding consent to access a workplace or failing to give reasons in writing for withholding consent
- expands by allowing consideration of whether a refusal to allow an employee to undertake delegate activities is reasonable
- removes the ability to hear applications to determine whether bargaining has concluded
- removes the ability to consider the validity of opt out notices from employers for bargaining involving two or more employers
- expands to penalise employers for breach of the provisions relating to:
 - employing new employees on the same terms and conditions of the applicable collective agreement for the first 30 days of their employment
 - requiring employers to provide information about the role and function of the union at

<p>the same time they provide an intended individual employment agreement to a prospective employee</p> <ul style="list-style-type: none"> • failing to provide the notice and form relating to an employee’s active choice to join a union, failure to pass the completed notice to the applicable union and failure to provide notice to the union that the employee had not completed the form. • expands by allowing consideration of the refusal by an employer to accept information about the role and function of a union to pass on to prospective employees • removes jurisdiction in relation to disputes relating to pay deductions for partial strikes • expands by allowing to hear personal grievances for discrimination based on union membership • expands by extending the timeframe within union activities can be considered as part of a personal grievance • expands by allowing consideration of compliance with set rest and meal break provisions, and the validity of exemptions to the requirement • expands by removing exempt employers from the requirements around continuity of employment if the employee’s work is affected by restructuring • expands by allowing consideration of reinstatement as a primary remedy where the employee subject to a personal grievance requests it, and where reasonable and practical. 	
3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice was consulted in the policy development for the Bill. The penalty provisions were developed in line with the regime in the Act.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>The Bill proposes unions are provided with information about whether an employee has decided to join the union or not. This information is restricted to the employee’s name and their decision. The employee can choose to opt out of that information being provided to the union. Where an employee does not complete the form to relating to these decisions, the employer would be required to inform the applicable union of the non-completion.</p>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Office of the Privacy Commissioner has been consulted on the provisions in the Bill related to the notification to unions of a new employee’s choice to join a union. The Privacy Commissioner does not support the proposal for an employee’s name and choice of employment agreement to be communicated by the employer to unions unless they opt out. The Commissioner considers that any obligations should be placed on employers rather than employees, and that employees should provide their express consent prior to their choice of employment agreement being communicated to unions.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
The Government has consulted stakeholders including unions and employer representatives in the development of the policy proposals in the Bill.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO
There has been no formal testing or assessment of the policy details to be given effect by the Bill.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>The Bill requires that the Authority and the Employment Court exercise their existing decision-making powers in a different way in relation to reinstatement for unjustified dismissal. It will now become the Authority's primary remedy, where the employee requests it and where practical and reasonable.</p> <p>The Authority will have its power to declare that bargaining has been concluded removed. This change reverts to the pre-2015 position that requires parties to conclude bargaining as part of the duty of good faith unless there is a genuine reason based on reasonable grounds not to, and removes the determination power of the Authority to declare bargaining to be concluded.</p> <p>Finally, as stated above, the Authority will be able to impose financial penalties on firms for not providing certain information to employees about the union and the collective agreement, if they do not provide the standardised form to employees, and if they do not pass on the decisions of employees to the applicable union (excluding those who have chosen to opt-out of their information being passed on).</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO