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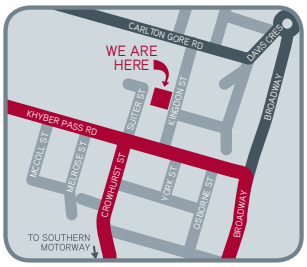
EMPLOYMENT ▪ HEALTH ▪ EDUCATION ▪ SPORTS

Proposed law changes

Last year, Cabinet proposed a number of law changes to the Employment Relations Act 2000 ('ERA'). These were introduced to Parliament on 26 April 2013 in the form of the Employment Relations Amendment bill ('the Bill').



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The Bill proposes significant changes to collective bargaining. These include:

- Removing the current requirement to conclude a collective agreement except where there are genuine reasons, based on reasonable grounds, not to;
- Allowing employers to opt out of multi-employer collective bargaining;
- Allowing employers to initiate collective bargaining in the same timeframes as unions;
- Allowing the Authority to make a determination that collective bargaining has concluded with neither party being allowed to reinitiate bargaining until 60 days after such a determination;
- Removing the rule that non-union employees who fall within the coverage clause of a collective agreement must be employed on the same terms as the collective agreement for the first 30 days of their employment (and any other agreed terms that are not inconsistent); and
- Requiring advance written notice of any strike or lockout and allowing reductions in pay for partial strikes.

The proposed changes also include a reworking of Part 6A of the ERA (dealing with the rights of "vulnerable workers" in a restructuring) to exclude businesses with less than 20 employees.

In addition, the Bill proposes that all employees will be able to request flexible working arrangements and the Bill will remove prescriptive rules around taking rest and meal breaks.

There are also proposed changes restricting an employee's ability to seek information about »

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» other candidates in redundancy selection processes.

Finally, the Employment Relations Authority will be required to give an oral determination at the conclusion of its investigation meetings or an oral indication followed by a written determination within three months.

The Bill has not yet been presented at its first reading and no doubt it will be hotly debated in Parliament and throughout the select committee stage.

In the meantime, there have been other legislative changes employers need to be aware of. These include:

- An increase in the minimum wage from **$13.50** to **$13.75** effective 1 April 2013;
- An increase in the training and new entrants minimum rate from $10.80 to $11.00 per hour;
- KiwiSaver minimum contribution rates increased on 1 April, with the minimum rates for both employees and employers increasing from 2% to 3%.
- A recent decision of the Employment Court has also clarified that a compulsory employer contribution to KiwiSaver must be in addition to the minimum wage. Further, the employer contribution is now subject to the deduction of ESCT (Employer Superannuation Contribution Tax).

Employers Strike Back

While employees have the ability to pursue personal grievances, employers also have the ability to sue employees for breaches of their duties as employees. It is a myth that only the employer can be sued. Employers do have the ability to strike back.

MOST OF THE CASES INVOLVING claims brought by employers are against employees who have breached duties of confidentiality, fidelity or restraints of trade or who have unlawfully set up competing businesses while still working for their old employer. However it is also possible to sue employees for damage caused by negligence.

Two recent cases are good examples of the types of actions employers can bring against current or former employees:

- In *Rooney Earthmoving Ltd v McTague & Ors*, the employer obtained a total of $4,290,000 in damages against former employees who had used their position as employees to unlawfully solicit customers and employees away from the employer and who had used the employer's confidential quotes and client lists to undercut the employer. These were serious breaches of fidelity and trust and confidence that had a significant financial impact on the employer.
- In *Phoenix Cabs 2006 Ltd v Artho* the Employment Relations Authority ordered an employee to pay an employer $10,000 being the replacement cost of a work vehicle that the employee had written off while driving drunk. She was a taxi driver. The employee was found to be negligent in her duties. She was also ordered to pay $1,225.13 in towing and storage costs.

These cases illustrate the types of claims employers can bring against employees. It's not all one way traffic!

Drug & alcohol testing an overview

ACCORDING TO BENJAMIN FRANKLIN, "BEER IS PROOF THAT GOD LOVES US AND WANTS US TO BE HAPPY."

HOWEVER, IT APPEARS MANY NEW ZEALAND EMPLOYERS are far from happy about the way their staff are using alcohol and drugs.

