

Departmental Disclosure Statement

Employment Standards Legislation 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.

31 July 2015

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Part One: General Policy Statement

This Bill is an omnibus Bill introduced in accordance with Standing Order 263(a) because the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy. It is intended that the Bill be divided into separate Bills at the committee of the whole House stage, so that:

- Part 1 becomes the Parental Leave and Employment Protection Amendment Bill
- Part 2 becomes the Employment Relations Amendment Bill
- Part 3 becomes the Holidays Amendment Bill
- Part 4 becomes the Minimum Wage Amendment Bill
- Part 5 becomes the Wages Protection Amendment Bill.

The Employment Standards Legislation Bill is an omnibus Bill which promotes fairer and more productive workplaces by providing enhanced protections and benefits for both employers and employees through a number of improvements to the employment relations – employment standards legislative framework. Specifically it:

- extends parental leave and payments to more workers and increases the flexibility of the parental leave scheme through amendments to the *Parental Leave and Employment Protection Act*
- provides for stronger and more effective enforcement of employment standards (such as the minimum wage and holidays entitlements) through amendments to the *Employment Relations Act*, *Minimum Wage Act*, *Holidays Act* and *Wages Protection Act*
- prohibits certain practices in employment relationships that lack sufficient mutuality between the parties (particularly in relation to ‘zero hours’ contracts) through amendments to the *Employment Relations Act* and *Wages Protection Act*.

Both employers and employees benefit from more effective enforcement of employment standards. For example, reducing non-compliance benefits employers through reducing the anti-competitive behaviour of non-compliant employers and employees through better outcomes from employment. Key measures in the Bill include:

- significantly higher penalties for serious breaches available at the Employment Court
- extending accountability to persons other than the employer who are knowingly and intentionally involved in breaches of employment standards
- enhancing the powers of labour inspectors to request information from employers and share information with other regulatory agencies
- an infringement notice regime for breaches of an employer’s obligations in relation to record keeping and individual employment agreements.

Complementing the Budget 2014 legislation that extends the period of paid parental leave to 18 weeks from 1 April 2016, the Bill broadens the eligibility of the parental leave scheme to better reflect current work and family arrangements, and provides more flexibility to increase choice for both employers and employees and support labour market attachment. Key measures in the Bill include:

- extending parental leave payments to non-standard workers (such as casual, seasonal, and employees with more than one employer) and those who have recently changed jobs
- extending parental leave entitlements to 'primary carers' other than biological or formal adoptive parents
- extending unpaid leave to workers who have been with their employer for more than six months (but less than 12) as a standard six month leave period (inclusive of the 18 weeks' paid leave period)
- providing for greater flexibility in how that unpaid leave is taken
- enabling Keeping in Touch days so employees can work limited hours during their paid leave period if they choose.

The Bill also prohibits specific practices that undermine the mutuality of obligations in the employment relationship. These issues were recently highlighted in relation to 'zero hours' contracts (in which employees are required to be available for work, but the employer is not required to offer guaranteed hours) and unreasonable wage deductions (for example, when deductions are made from an employee's wages to compensate the employer for loss or damage caused by a third party over which the employee could not reasonably be expected to have control).

The Bill will include a requirement that where the parties to an employment agreement commit to a set amount of hours, those agreed contracted hours are stated in the employment agreement.

The Bill will also prohibit:

- employers requiring employees to be available for work over the contracted hours unless employees are able to refuse any work offered or the agreement provides compensation for that availability.
- cancelling a shift without reasonable notice or compensation
- putting unreasonable restrictions on secondary employment
- making unreasonable deductions from employees' wages.

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?	NO

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

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

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Strengthening enforcement of employment standards, MBIE, 16 March 2015 http://mbie.govt.nz/info-services/employment-skills/legislation-reviews/employment-standards-legislation-bill/document-image-library/ris-2015-employment-standards-review.pdf</p> <p>Modernising parental leave, MBIE, 2 March 2015 http://mbie.govt.nz/info-services/employment-skills/legislation-reviews/employment-standards-legislation-bill/document-image-library/ris-2015-modernising-parental-leave.pdf</p> <p>Addressing zero hour contracts and other practices in employment relationships, MBIE, 8 June 2015 http://mbie.govt.nz/info-services/employment-skills/legislation-reviews/employment-standards-legislation-bill/document-image-library/ris-2015-addressing-zero-hours-contracts.pdf</p> <p>All three RISs are also available the Treasury website at http://www.treasury.govt.nz/publications/informationreleases/ris</p>	

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
<p>Treasury's RIA team provided an assessment of the RIS 'Addressing zero hour contracts and other practices in employment relationships'. This assessment is as follows:</p> <ol style="list-style-type: none"> The Treasury Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared by the Ministry of Business, Innovation and Employment and associated supporting material, and considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria. However, the paper also contains a proposal (recommendation one), that will require employment agreements to specify the number of agreed contracted hours wherever practicable in their employment agreements; this is not backed by any regulatory impact analysis. While there is limited evidence about the extent of the problem, the proposed specific prohibitions are aimed at addressing identified exploitative work practices that are occurring. The RIS is aimed at also preventing residual problems which are not yet manifest, and therefore covers a broader range of options than those proposed in this paper. These options include a general prohibition on unconscionable conduct, to be enforced by the courts, for which a risk of unintended consequences has been identified. The option is not being recommended in this paper. <p>The other two RISs were assessed by the internal MBIE RIS panel because a Preliminary Impact Risk Assessment concluded that the RIS did not meet the threshold for RIA involvement.</p>	

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
<p>As referred to in the response to question 2.3.1 the RIS 'Addressing zero hour contracts and other practices in employment relationships' originally considered an option of a general ban on unconscionable practices, but this option was not progressed.</p> <p>New section 67C (inserted by clause 87) in the Employment Relations Act has been introduced. This option was developed in the final stages of preparing the Cabinet paper and as such MBIE did not have the opportunity to fully analyse the impacts of this proposal as part of the RIS. The policy intent is that where parties agree to set hours, these must be recorded in the employment agreement.</p>	

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?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	YES
Refer Regulatory Impact Statements listed in response to question 2.3	

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
Refer Regulatory Impact Statements listed in response to question 2.3	

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?
MBIE's International Strategy and Partnerships Team was consulted on consistency with New Zealand's international obligations and no issues were identified.

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 on each of the three Cabinet papers seeking the policy decisions that form the basis of the Bill, as well as on the Cabinet paper seeking introduction of the Bill and a draft of the Bill itself.

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
Advice provided to the Attorney-General by the Ministry of Justice is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights	

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
Refer to Appendix One	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
The Ministry of Justice was consulted extensively on the new penalty and offence provisions relating to the enforcement of employment standards, and this consultation made a material difference to the development of the policy. On their advice, MBIE also consulted with both the Chief Justice and the Chief Judge of the Employment Court on certain specific issues (such as which Court should have the jurisdiction to consider the new offence of contravening a banning order).	

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
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The Bill creates a framework for information sharing between Labour inspectors/MBIE and other specified agencies for regulatory purposes. The relevant provisions make it clear that this information sharing is to be done within the framework provided by the Privacy Act. They also make it clear that before any sharing takes place either way (that is, between Labour inspectors/MBIE and other regulatory agencies or from other agencies to MBIE), conditions may be imposed on the provision of, and storage, use, access to, copying, returning and disposing of the information.

To achieve this, the Bill (at clauses 107-108) repeals section 233(5) and replaces it with new sections 233A and 233B.

Section 233A places a bar on Labour Inspectors sharing information they obtain under their powers subject to section 233B.

Section 233B provides that Labour Inspectors and defined regulatory agencies may share information with each other under certain circumstances. Specifically, this information sharing:

- must comply with the Privacy Act 1993
- will be overridden by any other legislation imposing information sharing constraints or requirements
- may be subject to any conditions that any party chooses to impose (eg in relation to the provision of, and storage, use, access to, copying, returning and disposing of any information).

Information sharing between the Labour Inspectorate or MBIE and other agencies will be governed by either Memoranda of Understanding (MoUs) or Approved Information Sharing Agreements (AISAs). If AISAs are required they will be given effect through Orders in Council, as provided for in Part 9A of the Privacy Act.

Subsection 233B(6) lists the regulatory agencies covered and provides that this list can be added to through regulation should there be a need in the future.

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
The Office of the Privacy Commissioner has been consulted on the information sharing provisions in the Bill. The Office understands that the Bill will not affect the application of the Privacy Act to the sharing of personal information and are comfortable with the substance of the provisions.	

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
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In June-July 2014 a discussion document 'Playing by the Rules – Strengthening Enforcement of Employment Standards' was released for public consultation to seek views on a number of high-level options to address issues associated with non-compliance with employment standards. A total of 84 submissions were received from a range of individuals and organisations. There was broad agreement that current sanctions are inadequate to deter serious breaches and that new measures should be introduced. However, many submitters cautioned that these must be reserved for serious breaches, and that employers who try and comply, but commit unintentional breaches, are better targeted with information.

In July-August 2014 a discussion document 'Modernising parental leave' was released for public consultation to seek views on a number of options to modernise the parental leave legislation, including broadening eligibility for the scheme to better reflect current work and family arrangements, and providing more flexibility to increase choice and support labour market attachment. Around 900 submissions were received and there was broad support for the proposals in the discussion document.

In March 2015 officials undertook three weeks of targeted consultation on the matters of zero hours contracts and other practices in employment relationships (eg unreasonable wage deductions) with a broad range of stakeholders which included employers, business and industry representative associations, unions, employee representatives and employment lawyers.

The Accident Compensation Corporation and WorkSafe New Zealand were invited to comment on the Cabinet papers on strengthening enforcement of employment standards and zero hours contracts.

