

Major Changes to New Zealand's Employment Laws Arrive

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Once again, employment law is in the news, with the Government having announced several changes to New Zealand's employment statutes last year that come into effect in April and May. Most of those changes were included in the Employment Relations Amendment Act 2018, which was passed into law on December 11th. One may be excused a sense of déjà vu, though, when reflecting on the changes, as much of the Act amounts to a roll-back of changes made by the previous Government as recently as 2015. The Act restores protections for employees, especially vulnerable employees, and strengthens the role of collective bargaining in the workplace. It introduces changes which take effect either the day after Royal Assent, 12 December 2018, or on 6 May 2019. Other recent changes to the employment law regime, nevertheless, bring into force entirely new legal requirements for employers and as of April 1 the increase in minimum adult wage announced in December, and the Domestic Violence Victims' Protection Act 2018 take effect.

Changes which took effect on 12 December 2018

- *Union access:* Union representatives can now enter workplaces without consent, provided the employees are covered under, or bargaining towards, a collective agreement. Union representatives still need to seek consent before entering workplaces where no collective agreement or bargaining exists, except to assist a non-union employee with matters relating to health and safety, if that employee has requested their assistance.
- *Pay deductions for partial strikes:* Employers are no longer permitted to make deductions from employee's pay when they engage in a partial strike, such as wearing t-shirts instead of uniforms as part of low-level industrial action. Employers may still respond to a partial strike by suspending or locking out employees who are a party to the partial strike. Locked out and suspended employees, of course, are not entitled to any remuneration.
- *Collective bargaining:* Employers are no longer able to opt-out of multi-employer bargaining. However, changes coming into effect on May 6th in relation to the duty to conclude (see below) stipulate that employers do not have to settle a multi-employer collective agreement, so long as their reason for not wanting to settle is reasonable.
- *Initiation timeframes for collective bargaining:* Unions can initiate collective bargaining 20 days ahead of an employer, which restores the Act as it was prior to 2015.
- *Discrimination based on union membership status:* Protections against discrimination on the ground of union membership status, including either being a union member or intending to be a union member, have been extended from 12 to 18 months, although this does not apply retrospectively. Hence, this law change effectively takes effect six months after the date of Royal assent.
- *Reinstatement as the primary remedy unjustifiable dismissal:* If an employee requests to be reinstated in the position from which they were found to have been unjustifiably dismissed,

reinstatement will be the first course of action considered by the Employment Relations Authority in such cases. The Employment Relations Authority is still required to determine whether reinstatement is practicable and reasonable for both parties.

- *Protection for 'vulnerable workers'*: New categories of employees may apply to receive the protections afforded to 'vulnerable employees' via an application process set out in Part 6A of the Employment Relations Act. In addition, categories of 'vulnerable employees' may be added to, varied or removed in response to changing work conditions by the Minister for Workplace Relations.

Changes which took effect on 01 April 2019

- *Increase in minimum adult wage*: The adult minimum wage increased to \$17.70 per hour or \$708 for a 40-hour week before tax from April 1st. The minimum rate for starting-out workers is now \$14.16 an hour or \$556.40 for a 40-hour week before tax, amounting to a 7.2 percent increase in the legislated minimum rate.
- *Domestic violence leave*: The Domestic Violence Victims' Protection Act 2018 adds legal protections in the workplace for employees affected by domestic violence, who now have the right to:
 - ✓ 10 days of paid domestic violence leave each year (separate from annual, sick and bereavement leave)
 - ✓ ask for short-term flexible working for up to 2 months
 - ✓ not to be treated adversely in the workplace because they might have experience domestic violence.

Further information is available on MBIE's [website](#).

