



Employment Standards Bill and Employment Law Update

**NZPPA 8th Annual
Conference**

19 November 2015

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Employment Standards Bill and Employment Law Update

Employment Standards Bill – Overview

- Current Status
- Proposed changes
- Potential issues

Employment Law Update

- Cashing in annual leave
- Holiday pay on bonus, incentive and allowance payments
- Wages protection and deductions
- Payments under settlement agreements
- Employees vs contractors
- Casual vs part-time

Employment Standards Bill

- Introduced on 13 August 2015
- First reading on 8 September 2015
- Currently before the Transport and Industrial Relations Committee
- Submissions closed - 6 October 2015
- Select Committee Report - 12 February 2016
- Scheduled to come into force - 1 April 2016

Overview

- Purpose:

“To promote 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”

- Legislation amended
 - Parental Leave and Employment Protection Act 1987
 - Employment Relations Act 2000
 - The Holidays Act 2003
 - Minimum Wage Act 1983
 - The Wages Protection Act 1983
- ‘Omnibus Bill’ – intention to divide into separate Amendment Bills

Summary of proposed changes

- Extends parental leave and payments to more workers and increases flexibility of scheme
- Stronger and more effective enforcement of employment standards
- ‘Prohibits’ practices that lack sufficient mutuality of obligation (Zero-Hours contracts)

Extension of Parental Leave

Parental Leave Changes - Overview

- New definitions – “Primary Carer” and “Partner”
- Broadening types of workers who will be eligible
- Extending entitlements to a wider range of Primary Carers
- New concept of “negotiated carer leave”
- New lesser entitlement to 6 month’s unpaid leave for employees with > 6 months’ < 12 months’ service
- Introduces “keeping in touch days”

Definitions / Terminology

- Definitions
 - “Maternity Leave” → “Primary Carer Leave”
 - “Partner’s / Paternity Leave” → “Partner’s Leave”
 - “Negotiated Carer Leave”
 - “Keeping in Touch Day”
 - References to “adoptions” removed – “persons who assume primary responsibility for the care of children”

Wider Range of Primary Carers

- Currently only:
 - biological mother / spouse partner or
 - adoptive parents
- New Primary Carer definition:
 - Biological mother
 - Spouse or partner of the biological mother (if taking over paid parental leave entitlement)
 - Another person who assumes primary responsibility (other than as a foster carer or on any other temporary basis) for the day-to-day care of a child under 5 years of age

Broader Eligibility for Payments

- Eligibility for paid leave entitlements:
 - Primary Carer
 - Employed or self employed for at least an average of 10 hours a week for any 26 of the 52 weeks immediately preceding
 - The expected date of delivery
 - Date on which they assume care of the child
- No requirement for continuous employment
- Wider range of workers potentially eligible:
 - Seasonal employees
 - Casual employees
 - Employees with multiple employers
 - People who have recently changed jobs

Eligibility for leave vs eligibility for payment

- Different thresholds for eligibility:

