DYHRBERG DRAYTON
EMPLOYMENT LAW

Employment Legislation Update

The Employment Relations Amendment Act 2014 will come into force on **6 March 2015**. We have outlined the main changes and potential impacts on employers below.

Flexible working

All employees will have the right to request flexible working arrangements, not just those who are responsible for the care of another person.

There will no longer be a requirement to have worked for an employer for 6 months before making a request, and an employee can make as many requests as they wish.

The timeframe for an employer to respond will be reduced from 3 months to 1 month. A written response must be given, and an explanation, if the request is refused.

In the changeover period, the Amendment Act provides that:

- For any request made before 6 January 2015, the employer has three months to respond (i.e. the current version of the Act applies).
- Employers must treat any request made from 7 January 2015 to 5 March 2015 as if it had been made on 6 March 2015 and respond by 6 April 2015 at the latest.

What does this mean for employers?

For most employers, this will simply mean extending their existing flexible working policy for caregivers to all employees. Managers need to deal with requests promptly. For any employers without a policy, now may be a good time to implement one. Clients can contact us for a free template.

Rest and Meal Breaks

The Amendment Act removes the specific entitlement to rest and meal breaks and replaces it with a general entitlement to breaks that provide:

> *a reasonable opportunity…for rest, refreshment, and attention to personal matters* [and] *are appropriate for the duration of the employee's work period.*

The entitlement can be subject to restrictions that relate to:

- The employee remaining aware of or continuing to perform some work duties during the break;
- Circumstances when an employee's break may be interrupted; or
- The employee taking their break in the workplace or at a specified place within the workplace.

As long as that restriction is:

- Reasonable and necessary; or
- Reasonable and agreed to by the parties.

The specifics around the timing and duration of breaks will also be removed, but employers will have to provide employees with a reasonable opportunity to negotiate these aspects of their breaks. If they can't agree, employers decide the timing and duration of breaks (which must be reasonable).

The Amendment Act will introduce the ability for employers to provide a reasonable compensatory measure instead of breaks, if:

- the employee agrees; or
- the nature of the work the employee performs means the employer cannot reasonably provide breaks.

'Compensatory measure' will mean:

> *a measure that is designed to compensate an employee for a failure to provide rest breaks or meal breaks… [and] 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.*

However, if another enactment requires employees to take breaks, the Employment Relations Act provisions don't apply.

What does this mean for employers?

Some employment agreements are silent on the matter of breaks. For those employers, they can change their policy, preferably after consultation.

Other employers may find the current framework works well for them and is easy to understand and apply so will just stay with the status quo. Employers need to inform current employees and allow them an opportunity to negotiate if they wish to introduce new requirements in line with the new legislation.

Many employment agreements contain the specific timing and duration wording from the current Act, which means employers will not be able to simply start applying the new law to existing employees.

For existing employees on individual agreements, employers wanting to change the breaks provisions will need to consult with those employees and try to get agreement to changes. If agreement cannot be reached, we recommend seeking legal advice before taking any further steps.

Employers may change their template individual agreements/ breaks policy to align with the above amendments.

For employees on collective agreements, employers will need to wait until the next round of bargaining to negotiate to amend the collective agreement.

Employers will still be liable for a penalty for non-compliance with the new break provisions of the Act. We recommend employers obtain legal advice before making any major changes to their breaks policies.

Good faith and the provision of information

Section 4 will be amended to clarify the circumstances when an employer is not required to supply employees with '*confidential information'*, which will be defined to mean:

> *Information that is provided in circumstances where there is a mutual understanding (whether express or implied) of secrecy.*

The new provisions will enable an employer to withhold confidential information from an employee in situations where:

- the information involved is *'about an identifiable individual other than the affected employee if providing access to that information would involve the* ***unwarranted*** *disclosure of the affairs of that other individual';*
- the information involved is *'subject to a statutory requirement to maintain confidentiality';* or
- *'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).'* (emphasis added)

The new section 4(1C) confirms that the Employment Relations Act does not affect an employer's obligations under the Official Information Act 1982 or Privacy Act 1993. This could mean that the obligations in section 4 are *additional* to the obligations in those Acts; i.e. even if information can be withheld under the Privacy Act or the OIA, if it is relevant to a decision affecting an employee, it must be released unless it is confidential information (i.e. not just *'personal'*) and one of the exceptions above applies.

