



November 2008

Employment Update

The wheels of political change are turning - but how fast?

On Saturday, 8 November New Zealanders went to the polls and voted for change; resulting in a National led minority Government, with support on confidence and supply from ACT, the Maori Party and United Future.

Now that National has won the election, the question many people (both employees and employers) are asking is whether they will “tinker” with our existing employment relations legislation, or whether they will seek to introduce more significant changes.

National’s message to date had been that they will not seek to introduce radical changes. Instead they are looking for a period of stability – for their first term at least.

The main changes being proposed by the National Government are as follows:

- Introduction of a 90-day personal grievance free probationary period
- Permitting employees to “cash up” their fourth week of annual leave
- Amendments to KiwiSaver, including changes to allow a total remuneration approach by employers
- Restoring workers’ rights to bargain collectively without being a member of a union
- Retaining, but improving, the Mediation Service
- Allowing injunctions and important questions of law to be heard in the Employment Court in the first instance
- Extending the right of appeal to the Court of Appeal so that appeals are not limited to questions of law, and
- Appointing a working party to review the Holidays Act 2003, in particular the definition of “relevant daily pay”.

In this newsletter, we take a look at three of the more significant of these proposals – probationary periods, cashing up leave, and changes to KiwiSaver.

Probationary periods

Employers can currently include probationary periods in employment agreements but must go through a process in order to terminate an employee based on poor or non-performance during the probationary period.

The new probationary period proposed by National will only apply to businesses with less than 20 employees. It is proposed that employers will be able to engage employees for a "90-day trial period", and employees would not be able to bring a personal grievance claim if dismissed in accordance with that trial period. Labour referred to the proposal as "daft", and stated that it was a "charter of abuse for workers' rights". That claim is obviously denied by National, which takes the view that employers must still follow a fair process during the trial period.

The proposed advantage of the probationary period is that it may facilitate employers hiring employees they may not otherwise be prepared to "take a risk" on.

"Cashing up" fourth week of annual holidays

At present the Holidays Act 2003 does not allow parties to agree to "cash up" any part of their statutory entitlement to four weeks' annual holidays (however, parties can agree to "cash up" any additional annual holidays that are provided).

While it is not expressly stated anywhere in the Holidays Act 2003 that annual holidays cannot be "cashed up", the Act provides that unused annual holidays must be paid out on termination of employment. This has consistently been interpreted to mean that any early "cash-up", before the end of employment, may be unlawful and of no effect.

In the current economic environment, National's new proposal may be attractive to both employers and employees. Employees will be able to receive the cash equivalent of their entitlement, and employers will be able to make the same payment but also obtain additional output from employees in the form of an extra week's work.

Collective bargaining

At present only employees who are members of a union can bargain for and be covered by a collective employment agreement. This proposal would allow employees to group together and bargain with their employer for a common set of conditions, without requiring union membership.

In order to balance claims that it is seeking to reduce union involvement or to remove the role of unions, National has also stated that they will seek to maintain the rights of unions to have reasonable access to workplaces, and will continue to support social partnerships with groups such as Business New Zealand and the Council of Trade Unions.

KiwiSaver

Another area in which changes are proposed is KiwiSaver. National's pre-election policy statements suggest that those amendments are likely to be:

- Reducing the rate of minimum employee contributions from 4% to 2%
- Discontinuing the employer tax credit, and
- Repealing the most recent amendments to the Employment Relations Act 2000 in respect of KiwiSaver (the total remuneration amendments).

There has also been some discussion about whether National will look to lower the compulsory employer contribution which is currently 1% rising by 1% per annum through to 2011, although there has been no official statement by them in this regard.

Lowering the compulsory employee contribution will arguably allow more employees to participate, as many, particularly in the current economic climate, argue they cannot afford to divert 4% of their salary to savings, even with the incentives offered.

Repealing the most recent amendments to the Employment Relations Act 2000 will allow employers to offer a KiwiSaver-equivalent contribution to non-KiwiSaver employees, thereby taking a total remuneration approach to achieve remuneration consistency across their workforce

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