



September 2008

Employment Update

KiwiSaver - do employers now need saving?

Amendments to KiwiSaver were passed by Parliament on 2 September 2008, with the new legislation (an amendment to the Employment Relations Act) being released on 9 September. This change occurred in a rather unusual way – by an amendment to the Breaks and Infant Feeding Bill already before Parliament. This meant that the changes did not go through the normal legislative process.

Many employers will have followed the Hon. Trevor Mallard's comments reported in the media, claiming that a number of employers have not been complying with the intentions of the KiwiSaver legislation by taking a "total remuneration" approach. By this we mean seeking to incorporate employer KiwiSaver contributions into a total package which is the same for equivalent employees, whether they are a member of KiwiSaver or not.

At first blush, the issue seemed to be with those employers who sought to include the 1% compulsory employer contribution as part of employees' existing salaries. Additionally, concerns were raised about those employers who were retaining the tax credit in respect of employer contributions and not passing it on to their staff, while at the same time asking staff to accept employer KiwiSaver contributions as part of their total remuneration.

However, a review of the latest amendments shows that the changes will impact on a much broader range of circumstances than this. As a result, many employers may need to change their current practices in respect of KiwiSaver moving forward, and in some instances, the changes will affect remuneration strategies which might have otherwise been advantageous to employees.

Previously, section 101B of the KiwiSaver Act 2006 allowed the parties to agree a remuneration package that would incorporate the compulsory employer contribution. However, the new legislation effectively stops this.

The key point is that the new legislation makes it unlawful for an employer to provide employees who do not elect to participate in the KiwiSaver scheme, with an equivalent contribution by way of increased salary or wages, either to be used for another superannuation scheme, or to do with as they please. To do so is deemed to result in a KiwiSaver employee receiving less in salary or wages than the employee who is not a KiwiSaver member. Where this is a result of an agreement entered into on or after 2 September 2008 or a variation made on or after that date, this gives the KiwiSaver employee grounds to raise a personal grievance.

The new legislation also allows an employee to bring a personal grievance where their employment has been "adversely affected" due to their KiwiSaver membership. The employee's employment is considered to be adversely affected if the employee is part of a KiwiSaver scheme, and:

- the employer refuses or omits to offer or to afford to the employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills (comparable employees) employed in the same or substantially similar circumstances; and
- the reason (wholly or in part) for the employer doing any of these things is that the employee is a member of a KiwiSaver scheme.

Further, the new legislation also provides for an assumption of adverse effect where:

- the employee's salary or wages are less than the salary or wages of other comparable employees; and
- the reason (wholly or in part) for this is that the employer has taken into account the compulsory employer contributions which the employer is required to make to the employee.

So what should employers do?

Making an additional payment to employees not participating in KiwiSaver is no longer an option. Employers will now have to choose whether to pay an allowance to all employees but also to pay the compulsory employer contribution to KiwiSaver on top of the allowance (thereby significantly increasing costs), or to abandon the idea of an additional allowance altogether and instead keep money in reserve for any employees who join KiwiSaver (thereby reducing the benefit to non-KiwiSaver employees).

Furthermore, employers who have already implemented a total remuneration approach will need to consider what they will do to comply with the new law.

Please contact us if you would like to discuss these amendments further or if you require assistance amending your existing practices.

Stop Press: Bill introduced to protect casuals and temps

Labour Minister Trevor Mallard introduced a Bill to Parliament on 9 September 2008 which covers two important issues.

First, it allows a Labour Inspector or the Employment Relations Authority to determine whether an employee is fixed term, whether an employee's time of work are fixed, and if so, what those time of work are. To determine this, there would be consideration of the employee's pattern of work, whether the employee works only when work is available, any work rosters or method of allocating work, and the employer's expectations of whether the employee will attend work when requested.

In the case of a fixed term employee, another consideration is whether the Employment Relations Act requirements for employing a person on a fixed term employment agreement (section 66) have been met. A determination by a Labour Inspector or the Authority would be binding on the employer and treated as a term and condition of employment.

Second, the Bill contains provisions which would affect 'triangular' employment relationships, which is a situation where labour is provided to a controlling third party through a contract between the employee's employer and that third party. A "controlling third party" is one which is entitled to exercise control over the employee that is similar to an employer's control.

Under the Bill, the terms and conditions of union-member employees in this situation must not be inconsistent with a collective agreement, where such an agreement is in place between the union and the third-party, and covers the employee's work but does not bind their own employer.

The Bill would also allow an employee to apply to join the controlling third party to personal grievance action. In such cases, remedies could be awarded against the controlling third party where they have contributed to a grievance.

Contacts

If you have any questions regarding this update and how it will impact on your organisation, please do not hesitate to contact us for assistance.

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