What does this mean for employers?

An unsettled area of the law (the ***Massey*** case) remains unsettled! We expect the ERA and Employment Court will interpret the above exceptions narrowly and many situations will continue to *warrant* the disclosure of information about other employees.

We recommend employers continue to provide as much information as is relevant to the decision they are making and, if in doubt, seek legal advice.

The current legislation will apply to any proposed decisions notified to employees before 6 March 2015, even if the final decision is made after that date.

Employment Relations Authority

Authority members will provide an oral determination or oral indication of preliminary findings at the conclusion of an investigation meeting, unless they consider there is good reason why that would not be practicable, in which case they can reserve their decision.

Oral determinations must be recorded in writing no later than 1 month after the investigation meeting. In recording their decision, the Authority will be able to correct any mistakes caused by errors or omissions in the oral determination.

Oral indications and reserved decisions will be followed by a written determination no later than 3 months after the investigation meeting or, if the Authority requested further information or evidence, 3 months after the Authority received the last information or evidence.

If the Authority decides to determine a matter without holding an investigation meeting, it will have to provide a written determination no later than 3 months after it received the last information or evidence.

The timeframes above can only be extended if the Chief of the Authority decides that exceptional circumstances exist.

Parties will only be able to challenge (appeal) written determinations, and records, not oral determinations or oral indications.

These changes will only apply to proceedings commenced in the Authority from 6 March 2015.

What does this mean for employers?

There will be some level of certainty over how long employers will need to wait for the outcome of an investigation meeting, but there may be resourcing issues, which could delay hearings being allocated.

Individual Employment Agreements

Employers will no longer have to place employees who are not union members on the collective terms and conditions for the first 30 days of their employment.

What does this mean for employers?

Policies and templates will need to be updated to give new employees the option of joining the union or agreeing to an individual employment agreement from the start of their employment.

Under the current law, employees who decide not to join the union often do not approach their employer to re-negotiate their individual terms and conditions after 30 days.

The amendment could result in more employees seeking to negotiate the terms of their employment agreements.

When negotiating, hiring managers will need to be clear about their organisations' HR delegations and what they can and cannot agree to without seeking approval from higher up.

Collective bargaining

Part 5 of the Act will be amended:

- The duty of good faith will no longer include the requirements for bargaining parties to:
  - conclude a collective agreement; or
  - continue bargaining despite reaching a deadlock.
- An employer will be acting in bad faith if it refuses to enter into a collective agreement solely because it is opposed to a collective agreement (as a matter of principle).
- Employers will be able to initiate bargaining at the same point in time as unions.
- Employers must notify employees that bargaining has been initiated after no more than:
  - 10 days if only one employer is identified as an intended party; and
  - 15 days if more than one employer is identified.
- Employers can opt-out of multi-employer bargaining by giving an opt-out notice to all other parties within 10 days of receiving the initiation notice.
- The Authority can determine bargaining has concluded and may:
  - consider whether the parties have tried to resolve the difficulties using mediation or facilitation and, if not, direct the parties to do so;
  - direct the parties to facilitation if any of the grounds in section 50C(1) exist (e.g. if a party has breached the duty of good faith in a serious and sustained manner, which has undermined the bargaining);
  - dismiss an application if the party seeking the declaration has breached its duty of good faith, unless the Authority is satisfied that the party has fixed the failure;
  - make a declaration if it determines bargaining has concluded; and
  - recommend the process the bargaining parties should follow if it determines that bargaining has not concluded.
- An expired collective agreement will remain in force for the duration of bargaining (not exceeding 12 months) if the bargaining was initiated by either party. Currently this only applies when bargaining is initiated by the union.

These changes will come into force from 6 March 2015.

However, the new section 33 (duty of good faith does not require collective agreement to be concluded) and amended section 53(2) (Continuation of collective agreement after specified expiry date) will apply to all bargaining from 6 March 2015 (i.e. even if bargaining commenced before 6 March).

What does this mean for employers?

Employers with a collective bargaining policy will need to update it to reflect the above changes. Employers may also consider providing training to those involved in negotiations before the next round commences.

We recommend seeking legal advice before applying to the Authority for a declaration that bargaining has concluded.

Strikes and Lockouts

Unions will have to provide advance notice in writing of a proposed strike and the same requirement will apply to employers in relation to lockouts.