Changes set to take effect from 6 May 2019

- *Trial periods*: Grievance-free 90-day trial periods will no longer be an option for employers with 20 or more staff. Nevertheless, all employers can continue to use a probationary period, which is not grievance free, to enable time to assess an employee's suitability.
- *Rest and meal breaks*: Unless the parties agree to some other arrangement, employees working an 8-hour day will be entitled to two 10-minute paid rest breaks and one 30-minute meal break taken in the middle of the work period, as long as it is reasonable and practicable to do so. An exemption from these requirements will apply to some employers in essential services.
- *Rights of 'vulnerable employees'*: This law change removes any employer exemptions, particularly that applying to employers with 19 or fewer employees, from Part 6A of the Act. Hence, any businesses taking over a contract involving 'vulnerable' employees will have to employ the people currently doing the work on the same terms and conditions under which they were previously employed.
- *Terms and conditions for new employees*: The '30-day rule', which requires that new employees who are not union members be employed under terms consistent with any applicable collective agreement for their first 30 days of employment, has been restored.
- *Union information*: Employers will be required to pass on union information to prospective employees. Unions must supply the employer with the information in the form they want it to be passed on in. Employers will need to provide new employees with an approved 'active choice' form within the first 10 days of employment. MBIE is currently developing the form, which will be available on their website before 6 May 2019.

- *Duty to conclude*: Collective bargaining must be concluded, unless there are ‘genuine reasons based on reasonable grounds’ for it not to be. This ensures that parties genuinely attempt to reach an agreement. However, as noted above, a genuine reason may include opposition to concluding a multi-employer collective agreement, if that opposition is based on reasonable grounds. Currently, though, the duty of good faith does not require a collective agreement – whether a SECA or MECA – to be concluded.
- *Paid delegate leave*: Employers will need to allow for reasonable paid time for union delegates to undertake their union activities, such as representing employees in collective bargaining. Employees will need to agree with their employer to do so or, at a minimum, notify them in advance.
- *Form and content of collective agreement*: Pay rates will need to be included in collective agreements, along with an indication of how the rate of wages or salary payable may increase over the agreement’s term.

Some implications of these changes for collective bargaining

Notwithstanding these changes to New Zealand employment law regime, data from CLEW’s collective agreements database suggest many employers and unions are well ahead of the game, having previously agreed to terms and conditions which meet or exceed the new legal requirements.

Two examples include the recent increase to the adult minimum wage and statutory entitlement to domestic violence leave. With respect to the former, CLEW has derived an estimate of the annualised wage increment for this survey year (1 June 2018 to 31 May 2019) from collective agreements settled 2018 and (for the most part) prior to announcement of recent increase to the statutory minimum wage. That data points to an average increase in the minimum printed rate of more than 3 percent, significantly higher than CPI. This suggests employers (and unions) are paying heed to the Government’s promise to increase the statutory minimum to \$20 by 2021.

Also important to note in this regard, though, is that the minimum rate paid to employees covered by collective agreements in our database is typically below the \$17.70 per hour statutory minimum rate as at April 1st. Of the 979 agreements so far in our 2019 data, 486 agreements have the minimum rate at \$17.70 or less or no rates at all, and this represents nearly half of the total coverage of those agreements. Of course, the final average annualised increment for the 2018-2019 year will not be known until we have included all the agreements that carry over for the year. Nonetheless, indications are that there will be a much higher annualised increment for this year as compared with last and that upward adjustments will need to be made to rates specified in many collective agreements negotiated prior to announcement of the new statutory minimum effective April 1st.

Furthermore, as a check on whether pay increases negotiated through collective bargaining which fall above contractual minimum are affected by increases in the statutory minimum wage, we are now also coding the maximum printed rate in collective agreements and calculating the mean annualised increment for this higher rate. This will enable us to compare the average annualised increment at both ends of the pay scale. While we are still in the process of tabulating data from collectives negotiated in the current survey year, indications are that those maximum rates, while somewhat lower on average than the 3 percent annualised increment for minimum negotiated rates, are still well above CPI as well as the increment reflected in the labour cost index (LCI). Our full set of data will be available at our [2019 Employment Agreement Update seminars](#) to be held in July/August and related book.

As to provisions aimed at given greater protection to victim of domestic violence, CLEW has coded for domestic violence leave clauses in collective agreements for the last two years. Our data for this year suggests that many employers who are party to collective agreements, particularly those in the public sector, have already recognised the need for provisions for employees experiencing the effects of domestic violence. Of the 884 agreements covering 116,500 employees included in our data to date for the 2019 survey year, most of which were negotiated before the recent law changes were announced, 10 percent of the employees have access to separate leave and 6 percent have a policy in their workplace that deals with domestic violence. However, provisions for domestic violence leave are mainly for public sector employees, particularly those in central government.

Analysis of the likely effects of these and other recent legislative changes on the process and outcomes of collective bargaining will be presented in the next CLEW'd In newsletter.