DYHRBERG DRAYTON

EMPLOYMENT LAW

What's New Update

May 2013

Proposed Employment Law Changes

On 26 April Labour Minister Simon Bridges announced proposed changes to the Employment Relations Act intended to improve fairness and flexibility in workplace relations. While most of the proposed changes had already been announced, an additional change aimed at speeding up Employment Relations Authority processes was also proposed.

It is proposed that the Act is amended to include explicit guidance to the Authority as to the nature and timeliness of its determinations. This includes that:

- The Authority will have to provide an oral determination at the conclusion of an investigation meeting, which must be followed within three months by a written record of that determination; or
- At the conclusion of the investigation meeting to provide an oral indication to the parties, subject to any additional information, of the Authority's preliminary findings; and
- The Authority will issue a written determination within three months of the completion of the investigation meeting or receipt of the last information from the parties (whichever is the later date) unless the Chief of the Authority agrees there are exceptional circumstances.

Other changes include:

- The extension of flexible working arrangements so any employee, not just caregivers, can ask for flexible work. Employees will also be able to ask for flexible work arrangements from the start of their employment, make more than one request per year, and the employer has one month to respond to requests.
- Greater clarity as to what confidential information employers are required to provide to affected workers in situations such as dismissal or redundancy. An employer will not have to provide access to confidential information if that information is about an identifiable individual, evaluative or opinion material, or the identity of the person who supplied opinion material. This would overturn the *Massey v Wrigley* case.
- A return to the original position in the Employment Relations Act where the duty of good faith does not require the parties to conclude a collective agreement. Instead, the Employment Relations Authority may declare collective bargaining has concluded.
- Allowing unions and employers to initiate bargaining at the same time. A collective agreement may also continue in force up to 12 months after its expiry whether it is the union or the employer who initiated bargaining.
- Removing the 30-day rule that requires non-union members to take on union terms and conditions, for the first 30 days of employment.
- Allowing employers to opt out of multi-employer bargaining.
- Allowing for partial pay reductions in cases of partial strike action.
- Parties will be required to provide written notice of a strike or lock-out.
- Changes to Part 6A so employers have greater certainty over the transfer of employees in industries such as cleaning, catering, orderly and laundry services if there is a restructuring or change in the contracted service provider. Small to medium-sized businesses with fewer than 20 employees will also be exempted from the obligations under Part 6A.
- Allowing employers to impose restrictions on an employee's breaks where it is reasonable and necessary having regard to the nature of the work.
- An employer may specify times and durations of breaks having regard to the operational environment or resources and the employee's interests when the parties cannot agree on break times and duration.

- An employer will not be required to provide breaks where the parties agree the employer will compensate the employee or, to the extent that having regard to the nature of the work, the employer cannot reasonably provide breaks.

Health and Safety

The Independent Taskforce on Workplace Health and Safety has released its final report, concluding the current system is not '*fit for purpose*'.

The report recommended various key changes to health and safety law in New Zealand. One of these changes (the creation of a workplace health and safety agency), has already been confirmed by Labour Minister, Simon Bridges.

The intention is for the standalone Crown agent to be established and up and running from 1 December 2013.

The Crown agent will have a dedicated focus on health and safety and will be committed to ensuring people are well protected from injury and death when they go to work each day.

The agency will enforce health and safety regulations, and work collaboratively with employers and employees to embed and promote good workplace health and safety practices.

The other key changes proposed in the report are:

- New legislation based on the Australian Model Work Health and Safety Act. The Taskforce concluded the current legislation was confusing and outdated.
- A focus under the new legislation on imposing duties on all *'persons conducting a business or undertaking'* as opposed to the current focus on the employer-employee relationship. This would result in broader duties and new offences.
- Modifying the standard of care from employers having to take 'all practicable steps' to ensure safety to ensuring all 'reasonably practicable' steps are taken. This is a lower threshold.
- Penalties to be significantly increased equivalent to those in the Australian legislation (up to AUD$600,000 or five years imprisonment, or both, for reckless conduct offences by individuals and up to AUD$3 million for body corporates). Corporate manslaughter charges may also be possible.
- It is proposed that employees and other workers have greater influence in worker safety systems.
- It is recommended that the new safety agency prioritises new and/or increased prescriptive regulation of high hazard industries (e.g. mining and exploration, forestry, construction, agriculture and maritime sectors).

Bullying

Bullying is becoming increasingly recognised in the employment jurisdiction as a serious concern which needs to be addressed. There are various recent developments in relation to dealing with bullying, which are important for employers to keep in mind.

The Ministry of Business, Innovation and Employment is preparing an updated Bullying Guideline which is expected to be released by the end of the year. A draft was considered by four focus groups in August 2012 comprising representatives from health and safety groups, human resources, employees/unions and employers. The Guideline is expected to involve definitions of bullying and the nature of bullying, how to identify bullying, preventing bullying, values, responding to bullying, advice to employees and tools to deal with bullying. This will be a useful resource for employers in addressing bullying in the workplace.

In August 2012 the Law Commission produced a Ministerial briefing paper entitled '*Harmful Digital Communications: The Adequacy of the current sanctions and remedies',* which discusses the use of new communication technologies which cause harm and proposals to address this. In a Cabinet paper released in April this year Minister of Justice Judith Collins adopted most of the Law Commission's recommendations. The proposed changes include:

- **A new civil enforcement regime to deal with harmful digital communications**. Complaints about harmful digital communication will initially be made to an approved agency. The agency could assist those harmed by digital communications to resolve their disputes through negotiation, mediation and persuasion. If a complaint cannot be resolved by the agency, and a threshold of seriousness is reached, it could proceed to the District Court. It is proposed the District Court should be able to

order a broad range of sanctions and remedies including an order to take down material, an order that the defendant cease the conduct in question or an order of publication of an apology. At this stage the District Court will not have the power to impose criminal or monetary sanctions.

- **Changes to existing legislation to ensure it responds appropriately to harmful digital communications and covers technological advances**. This includes the proposal to create a new offence of using a communications device with the intention to cause harm, with a sentence of three months' imprisonment or a $2,000 fine; a new offence for incitement to suicide where suicide has not been attempted, which is proposed to be punishable by up to three years' imprisonment, amendments to the Harassment Act 1997 to make it explicit that making contact with a person can include electronic communication, and giving offensive material to a person by placing the material in any electronic media where it is likely that it will be viewed by or brought to the attention of that person.

With the advances of technology, it is possible for employees to be bullied in the work place by other employees through instant messaging, emails and cell phones. This is a far more covert way for people to be bullied, and can occur without others in the workplace being aware that it is happening. This form of bullying can have a very detrimental impact on the employee along with a likely decrease in the employee's performance levels and the possibility of losing that employee, and even a personal grievance being raised.

The effects of the proposed changes outlined above, once implemented, will likely seriously impact on the way cyber bullying will be dealt with in the workplace. The ability to address bullying through an approved agency may prove to be an effective mechanism for dealing with bullying in a low-level, cost effective way.

Remember it is important to make it clear to employees that bullying is unacceptable and will be dealt with seriously. Please contact us if you would like help creating an anti-bullying policy.

Mondayised holidays

On 17 April 2013 the Holidays (Full Recognition of Waitangi Day and ANZAC Day) Amendment Bill passed its third reading in Parliament. The new law involves transferring Waitangi Day and Anzac Day holidays to a Monday when they fall on a weekend. This will first be effective on Anzac Day 2015 and Waitangi Day 2016.