There will be specific requirements for the content of the notices in new sections 86A and 86B. The amendments will also enable a union or employer to withdraw a notice of strike or lockout.

If a strike or lockout is already afoot on 6 March 2015, the employer or union will need to issue a notice complying with any parts of the notice provisions not already complied with.

Failure to comply with the new notice provisions will make a strike or lockout unlawful.

The amendments also set up a framework for employers to make specified pay deductions where an employee is engaged in a partial strike. The Minimum Wage Act 1983 does not apply to such deductions (consent is not required).

Unions will be able to request information from employers about pay deductions, seek the Authority's assistance if a problem relating to pay deductions cannot be resolved or even seek an injunction from the Employment Court to stop the deduction.

The Authority will be able to prioritise proceedings relating to specified pay deductions, even if the parties have not attempted to resolve their dispute by mediation.

Employers will not be able to make pay deductions in relation to a partial strike that ended, or any period of a partial strike that occurred, prior to 6 March 2015.

What does this mean for employers?

Any strike/lockout policies or notice template will need to be updated to reflect the above changes.

Employers who regularly deal with strikes may also want to provide training to relevant staff to ensure compliance with the new notice of lock out and pay deduction provisions.

Part 6A (continuity of employment)

This Part of the Act applies to employees working in cleaning or food catering services in any place of work and certain other related industries (caretaking, orderly services and laundry services) in relation to particular workplaces.

As well as the amendments below, the Act will clarify that any failure of an outgoing employer to comply with Part 6A does not affect the employee's entitlement to transfer or the obligations of the new employer.

Exemption

Small to medium-sized businesses which, along with any 'associated person', employ fewer than 20 employees will be exempt from the obligations under Part 6A. The new employer must provide a warranty to the original employer about how many staff they have.

The definition of '*associated person*' includes holding companies, subsidiaries and certain contracting relationships and franchises.

The Authority will be able to impose a penalty against any person who provides a false warranty. The affected employee(s) will also be able to raise a personal grievance as if they had transferred to the new employer and been unjustifiably dismissed. Reinstatement is specifically excluded as a remedy. The employer who received the false warranty will also be able to sue the new employer for damages.

Whether or not a warranty is false will be determined as a matter of fact and whether the person knew the exemption was false will be irrelevant.

Election process

The election process in the Act will be amended to require the original employer to give employees a notice containing specific information no later than 15 working days before the restructuring takes effect. Employees will have a minimum of 5 working days to make an election although the employers may agree on a later date.

Liability for service related costs

New provisions will apportion liability for the service related costs associated with transferring employees. If the original and new employers cannot agree, the original employer will be liable for the costs it would have incurred had the employee resigned (e.g. annual leave) and the new employer will be liable for entitlements accrued, but that would not have been paid out had the employee resigned (e.g. sick leave).

There will be a new dispute resolution section for situations where the employers cannot agree, which will include the ability to access mediation services and commence proceedings in the Authority as if the dispute was an employment relationship problem.

Implied warranty

There will be a new section that creates an implied warranty from the original employer to the new employer that they have not (without good reason) changed:

- the work affected by the restructuring,
- the employees who perform the work; or
- the terms and conditions of their employment.

If an original employer breaches the implied warranty, and the new employer is disadvantaged, the new employer will be able to sue the original employer for damages.

Provision of information

Subpart 2 currently deals with the provision of employee transfer costs information. An exempt employer cannot request this information.

This subpart will be extended to deal with '*Individualised employee information*', which is defined as '*information about an employee kept by the employer for employment related purposes*'.

If an employee elects to transfer, the original employer must provide the new employer with this information no later than the date on which the restructuring takes effect, unless a later date can be agreed, and keep the information up-to-date.

If an original employer does not provide individualised employee information either the new employer or the employee concerned will be able to apply to the Authority for a compliance order. If the original employer does not comply with that order, it will be treated as an employment relationship problem.

The amendments to Part 6A will only apply to restructurings concluded after 6 March 2015.

It will not apply to restructures which take effect after 6 March 2015 if the relevant agreements were concluded before that date.

What does this mean for employers?

Employers engaged in Part 6A sectors will need to review their policies, templates and training in this area to ensure compliance with the various amendments outlined above and, if in doubt, seek legal advice.