

## OFFICE OF THE MINISTER FOR WORKPLACE RELATIONS AND SAFETY

The Chair  
Cabinet Economic Growth and Infrastructure Committee

### **Employment Standards Legislation Bill – Supplementary Order Paper**

#### **Proposal**

- 1 This paper seeks one policy decision in relation to the Employment Standards Legislation Bill (the Bill) and notes some further amendments that I propose to make by way of a Supplementary Order Paper (SOP).

#### **Background**

- 2 The Bill was reported back to the House from the Transport and Industrial Relations Committee on 12 February 2016.
- 3 Since then, a number of issues have been raised with the Bill and I consider that some useful amendments could be made. I propose to advance these by way of a SOP.
- 4 Officials at the Ministry of Business, Innovation and Employment (MBIE) have also noted a few issues (most of which are minor and/or technical) and recommended that changes are made as part of the SOP.

#### **Issues raised and proposed amendments**

##### ***Definition of serious (new s142B(4) of the ERA inserted by clause 95)***

- 5 New Part 9A of the Employment Relations Act 2000 (ERA) provides significantly higher penalties for 'serious' breaches of minimum employment entitlements. New section 142B(4) provides an indicative list of factors for the Employment Court to consider when determining whether a breach of minimum entitlements is serious.
- 6 In the introduction version of the Bill, s142B(4)(d) read "whether the breach was intentional". An issue was raised in submissions as to whether it was the conduct leading to the breach that was intentional, or, in addition, the person also knew they were breaching minimum entitlements.
- 7 I will propose in the SOP that s142B(4)(d) is amended to "whether the breach was intentional or reckless". This will clarify that what is intended is that this factor captures the person's state of knowledge about their minimum entitlements as an additional aggravating factor for the determination of 'serious'.

***Record keeping provisions (amendments to s130 of the ERA inserted by clause 89)***

- 8 New subsections (1B) and (1C) in s130 provide legislative guidance on how to meet the new general requirement to have a record of “the number of hours worked each day in a pay period and the pay for those hours”. The intent is to avoid imposing unnecessary compliance costs on employers while ensuring that employers record sufficient detail for compliance with minimum entitlements to be assessed.
- 9 A concern has been raised that the exemption from recording “reasonable additional hours” could make assessment of compliance with the Minimum Wage Act difficult in the case of low paid salaried employees. Uncertainty about the “reasonable” threshold could also lead employers to incur additional costs when minimum entitlements are clearly not at risk.
- 10 The amendments I am proposing in the SOP remove the “reasonable” threshold, restrict the exemption from recording additional hours to salaried employees and instead require employers of salaried employees to record additional hours only when minimum entitlements are at risk.

***Availability provisions (new s67E of the ERA inserted by clause 87)***

- 11 New section 67E(2)(a) is an avoidance of doubt provision which states that an availability provision may relate to “all work performed under an employment agreement”. There is a concern that this provision may inadvertently unwind existing case law on whether there must be a minimum number of hours in a permanent employment agreement. I am proposing in the SOP that s67E(2)(a) be deleted to avoid this.
- 12 For the same reason, I am also proposing a change to s67E(2)(b) which would indicate that availability provisions may only relate to work performed in addition to any guaranteed hours of work. While the practical impact of this change is not significant, it is a departure from the original policy as it expressly rules out the possibility of an availability-only agreement. This change means that there must be some commitment to ongoing work before an employer can use an availability provision and so I am seeking the Committee’s agreement to this change.
- 13 An issue was also raised that the requirement to provide a genuine reason based on reasonable grounds for including an availability provision in an employment agreement should be extended to also include the number of hours of availability the employer requests.
- 14 Given that the number of hours of availability is already a factor to be taken into account when considering if there is a genuine reason based on reasonable grounds for including an availability provision, this does not introduce an entirely new idea. I believe this change will limit the inappropriate use of availability agreements but still allow their use where they are necessary and propose including this amendment in the SOP.

***Shift cancellations (new s67G of the ERA inserted by clause 87)***

- 15 I am also proposing to respond to a couple of issues raised with the shift cancellation provisions. The definition of 'shift work' utilises the concept of employees 'succeeding' each other in a particular role at work. This is unintentionally narrow and may remove a large proportion of employees from the protection of these provisions. I propose removing this concept from the definition. The rest of the conceptual elements of the definition would remain intact.
- 16 There is also some concern that the shift cancellation provisions would lead to confusion by some employers about whether the Bill introduced a general right to cancel shifts. While the provisions currently require the employer to include a valid shift cancellation clause in the employment agreement to be able to cancel shifts, I propose inserting an avoidance of doubt that clarifies that these provisions do not permit an employee's shift to be cancelled where doing so would breach the terms of that employee's employment agreement.
- 17 The Bill introduces the concept of a notice period which the employer must meet to cancel an employee's shift without having to pay compensation. New section 67G(3) mandates that this minimum period of notice must be reasonable. It has been suggested that it could be useful to provide factors for consideration as guidance on what would constitute a reasonable notice period. I agree and am proposing to amend the provision to include a non-exhaustive list of factors.
- 18 These factors would include regard for all relevant matters including:
- a. the particular nature of the business;
  - b. whether the circumstances that have given rise to the proposed shift cancellation are beyond the employer's control;
  - c. how soon the employer could reasonable foresee the need to cancel shifts; and
  - d. the nature of the employment arrangements.

**Penalty for breach of s65 of the ERA**

- 19 One objective of the Bill is to rationalise the penalty provisions where appropriate so that both labour inspectors and employees can take penalty actions at the Employment Relations Authority. While this was done for section 64 of the ERA (relating to the obligation to retain a signed copy of an individual employment agreement), it was not done for section 65 (relating to the form and content of an individual employment agreement). The SOP amends s65(4) so that employees can seek penalties in addition to labour inspectors.

**Next steps**

- 20 I will introduce a SOP reflecting these proposals at the Committee of the Whole House stage of the Bill.

### **Consultation**

- 21 I have consulted with our support parties and the Council of Trade Unions, Business New Zealand and the Auckland Chamber of Commerce on the amendments to the Bill discussed in this paper.

### **Financial implications**

- 22 There are no financial implications from the amendments to the Bill discussed in this paper.

### **Human rights**

- 23 The proposals discussed in this Cabinet paper are consistent with previous Cabinet decisions and do not raise any additional issues of consistency with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

### **Legislative implications**

- 24 The proposals discussed in this Cabinet paper will be progressed through a Supplementary Order Paper.

### **Regulatory impact analysis**

- 25 The proposals discussed in this Cabinet paper are consistent with previous Cabinet decisions. Regulatory Impact Statements were prepared and submitted to Cabinet at the time the original policy decisions were made.

### **Publicity**

- 26 I intend to signal in my second reading speech on the Bill my intention to propose some further amendments to the Bill by way of a SOP.

### **Recommendations**

- 27 The Minister for Workplace Relations and Safety recommends that the Committee:
- 1 **Agree** that instead of allowing an availability provision to relate to all work, an availability provision should only be permitted in employment agreements that include guaranteed hours of work
  - 2 **Note** his intention to make various amendments to the Employment Standards Legislation Bill by way of a Supplementary Order Paper.

Hon Michael Woodhouse

MBIE-MAKO-46253182

**Minister for Workplace Relations and Safety**

\_\_\_\_ / \_\_\_\_ / \_