The New Zealand Drug Detection Agency (NZDDA) recently announced that in 2012, it had been called on by employers to conduct over 31% more drug and alcohol tests than in 2011.

In turn, we are fielding more and more inquiries from employers wishing to implement drug and alcohol testing procedures.

So what can an employer do if it wants to test for drug and alcohol use?

In 2004, the Employment Court ruled in a test case involving *Air New Zealand* that certain types of drug and alcohol testing could be introduced by an employer, providing it did not conflict with any express provisions in any employment agreement, and provided there was appropriate consultation with affected employees.

Subsequently, the courts have found that drug and alcohol testing is likely to be lawful in most cases if carried out pre-employment, post-accident or for "reasonable cause", such as if the employee appears intoxicated or under the influence of drugs.

Random testing on the other hand is only likely to be lawful in safety-sensitive industries and in roles that are safety sensitive by their nature. There has been no precise judicial definition of what a safety-sensitive industry or role is although the Courts have indicated that work places such as airports and wharves are, by their nature, safety-sensitive.

If an employer does wish to introduce any form of testing, its policy will need to be comprehensive. As such, using trained experts and following a carefully documented and fair process is essential.

The most common form of drug testing is urine testing. However, New Zealand employers should be aware that it appears that saliva testing may now be a more accurate indicator of cannabis impairment than urine testing, following an Australian case *(Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.* Further, this type of testing is also considered to be less invasive.

There are dangers in relying on the results of a urine test for the presence of cannabis as conclusive proof of impairment. This is because the test for the presence of cannabis measures a non-psychoactive substance that is stored in the body's fatty tissues for us to a month after cannabis use. The chemical that is actually detected has no effect on the brain and therefore the test cannot be used, in itself, as conclusive proof of impairment.

What happens if an employee fails an alcohol or drug test? The Courts have indicated that failing a drug or alcohol test is not necessarily justification for dismissal. The employer must still follow a fair procedure and weigh up all the evidence, including the employee's explanation.

It is also important to be aware that a good drug and alcohol policy will usually include putting the employee on a rehabilitation plan as an alternative to dismissal.

Drug and alcohol testing can be lawful, but it is a matter of balancing the employer's legitimate interests in keeping the workplace safe against the employee's rights to privacy outside of work.

It is best to get specialist advice if an employer wishes to introduce drug and alcohol testing or it has an employee who it suspects is under the influence of drugs. This area of law is complex!

Paid breaks for piece rate workers

IF YOU PAY YOUR STAFF ON A COMMISSION ONLY OR PIECE RATE BASIS, THEN YOU NEED TO BE AWARE OF AN IMPORTANT DECISION BY THE EMPLOYMENT RELATIONS AUTHORITY.

THE EMPLOYMENT RELATIONS ACT was amended on 1 April 2009, to provide an entitlement to two paid 10 minute rest breaks and one 30 minute unpaid meal break during an 8 hour shift.

However, the amendment did not explain how this entitlement applied to workers who were paid only for what they did or sold (and who were not paid an hourly rate). Clearly, the intention of the legislation is that the 10 minute breaks are paid, but how does an employer pay an employee for those breaks if the are paid only on the basis of the work they do during any time period?

The Authority has now ruled in FIRST Union Inc. v General Distributors Ltd that piece rate workers are entitled to "paid" rest breaks.

The collective agreement at General Distributors stated that the workers would be paid by piece rate and would not be paid during breaks or other interruptions to work. The Union brought a claim seeking wage arrears.

The Authority ruled that the words of the Act were clear and that the entitlement was to "paid" rest breaks. Therefore, even if the workers were paid piece rates, they were still entitled to actual payment during these breaks.

Unfortunately, the Authority provided no guidance whatsoever on how such a payment was to be calculated and the proposed amendments that address it. Any employer paying on a piece rate or commission only basis will need to carefully consider the implications of this decision. If you pay employees piece rates or commission only, we would be happy to discuss this further with you.

Tim Oldfield

We are delighted to announce that experienced employment lawyer Tim Oldfield joined us at the start of this year. Tim has specialised in employment law in New Zealand for all of his career to date, most recently as the solicitor for the Service & Food Workers Union. Tim has a wealth of experience and brings a practical and balanced approach to our team.

New appointment for Kathryn Beck

We are also proud to announce that Kathryn Beck has recently been appointed a Vice President of the New Zealand Law Society.

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