



COVERSHEET

Minister	Hon Andrew Little	Portfolio	Immigration
Title of Cabinet paper	Restricting the use of trial periods in the Accredited Employer Work Visa	Date to be published	13 November 2023

List of documents that have been proactively released		
Date	Title	Author
August 2023	Restricting the use of trial periods in the Accredited Employer Work Visa	Office of the Minister of Immigration
30 August 2023	Restricting the use of trial periods in the Accredited Employer Work Visa DEV-23-MIN-0197 Minute	Cabinet Office

Information redacted

YES

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Some information has been withheld for the reason of confidential of advice to government.

In Confidence

Office of the Minister of Immigration

Cabinet Economic Development Committee

Restricting the use of trial periods in the Accredited Employer Work Visa

Proposal

- 1 This paper seeks agreement to restrict the use of trial periods in the Accredited Employer Work Visa (AEWV). Under this proposal, accredited employers detected continuing to dismiss migrant workers on the basis of a trial period will be liable to have their accreditation revoked.

Relation to government priorities

- 2 This proposal relates to the 2020 Election Manifesto commitment to “continue work to stamp out migrant worker exploitation”. It is consistent with the Immigration Rebalance and our Workplace Relations Policy, which aims to protect vulnerable workers.

Executive summary

- 3 Recently, the use of trial periods has been linked to reports of migrant exploitation. Although there is a Dismissed Worker Visitor Visa to cater for migrants dismissed under a trial period, there is no restriction on the lawful use of them in the recruitment of migrants. There are indications that the misuse of trial periods is part of a wider pattern where employers and agents take advantage of an imbalance of power to treat migrant employees unfairly. Trial periods reduce the risk of negative consequences for a non-genuine employer who is treating migrants unfairly.
- 4 The objective of the trial period settings is to create more employment opportunities for New Zealanders, particularly those who are disadvantaged in the labour market by reducing the risk and potential cost for small employers of taking on someone who may not work out. Allowing migrants to be recruited and dismissed in this way does not align with this objective.
- 5 I propose banning the use of trial periods in the Accredited Employer Work Visa, as a standard of accreditation and in the Job Check. An application that contains a trial period can be declined, and if employers are found to be using the trial period to dismiss migrants they could lose accreditation and the ability to recruit other migrants through the AEWV. This adds to the already expanded suite of tools we have to prevent, identify and take action in cases of migrant exploitation. Many of the drivers of exploitation or misuse of the immigration system are outside of policy settings, but where there is a link we should investigate it and respond appropriately.

Background

- 6 Section 67A of the Employment Relations Act 2000 allows an employment agreement to contain a trial period provision of 90 days or less. If a trial period is valid and is agreed in good faith, an employer can dismiss an employee during that period and the employee is not entitled to bring a personal grievance. The intention of this policy was to provide employers with greater confidence when hiring new employees and enable extra opportunities for employees, particularly those who are disadvantaged in the labour market.
- 7 In 2019, Cabinet agreed to restrict eligibility to employers with fewer than 20 employees [CBC-18-MIN-0016 refers].
- 8 Between 2017-2022, Cabinet and Ministers made a series of decisions agreeing to the principles and design of the Accredited Employer Work Visa (AEWV). Among other things, these decisions sought to ensure migrants were only being recruited for genuine skill shortages [CAB-18-MIN-0608.01, DEV-19-MIN-0228, DEV-19-MIN-0229 refer].
- 9 In September 2022, Cabinet approved the introduction of the Worker Protection (Migrant and Other Employees) Bill to improve compliance legislation and deter employers from exploiting migrant workers [CAB-22-MIN-0415 refers].
- 10 We now have more tools in place now to detect exploitation and take action against employers where it is detected. Work is ongoing on embedding these systems, taking action against employers, and calibrating targeted scrutiny and tolerance levels in visa assessment and in compliance and enforcement actions.
- 11 Recently, the use of trial periods has been linked to reports of migrant exploitation. These include situations where a migrant employee has paid considerable sums for a work visa (sometimes to an unlicensed offshore agent) and is dismissed once in New Zealand on the basis of a trial period. Some have brought personal grievances. In at least one case, the employer dismissed the worker even though the employment agreement did not contain a trial period. Although recent reporting has drawn attention to these patterns, they are longstanding and pre-date the AEWV.

Analysis

The misuse of trial periods may be making it easier for employers to treat migrant employees unfairly

- 12 Currently, there is no restriction on the lawful use of trial periods in the recruitment of migrants for employers who have 20 or fewer employees. Immigration policy requires an employer to meet minimum employment standards and generally does not impose standards above these, unless there are specific reasons to do so. In 2010, the government introduced a Dismissed Worker Visitor Visa. This allows migrants who have been dismissed on the basis of a 90-day trial period to obtain a three-month visitor visa. They must show sufficient funds to support themselves as they cannot work.
- 13 Some employers of migrants may be including trial period clauses for genuine reasons, to protect themselves against the risk of hiring decisions not working out.