Payments



No
continuous
service
requirement

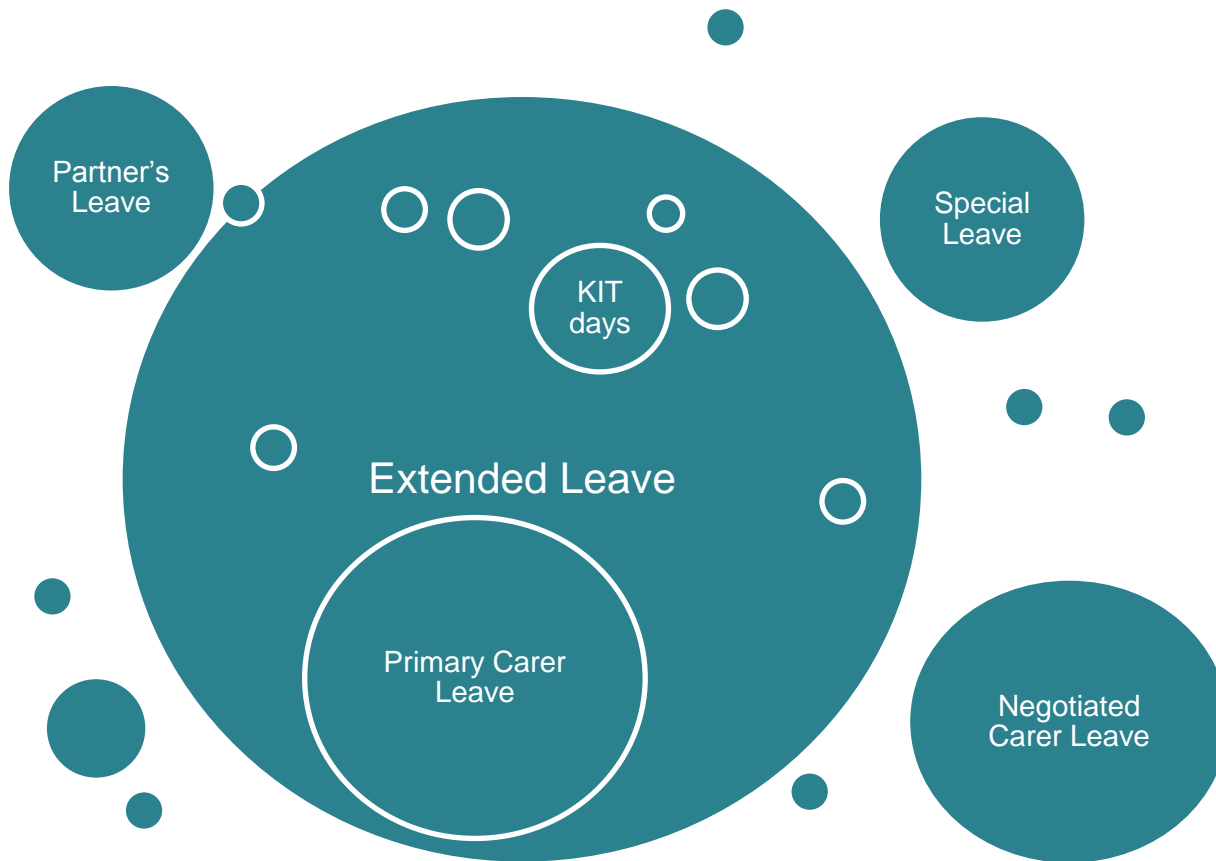
Primary Carer Leave



Minimum 6
months
continuous
service
requirement

- Maternity leave and paid parental leave entitlements now not the same thing
- People can qualify for payment but not be entitled to PCL
- Can apply for “negotiated carer leave”

Parental Leave Matrix



Primary Carer Leave

- Replaces what was “maternity leave”
- Will increase to 18 weeks from 1 April 2016
- Eligibility requirement:
 - Must be the Primary Carer; and
 - Meet 6 month or 12 month employment test

6 and 12 month employment tests

- 6 month employment test:
 - Employed by the same employer
 - for at least an average of 10 hours a week
 - in the 6 months immediately preceding the expected date of:
 - Delivery of the child
 - Assumption of responsibility for the care of the child

- 12 month employment test:
 - Employed by the same employer
 - for at least an average of 10 hours a week
 - in the 12 months immediately preceding the expected date of:
 - Delivery of the child
 - Assumption of responsibility for the care of the child

Partner's Leave

- Entitlement requirements:
 - Spouse or partner of Primary Carer; *and*
 - Assumes or intends to assume responsibility for the care of the child; *and*
 - Meets the 6 month or 12 month eligibility test
- Leave entitlement:
 - 6 month eligibility test: 1 week (unpaid)
 - 12 month eligibility test 2 weeks (unpaid)