The Office of the Privacy Commissioner was consulted in relation to the policy around information sharing.

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?	YES
<p>The proposed amendments to the record keeping requirements were further discussed with Business New Zealand, who indicated that they were comfortable with the approach.</p> <p>The universal applicability of the criteria for awarding penalties at the Employment Relations Authority (ERA) was tested with the ERA, who were comfortable with the approach.</p> <p>The matter of the appropriate evidentiary requirements for consideration of an application for a 'declaration of breach' in relation to serious breaches was discussed with the Chief Judge of the Employment Court.</p> <p>The views of both the Chief Justice and the Chief Judge of the Employment Court were sought on the matter of the appropriate Court to hear the new offence of contravening a banning order.</p> <p>The provisions that address issues around zero hours contracts were discussed with Business New Zealand, who indicated they were comfortable with the approach.</p> <p>The workability of the proposed changes to the parental leave legislations has been tested with Inland Revenue, which has operational responsibility for parental leave payments, and the New Defence Force, as the proposed changes will allow members of the Armed Forces to access the parental leave payments.</p>	

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
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The Bill extends the jurisdiction of the Employment Relations Authority to consider disputes between employers and employees on the process requirements associated with negotiating unpaid leave for employees who do not qualify for parental leave and enables the Authority to impose a penalty of up to \$2,000.

The Bill also extends the jurisdiction of the Employment Relations Authority to the decisions made by the department concerning members of the Armed Forces.

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?

YES

Changes to the Parental Leave and Employment Protection Regulations 2002 are required to implement the key policy changes in the Bill that relate to extending eligibility to paid parental leave. These Regulations prescribe information/documentation requirements and processes to be followed when applying for parental leave payments.

The Bill provides for two new regulation making powers under the Employment Relations Act 2000. One will support a new infringement offence regime. The other provides that, for the purposes of the information sharing provisions, a department of State, person or organisation (other than those already listed in the definition) can be defined in regulations as a regulatory agency.

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

Appendix One: Further Information Relating to Part Three

Offences, penalties and court jurisdictions – question 3.4

Clause 34 inserts a new Part 3A for the Parental Leave and Employment Protection Act to put in place a framework to enable employees who do not qualify for primary carer leave to request a period of negotiated carer leave to enable them to receive parental leave payments. This framework includes the process for resolving disputes and enables the Employment Relations Authority to impose a penalty of up to \$2,000 on an employer, if found not to have complied with the required process provisions for considering employees request.

Clause 73 amends s71Z of the Parental Leave and Employment Protection Act to increase the fine for the offence of misleading the Department from \$5,000 to \$15,000.

Clause 74 amends s71ZB of the Parental Leave and Employment Protection Act to extend the jurisdiction of the Employment Relations Authority to the decisions made by the department concerning members of the Armed Forces.

Clause 86 amends s64 of the Employment Relations Act (ER Act) to provide that an employee can also take a penalty action at the Employment Relations Authority (the Authority) for an employer's failure to keep a signed copy of his or her employment agreement.

Clause 89 amends s130 of the ER Act to provide that a labour inspector can also take a penalty action for an employer's failure to keep wages and time records.

Clause 90 inserts a new section providing for criteria that the Authority must consider when awarding penalties.

Clause 94 amends s141 of the ER Act to provide that a portion of a fine ordered under s140(6) can be awarded to the employee concerned.

Clause 95 of the Bill inserts a new Part 9A for the Employment Relations Act which:

- introduces a pecuniary penalty regime at the Employment Court (the Court) for serious breaches of employment standards accessible only by labour inspectors and with a maximum penalty (per breach) of \$50,000 for an individual and the greater of \$100,000 or three times the financial gain for a company
- introduces a new offence of contravening a banning order to be heard at the District Court and attracting a maximum fine of \$200,000 and three years' imprisonment
- introduces accessorial liability providing that persons 'involved in a breach' of employment standards can face the same penalties as the person in breach (with the exception that employees can only take cases against accessories at the Authority with the Authority's permission and cannot take penalty actions against them)
- provides for defences against liability for both persons in breach and persons involved in a breach (while preserving an employee's entitlement).

Clause 99 amends s187 of the ER Act to provide that the Court has jurisdiction for the pecuniary penalty regime.

Clause 103 inserts a new s214AA of the ER Act providing that appeals to decisions made within the pecuniary penalty regime at the Court can be made to the Court of Appeal on questions of both fact and law.

Clause 110 inserts new ss235A-G in the ER Act which create infringement offences for a failure to comply with the obligations to keep records (under either the ER Act or Holidays Act) and the obligation to keep a signed copy of an employee's individual employment agreement. The infringement fee is \$1,000 for each offence with a maximum cumulative infringement fee of \$20,000 for any one employer over a three month period.

Clause 117 amends s76 of the Holidays Act to provide that an employee can also seek penalties under the Act.

Clause 125 amends s10 of the Minimum Wage Act to provide that an employee can also seek penalties under the Act.