IN CONFIDENCE

Because migrants move themselves and often their family to New Zealand, there are much greater costs and risks to a migrant compared to a New Zealander when an employer acts in this way. Importantly, there are also indications that the misuse of trial periods is part of a wider pattern where employers and agents take advantage of an imbalance of power to treat migrant employees unfairly.

- 14 Many of the drivers of exploitation or misuse of the immigration system are outside of policy settings. In cases where there is an apparent link between exploitation and immigration policy settings, we should investigate this link and consider the appropriate response.
- 15 The ability for employers of migrants to use trial periods is one such case. Trial periods can give employers greater power in the employment relationship with a migrant. They reduce the risk of negative consequences for an employer with a non-genuine job offer who is treating migrants unfairly.
- 16 Prohibiting employers from including this clause in employment agreements with AEWV holders would discourage employers from relying on a trial period, therefore making it less attractive to enter into arrangements where they receive money for a job through an offshore agent. Alongside this, it could incentivize genuine employers to ensure their offshore recruitment practises are thorough and the migrant is suitably skilled.

It would be consistent with our objectives for immigration and the workforce to restrict the use of 90 day trial periods through the AEWV

- 17 I propose to restrict the use of 90 day trial periods for migrants by introducing rules in the AEWV. Discouraging the use of trial periods would be consistent with our commitment to minimize migrant exploitation. Recently, we have made a suite of changes to strengthen the compliance and enforcement regime around the hiring of migrants.
- 18 It is also consistent with our Workplace Relations Policy. The objective of the 90-day trial period is to provide employers with greater confidence when hiring new employees, particularly small businesses that face greater risks and costs. Removing a trial period option for migrants may increase the risk and potential costs for small businesses recruiting a migrant who does not work out. Other means will remain available to dismiss employees where justified and where the process outlined in the Employment Relations Act is followed.
- 19 This change would also support the principles of the AEWV by disincentivizing employers from hiring where there is not a genuine need for the migrant. It would also align with the Immigration Rebalance decisions taken between 2021-2022, which among other things, seek to increase the 'cost' of relying on migrant labour to encourage employers to consider the domestic workforce or less labour-intensive models [CAB-21-MIN-0554 refers].
- 20 It also reduces the chances that a migrant may not have fully understood the trial period conditions before deciding to move themselves and their family to New Zealand.

This rule will add to the tools Immigration New Zealand can use to review status of non-compliant employers

- 21 I propose to introduce this requirement as follows:
- 21.1 A requirement in the AEWV Job Check which states that applications must not include an employment agreement containing a trial period. This will be detected upfront in some but not all cases; employment agreements will be checked based on operational rules in place at the time. A Job Check or AEWV visa may be declined if the employment agreement contains a trial period.
- 21.2 A new accreditation standard for the AEWV which requires an employer to commit to not use trial periods in the hiring of AEWV holders. This provides a wider and stronger basis for enforcement. Breach of an accreditation requirement is grounds to revoke accreditation. If an employer dismisses AEWV employees based on a 90 day trial period and this is reported to or detected by MBIE, this may trigger a review of the employer's accreditation status. There is precedent for introducing this: under a previous form of accreditation developed for the Canterbury rebuild, labour hire companies had to commit not to using trial periods as a condition of their accreditation.
- 22 These rules will add to the range of tools Immigration New Zealand can use to review non-compliant employers. In practice, how frequently it results in revocation of accreditation depends on operational resourcing, the strength of evidence, and severity of the breach. The introduction of these rules would not prevent breaches in 100 percent of cases, nor will it fundamentally change the incentives on offshore unlicensed agents to arrange jobs for payment. However, it would send a signal that relying on 90 day trial periods to dismiss a migrant worker is no longer acceptable practice under the AEWV scheme. It would allow targeted post-decision and re-accreditation checks where a report has been made.
- 23 The AEWV policy was designed to allow a relatively light touch check of the role, pay rate and advertising for most jobs in the Job Check, with higher targeted scrutiny of some applications. The system is a 'learning' system; as INZ gathers further information about employers and risk factors, bad faith actors are removed through a suite of controls, including assessment practices, revocation, suspension and infringements.
- 24 If we introduced this rule, initially we would expect to see some reduction in the use of 90 day trial periods. Some employers who continue to use trial periods may not be detected immediately, and if they are it may take time to build a case to revoke accreditation. Over time, employers who repeatedly breach accreditation standards will be subject to scrutiny when their accreditation is due for renewal, a substantiated complaint is made, or they are subject to post-decision checks.
- 25 Importantly, Confidential advice to Government trial periods will remain lawful under the Employment Relations Act for all employees of eligible businesses, including migrants Confidential advice to Government

Confidential advice to Government

- 26 MBIE will develop an education campaign to ensure that employers adjust to the new rule and migrants understand how it affects them.