Extended Leave

- Two categories:
 - Employees who meet the 6 month employment test
 - **New** 26 weeks extended leave entitlement (including Primary Carer Leave taken)
 - Employees who meet the 12 month employment test
 - 52 weeks extended leave entitlement (including Primary Carer Leave taken)
- If sharing and one meets 12 month test, one meets 6 month test:
 - 52 weeks - but employee who does not meet the 12 month test may only take a maximum of 26 weeks
- Can take one or more periods of extended leave (no longer required to be taken as one continuous period each)

Negotiated Carer Leave

- Employees who qualify for parental leave payments, but do not qualify for Primary Carer Leave can make a request for “negotiated carer leave”
- Similar to flexible working request
- Employers may only refuse request if it cannot be accommodated on certain grounds (same grounds as a flexible working request)
- Employees may only challenge refusal on basis of:
 - failure to respond; or
 - failure to respond adequately
- Penalty of up to \$2,000 for breach – payable to employee

Keeping-in-Touch Days

- Employees may perform up to 40 hours of paid work on 'keeping-in-touch days' whilst on parental leave
- Employees who work on keeping-in-touch days will not be treated as having returned to work (currently the case)
- Extended Leave is not increased by any 'keeping in touch days' worked
- Both employer and employee must consent to employee working
- Cannot work a keeping-in-touch day within 28 days of giving birth
- If employee works more than 40 hours, or within the first 28 days following the birth - treated as having returned and any parental leave payments from that point will be recoverable

Paid Parental Leave

- 18 weeks Paid Parental Leave from 1 April 2016
- Stated intention to increase leave entitlement where baby born pre-term (37 weeks gestation being full term)
 - 1 week's additional leave for each pre-term week
- Can be transferred to eligible employee's partner/spouse if the spouse or partner:
 - intends to have primary responsibility for the day-to-day care of the child
 - Meets the same eligibility criteria (employed or self-employed for an average of 10 hours a week for 26 of the 52 weeks immediately preceding birth/assumption of care)

Amount of parental leave payment

- Amount of Parental Leave payment
- Lesser of:
 - \$516.85 (currently) *and*
 - The greater of:
 - 100% of the eligible employee's ordinary weekly pay before commencement of the parental leave; and
 - 100% of the eligible employee's average weekly earnings;



New calculation for “average weekly earnings” (for parental leave payments)

Sum of employee’s gross weekly earnings from all employments for the 26 out of the relevant 52-week period in respect of which the highest amounts were earned by the employee

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Employment Standards Enforcement and Penalty Regime

Enforcement and Penalty Regime

- Increased obligations around record keeping
- Greater powers for Labour Inspectors
- Higher penalties for serious breaches
- “Banning Orders”
- Wider accountability provisions, meaning people other than employer can be prosecuted

Record Keeping Obligations

- **New** requirement to keep records in sufficient detail to demonstrate compliance with minimum entitlement provisions:
 - Holidays Act minimum entitlements and payments
 - Minimum Wage Act minimum entitlements
 - Provisions of the Wages Protection Act
- Wages and time records – requirement to record, for each employee, the number of hours worked each day in the pay period and the pay for those hours
- Must be kept in written form or in a form that can easily be accessed and converted to written form
- Holiday and leave records – requirement to record, for each employee, the number of hours worked each day in a pay period and the pay for those hours
- Not limited to waged employees

Greater Powers for Labour Inspectors

- For serious breaches, Labour Inspectors can apply to the Court for:
 - Declarations of breach
 - Pecuniary penalty orders
 - Compensation orders
 - Banning Orders
- Wider powers to require disclosure – any document they reasonably believe may assist in determining whether breach has occurred
- Court can make more than one kind of Order in respect of breach

Higher Penalties

- **New** maximum penalties for pecuniary breaches:
 - \$50,000 in the case of an individual
 - \$100,000, or 3 x amount of financial gain, in the case of company
- Current maximum penalties:
 - \$10,000 in the case of individual
 - \$20,000 in the case of company
- Determined taking into account:
 - Nature and extent of breach and involvement in breach
 - Whether breach intentional, inadvertent, or negligent
 - Nature and extent of any loss/damage suffered; gains made or losses avoided by person in breach
 - Any compensation / reparations paid
 - Circumstances including the vulnerability of employee
 - Previous breaches
- Unlawful to insure against pecuniary penalty

