



## BRIEFING

### Further decisions on AEWV 90-day trial restriction and accreditation suspension threshold

<b>Date:</b>	15 September 2023	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2324-0690

Action sought		
	Action sought	Deadline
Hon Andrew Little <b>Minister of Immigration</b>	Agree to the recommendations	18 September 2023
Hon Rachel Brooking <b>Associate Minister of Immigration</b>	For information	N/A

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Kirsty Hutchison	Acting Manager, Immigration (Skills and Residence) Policy	Privacy of natural persons	Privacy of natural persons	
Clare Devine	Senior Policy Advisor	Privacy of natural persons		✓
Bronwyn Chapman	Senior Policy Advisor	Privacy of natural persons		
Jason Austin	Acting Manager, Operational Policy	Privacy of natural persons	Privacy of natural persons	
Uchi Amaliah	Senior Business Analyst, Operational Policy	Privacy of natural persons		

The following departments/agencies have been consulted
MBIE Employment Relations Policy, International Labour policy, Employment Services

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



# BRIEFING

## Further decisions on AEWV 90-day trial restriction and accreditation suspension threshold

<b>Date:</b>	15 September 2023	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2324-0690

### Purpose

To seek detailed decisions on the Accredited Employer Work Visa (AEWV) 90-day trial restriction and on clarifying the accreditation suspension threshold.

### Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

#### *90 day trial period restriction*

- a **Note** that Cabinet agreed to an AEWV 90-day trial period policy, which includes:
- the ability to decline AEWV Job Check applications if they contain a trial period clause;
  - an accreditation standard, which requires employers to commit not to use trial periods in the hiring of AEWV applicants and holders, and enables Immigration New Zealand to decline or revoke accreditation if the requirement is breached [CAB-23-MIN-0413 refers]
- Noted*
- b **Legal professional privilege** [REDACTED]
- Noted*
- c **Note** that **Legal professional privilege**, there are existing employment law options where an employer has invalidly used a trial period
- Noted*
- d **Note** that Cabinet authorised you to make detailed decisions to implement this policy
- Noted*
- e **Agree** that the Job Check rule will apply to Job Check applications assessed on or after 27 November 2023
- Agree / Disagree*
- f **Agree** that when breaches of the accreditation standard are identified through reports or post-decision checks, the standard will be enforced by assessing whether there is written evidence of a trial period in an employment agreement
- Agree / Disagree*
- g **Agree** that the accreditation standard will be implemented on 27 November 2023, and can be enforced against existing accredited employers (regardless of when their accreditation was approved) where they have a Job Check approved on or after 27 November 2023
- Agree / Disagree*

*Other matters*

h **Note** that recent cases have highlighted some gaps between the policy intent and the immigration instructions in relation to suspending accreditation and the requirement that accredited employers not pass on certain costs to migrant workers

*Noted*

i **Agree** to clarify that accreditation can be suspended in any case where INZ or another regulator is taking active steps to confirm whether the employer or its key people are compliant with the specified immigration, employment and business standards

*Agree / Disagree*

j **Agree** to clarify that the requirement for accredited employers not to pass on certain costs to migrant workers includes passing on costs to visa applicants, as well as those who already hold a visa

*Agree / Disagree*

*Changes to immigration instructions*

k **Agree** to update the employer accreditation, Job Check and Accredited Employer work visa Temporary Entry immigration instructions by signing the Ministerial Certificate attached in Appendix 1.

*Agree / Disagree*

Privacy of natural persons

Kirsty Hutchison  
**Acting Manager, Immigration (Skills and Residence) Policy**  
Labour Science and Enterprise, MBIE

..... / ..... / .....

Hon Andrew Little  
**Minister of Immigration**

..... / ..... / .....

Privacy of natural persons

Karen Bishop  
**General Manager, Service Design and Implementation**  
Immigration New Zealand

15 September 2023

## Background

---

1. On 4 September, Cabinet agreed to restrict 90-day trial periods in the Accredited Employer Work Visa (AEWV) [CAB-23-MIN-0413 refers]. Cabinet authorised you to make detailed policy decisions to implement the policy. MBIE is planning for the changes to come into effect on 27 November 2023.
2. We also recommend taking this opportunity to clarify some other elements of the AEWV policy, specifically in relation to suspending employer accreditation and the requirement not to pass on recruitment costs to migrant workers, as recent cases have highlighted some gaps between the policy intent and what is reflected in the immigration instructions.