Risks and mitigations

- 27 This restriction may not be a sufficient deterrent for employers who seek to use trial periods in the hiring and firing of AEWV holders. Over time, MBIE will monitor its effect and increase targeted checks if needed.
- 28 It is also possible that migrants misinterpret this policy and believe that we have made trial periods unlawful. The communications approach will involve migrant communities and advocates, to promote wide understanding of the policy. This will include making it clear that the policy does not apply to employment relationships outside the AEWV, such as working holiday makers.
- 29 The impact section of this paper sets out how this is likely to affect businesses. While significant negative effects are not anticipated, it will increase the potential cost of hiring for some employers. Some businesses in labour hire and construction may need to adjust their employment practises as a result of the policy.

Implementation

- 30 The Job Check rule and new accreditation standard can be introduced in late November 2023 with accompanying ICT system changes that require an employer to acknowledge the new rule when they apply for a Job Check. From November, a Job Check application that contains a trial period can be declined. New employers seeking accreditation will be required to commit to this standard from November. For accredited employers, it is intended that their accreditation could be revoked if they dismiss a migrant under a trial period based on a Job Check that was approved on or after the implementation date, regardless of when they applied.

Cost-of-living Implications

- 31 There are no direct cost-of-living implications of this proposal. The impact analysis section of this paper sets out in more detail the anticipated impact on businesses.

Financial Implications

- 32 There are no direct financial implications of this proposal.

Legislative Implications

- 33 There are no legislative implications of this proposal.

Impact Analysis

Regulatory Impact Statement

- 34 This proposal does not involve the potential introduction, repealing or amending of legislation, so regulatory impact analysis is not required. A high level summary of impacts is described below:
- 34.1 Businesses and individuals misusing the immigration system: where a migrant has paid significant sums to an agent for a visa, there are strong push factors, such as hardship, debt, lack of economic opportunity and family obligations, which mean that people offshore may be willing to agree to risky arrangements regardless of the presence or absence of a trial period.
- 34.2 Genuine employers: employers already incur risk and cost where they recruit a migrant from offshore. Employers will need time to update their employment agreements, especially where a collective employment agreement is in place. It is possible that some employers may choose to use probation periods instead of 90 day trial periods. If a probation period is used, an employee must follow a fair process which includes telling the employee if there are issues with their work. An employee may still bring an unjustified dismissal grievance if they are dismissed on a probation period.
- 34.3 Migrant workers: this policy would aim to limit the extent of employers dismissing migrants under a trial period, Confidential advice to Government
- 34.4 Domestic workforce: if a unionised workforce includes both migrants and citizens/residents, it is possible that this policy would create pressure on employers to offer the same terms to all its employees.

Population Implications

- 35 Detailed populations analysis has not been completed for this proposal. The impact analysis section sets out the anticipated impact on some groups.

Human Rights

- 36 The proposals in this paper do not have direct implications for the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 as they do not affect the employment rights of individuals.

Use of external resources

- 37 No external resources were engaged in the preparation of the policy advice in this paper.

Consultation

- 38 The following agencies have been consulted in the development of this proposal: Ministry of Social Development, the Treasury, the Department of Prime Minister and Cabinet, the Ministry for Primary Industries. Within MBIE, the following teams were

consulted: Small Business policy, International Labour policy, Employment Relations policy, Immigration Compliance and Investigations, the Labour Inspectorate, Immigration New Zealand, Tourism policy, the Construction Sector Accord Transformation Unit.

Communications

- 39 I intend to communicate this decision after Cabinet. The details of the announcement are not yet finalized.

Proactive Release

- 40 This paper will be proactively released subject to redactions as appropriate under the Official Information Act 1982 after announcements are made. Depending on the timing of announcements, this may be beyond the normal 30 business days.

Recommendations

The Minister of Immigration recommends that the Committee:

- 1 note that the use of trial periods has been linked to reports of migrant exploitation;
- 2 note that the purpose of the trial period for smaller businesses is to encourage employment of New Zealanders who are disadvantaged in the labour market by reducing the risk and potential cost for small employers of taking on someone who may not work out;
- 3 agree to restrict the use of trial periods in the Accredited Employer Work Visa by introducing:
 - 3.1 an accreditation standard which requires employers to commit not to use trial periods in the hiring of AEWV holders, and enables Immigration New Zealand to decline or revoke accreditation if the requirement is breached;
 - 3.2 the ability to decline AEWV Job Check applications if they contain a trial period clause;
- 4 authorise the Minister to make detailed policy decisions to implement recommendation three;
- 5 note that **Confidential advice to Government** trial periods will remain lawful under the Employment Relations Act for employees of eligible businesses, including migrants.

Hon Andrew Little

Minister of Immigration