Banning Orders

- The Court may make a “Banning Order” if:
 - The Court has made a declaration of a breach
 - The person has persistently breached or persistently been involved in the breach of one or more employment standards
 - The person has been convicted of an offence under s351 of the Immigration Act 2009
- Can only be applied for by a Labour Inspector / Immigration officer
- Banning Order – prevent person from:
 - employing people
 - being an officer of an employer
 - being involved in the hiring or employment of employees
- Maximum period of 10 years
- Maximum penalty for breach of Banning Order - \$200,000 or 3 years in prison

Wider accountability

- Liability for persons involved in breach if:
 - Aided, abetted, counselled, or procured, the breach
 - Induced the breach
 - Directly or indirectly knowingly concerned in, or party to, the breach
 - Conspired with others to effect the breach
- Only “officers” can be involved in the breach
 - Director of Company
 - Partner
 - Person in a position to exercise significant influence over the management or administration of the employer
- Liable for a penalty
- Applications can only be brought by a Labour Inspector
- Standard of proof required - the balance of probabilities

Defences

- Defence for person in breach:
 - Breach was due to reasonable reliance on information supplied by another person;
 - Breach was due to another person's act or default or to an accident or some other cause beyond their control and the person took reasonable precautions and exercised due diligence to avoid the breach
- Defence for person *involved* in breach:
 - Involvement was due to reasonable reliance on information supplied by another person (not including one of their/its own directors, employees or agents);
 - took reasonable and proper steps to ensure provision was complied with

Mediation changes

- Mediation is not the primary problem solving mechanism where there has been an alleged breach of employment standards

Rules on Zero-Hours Contracts

Zero Hours Contracts - Overview

- Requirement to include hours in IEA (where hours have been agreed)
- “Availability” clauses unenforceable unless “compensation” is provided for in the employment agreement
- Prohibition on adverse treatment for refusing to work under unlawful availability provision
- Requirement to give “reasonable notice” of a shift cancellation, or pay compensation
- Rules around secondary employment restrictions
- Extension of Personal Grievances provisions to cover breaches

Availability Clauses

- Availability clause:
 - Work conditional upon employer making work available
 - No obligation on employer to provide work
 - Employee required to be available for work
- Availability provisions can relate to
 - All work performed; or
 - Work in addition to agreed hours of work (e.g. over-time / on call)
- Unenforceable unless the employment agreement provides “compensation”
- No indication of how much “compensation” or what this means
- If paid salary for agreed hours – can agree that salary includes compensation for availability to do additional hours

Cancellation of shifts

- Employment agreement must specify:
 - “reasonable” notice required to cancel shift
 - Compensation payable to the employee if shift is cancelled without giving specified notice
- Employee entitled to what they would have earned for working shift if:
 - Shift is cancelled and employment agreement does not comply;
 - Shift is cancelled at start of shift
 - Shift is cancelled part way through shift, without notice of cancellation being given before the shift started
- “Shift work” means any period of work that an employer has agreed to make available to an employee
- “Reasonable notice” and “shift” not defined

Restrictions on secondary employment

- Provision restricting employee secondary employment unenforceable except where:
 - Genuine reasons;
 - Based on reasonable grounds
 - which are stated in employment agreement
- Examples of “Genuine reasons”
 - Protecting commercially sensitive information
 - Protecting intellectual property rights
 - Protecting commercial reputation
 - Preventing a real conflict of interest

Wages Protection

Wages Protection

- New section prohibiting deductions which are “unreasonable”
- Recovery of wages
 - Can be recovered by a Labour Inspector on behalf of employee
 - Employee may recover wages or other money due from a person involved in the breach if Authority or Court has ordered it, and employer is unable to pay the arrears

