



## Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
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# New Employment Standards - Harsh Penalties for Transgressors

On 1 April 2016, the various Acts amended by the Employment Standards Legislation Bill came into effect. A summary of the changes around enforcement of employment standards are below. Subsequent issues of 'The Advocate' will deal with 'zero hours' changes and parental leave changes.

## EMPLOYMENT RELATIONS ACT AMENDMENTS

The Act has a number of amendments, the object of which is to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority and the Court. Changes to the Act introduce a series of measures designed to "target the worst transgressors without imposing unnecessary compliance costs on employers in general".

Employment standards include requirements to keep signed individual employment agreements, rest and meal breaks, wage and time records, equal pay etc.

### WAGE AND TIME RECORDS

The recent amendment to the Employment Relations Act legislation tightens up record-keeping requirements. Employers are now required to record the number of hours worked each day in a pay period and the pay for those hours.

While it is acceptable to show agreed hours which are worked "usual hours", for a salaried employee it is still necessary to be able to show compliance with the Minimum Wage Act. Employers should ensure that employees whose salaries are in the \$30,000 - \$50,000 bracket keep a record of hours worked if there is a risk that a minimum wage claim may arise.

### NEW SANCTIONS FOR SERIOUS BREACHES

There is a new category of breach defined in the Act as a 'serious' breach. 'Serious' is defined by:

- The amount of money involved.
- Whether a single or a series of breaches have occurred, including how many and over what period.
- Whether they were intentional or reckless.
- Whether records have been kept.
- Other relevant matters.

In cases of serious breach, Labour Inspectors can apply to the Employment Court for:

- A declaration that a person has committed (or has been involved in) a "serious breach" of minimum entitlement provision.
- Pecuniary penalty orders for serious breaches (\$50K for individual; for a body corporate the greater of \$100K or 3 times the amount of financial gain from the breach).
- Compensation orders for serious breaches for employees who have suffered or are likely to suffer damages. This may include an order against a "person involved in the breach" (see below) but only if the employer is unable to pay.

### BANNING ORDERS

The Court may also make a banning order if it has declared that a breach has occurred, or is satisfied that there have been persistent breaches of employment standards or person has been convicted of Immigration Act offences.

Any such order would prevent the employer from entering into an employment agreement and/or being an officer of an employer and/or being involved in hiring employees.

### PERSON INVOLVED IN A BREACH (OTHER THAN EMPLOYER) CAN BE LIABLE:

A person who is not the employer can now be found liable for a breach. This can include an Officer of a company (a Director, Partner etc) being liable for wages or other money due if the employer entity cannot pay.

## Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart.**

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The intent of the provision is to ensure greater accountability including preventing an employer from winding up a company to avoid paying arrears or fines.

### INFRINGEMENT NOTICES

To avoid the need for Authority/Court action in “*clear cut*” breaches, a Labour Inspector can now issue infringement notices.

Infringement offences relate to the requirements to have:

- A signed IEA or intended IEA
- Wage and time records
- Holiday and leave records
- Or other breaches specified by regulations.

The fine payable upon the issuing of an infringement notice is \$1000, to a maximum of \$20,000 in 3 month period.

### SECONDARY EMPLOYMENT PROVISIONS

There are now new restrictions imposed on provisions that restrict the ability of an employee to take secondary employment. When introducing these in the Bill, the Minister stated:

*“... It would not be reasonable to restrict a low-wage, low-responsibility employee who makes hamburgers part-time for one company from making hamburgers for another company due to the risk the employee may share information about promotions. It is an unbalanced response to the risk to restrict that employee earning other income. However, it may be reasonable to restrict a well remunerated professional, such as a doctor advocating for a cancer charity from also working as an advocate for a tobacco company.”*

On this basis, secondary employment provisions have been defined and restricted. A secondary employment provision is defined as a provision that:

- a) Prohibits or restricts the employee from performing work for another person; or
- b) Prohibits or restricts the employee from performing work for another person without the employer’s consent.

Secondary employment provisions must not be included in an employment agreement unless:

- There are genuine reasons based on reasonable grounds to include them.
- Those reasons are stated in the agreement.

“Genuine reasons” include:

- a) Protecting an employer’s commercial sensitive information; or
- b) Protecting an employer’s intellectual property rights; or
- c) Protecting an employer’s commercial reputation; or
- d) Preventing a real conflict of interest that cannot be managed without including a secondary employment provision.

A secondary employment provision must not:

- Prohibit employee from working for another person unless it is necessary having regard for the reasons the provision is included; or
- Restrict employee from working for another person to a greater extent than is necessary having regard for the reasons the provision is included.

### RESTRAINT OF TRADE

While there are now restrictions on secondary employment the Act makes it clear that the law on restraint of trade provisions is not limited or affected by this amendment.

### WAGES PROTECTION – UNREASONABLE DEDUCTIONS

The Wages Protection Act has been amended to include a new provision, s.5(1A):

*“An employer must not make a specific deduction in accordance with a general deductions clause in a worker’s employment agreement without first consulting the worker.”*

Thus, for any new deductions from now on, an employer must discuss the deduction with the employee.

In addition s.5A provides that “An employer must not make a deduction under section 5 from wages payable to a worker if the deduction is unreasonable”.

“Unreasonable” deductions are not defined in the Act but the Minister has stated:

*“An example of where it is unreasonable to deduct the pay of an employee is to cover loss due to third party behaviour over which that employee had no reasonable control. However, it may be reasonable to make deductions in, for example, on-farm employment arrangements where it is common for employers and employees to agree that the cost of lodgings and provisions will be deducted from the employee’s salary.”*

Prior to this change, the media highlighted the case of a Service Station owner who deducted from workers’ wages for petrol lost through drive-offs.

The intention of the amendment is to provide an additional ground on which an employee can challenge a deduction in the Employment Relations Authority (existing grounds are deductions made without written consent or under duress).

The Minister has stated that he considers that the new arrangement will still allow “good employers to make reasonable deductions, including deductions that may be necessary to recover employee debts at the end of an employment relationship.”

### SUMMARY:

Most employers will not be affected by the powerful new sanctions surrounding serious breaches, as they will have kept good records. However, the new infringement notice regime will catch out employers who have neglected to get IEAs signed by their employees or have insufficient wage and time records. Employers must also be wary about deductions from wages and secondary employment provision restrictions.