Employment Law Update

Overview

- Cashing in annual leave
- Holiday pay on bonus, incentive and allowance payments
- Wages protection and deductions
- Payments under settlement agreements
- Employees vs contractors
- Casual vs part-time

Cashing in Annual Leave

- Agreements to pay out up to one week of annual leave:
 - Must genuinely be at employee's request and in writing
 - Can only request pay out for leave employee is entitled to
 - Can request less than one week
 - Usual calculation for leave applies
 - Employer not required to agree
 - Employer can have a policy of not cashing up

Holiday Pay on Bonus, Incentive and Allowance Payments

- Focus of holiday pay is on payments the employer is required to make under the employment agreement, rather than payments received during employment.
- “Gross earnings” includes bonus/incentive payments that are contractual. Excludes those that are purely discretionary.
- Excludes actual or “reasonably assessed” reimbursement payments for costs incurred by the employee in the course of their employment.
- Simply because the employer reserves the right to change/remove a particular bonus scheme “at any time” does not necessarily mean the payment is “discretionary”. In a number of cases the courts have held that while a scheme is ‘current’, payments under it will typically be contractual.
- What about bonus payments paid after the employment has ended? May still attract holiday pay. In a recent case (Howell) the employee received an incentive payment 12 months after the employment ended. It was held that the payment was contractual, formed part of gross earnings and so holiday pay was due on it. It did not matter that the payment was after the employment ended.
- Holiday pay not due on payments for redundancy compensation as triggered by the employment ending not the work done by the employee.

Wages Protection Act and Deductions

- Obligation to pay entire amount of wages/salary when payable, without deduction (s.4).
- Unless stated exception applies, employer cannot claim a counter-claim or set-off to defeat s 4.
- Employee can consent in writing to deduction but can withdraw consent.
- Consent has to be “freely given”.
- Employee has to be told they can withdraw consent.
- Even if there is consent, “good faith” still applies to the manner in which the deduction is made.
- Courts have expressed doubt about enforceability of general consent to deduct monies in the case of employee breach or negligence.
- Employer can recover overpayment in certain limited circumstances.
- Employer can recover overpayments (e.g. where not required to pay the wages or where there is a strike/lock out/suspension and withholding payment is not “reasonably practical”.)

Payments Under Settlement Agreements

- Reasonably common, in case of Personal Grievance settlement, for there to be a payment for “hurt and humiliation”.
- Check that there is a documentary record (for instance a settlement agreement) stating that the payment is for hurt/humiliation under s 123 of ERA 2000.
- Genuine/reasonable payment under s 123 is not taxable.
- Payment that merely seeks to repackage wages/salary as s123 payment is liable to be regarded by IRD as a sham.
- Be wary of s123 payments in excess of \$15,000-\$20,000.

Employee/Contractor Distinction

- Important to remember that the parties' own label for relationship is not necessarily determinative.
- Generally a contractor works on his/her own account, provides services, invoices for that work, and has a greater degree of autonomy than an employee.
- Relevant tests include:
 - Degree of control exercised by principal
 - Fundamental – whether the person in reality in business 'on their own account'
 - Integration – the degree to which the person's work is integral to the business
 - Intention – what the parties' agreement provides for
 - Industry practice
- Past treatment of tax is a relevant factor, but not determinative

Casual/Permanent Employees

- A permanent employee's employment (whether full time or part time) continues for an indefinite period.
- A casual employee is employed on an occasional or ad hoc basis, as and when required. Each assignment is seen as constituting a separate period of employment.
- The relevant legal tests for a casual are:
 - Employee engaged for short periods of time for specific purposes
 - Lack of regular work pattern
 - Lack of expectation of on-going employment
 - Employment dependant on work demands
 - No obligation on employer to offer employment and no obligation on employee to accept further offer
- Notwithstanding parties may have agreed to casual employment, imperative that the relationship in practice reflects relationship being casual.

Presenters



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- absence management and medical incapacity;
- collective agreements/industrial relations; and
- employment aspects of commercial transactions.