## Implementation of 90-day trial period restriction

---

3. Cabinet agreed to introduce:
  - the ability to decline AEWV Job Check applications if the terms of employment (including employment agreements) contain a trial period clause
  - 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.
4. This policy has been designed to fit within the AEWV framework and is based primarily on employer deterrence. It introduces a rule at the two employer gateways i.e. Job Check and accreditation. It does not create an explicit rule in the migrant gateway, as the AEWV policy is designed to hold employers to particular standards, rather than penalising the migrant for employer non-compliance (discussed further at paragraph 10).

## Job Check

5. The Job Check rule will create the express ability for immigration officers to decline applications where the proposed employment agreement submitted in support of the Job Check application contains a trial period clause.
6. The Job Check rule is straightforward to implement in immigration instructions. As previously agreed, it will be implemented in late November due to the time needed to update relevant systems and processes. We propose that it applies to all applications for Job Checks that are assessed on or after 27 November 2023. Applying the rule to all Job Checks assessed from 27 November rather than submitted, helps to prevent employers from avoiding the rule by submitting Job Check applications with large numbers before 27 November.
7. However, it will have no effect on existing visa holders or visa applications, or Job Checks that were granted prior to that date. This approach is broadly consistent with how MBIE generally implements immigration policies i.e. prospectively.
8. In theory, it is possible to design a rule with retrospective effect, i.e. to enforce it against Job Checks that have already been approved based on a proposed employment agreement containing a trial period. However, this would require checking and possibly declining AEWVs in a way that is inconsistent with policy design and, as with any retrospective action, would likely lead to increased risk of legal challenge.

### *Detection and enforcement of policy*

9. The intention is that this policy is enforced based on targeted scrutiny where there is a higher risk of breach, rather than checking all applications in all cases. In light of this, a change to the general instruction on the processing of AEWV Job Checks and work visa applications is being considered, which would direct immigration officers to check employment agreements for trial periods in job check applications and work visa applications which are based on a Job Check approved after 27 November for triangular employers and construction sector roles.

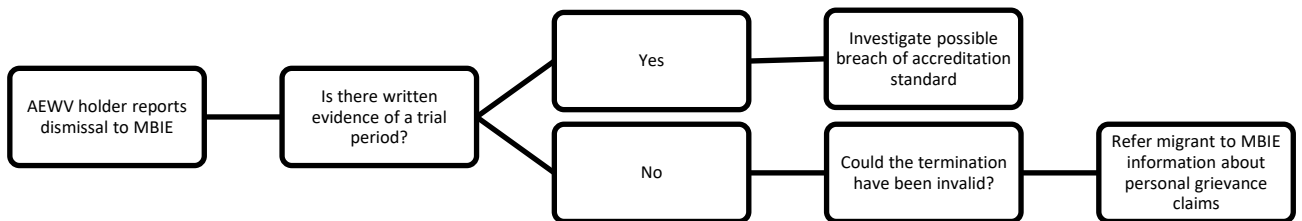
- Under current AEWV policy, the employment terms offered to the migrant must be equal to or more favourable than those approved at the Job Check. This creates the ability to decline a work visa application if it contains a trial period, and the approved Job Check did not. An explicit requirement to check all visa applications for 90-day trial periods is not recommended at this stage, as scrutiny should be applied at the Job Check consistent with the policy design of the AEWV. The extent to which visa applications are checked will depend on operational rules in place at any given time. Further consideration could be given to specific policy rules in the AEWV assessment stage, which would need to [REDACTED] operational efficiency, assurance, and the policy imperatives.

**Accreditation standard**

- Cabinet agreed that the new accreditation standard will require employers to commit to not using trial periods in the hiring of AEWV holders. The most straightforward way to identify and enforce any breaches of an express requirement of this nature in the immigration system is to assess whether there is written evidence of a trial period in the terms of employment between an AEWV employer and AEWV holder or applicant: from application records, employment agreements or the information produced by the person reporting a potential breach. This would address situations where an employer includes this clause in an employment agreement that is different from that submitted in the Job Check.

- Legal professional privilege [REDACTED]

*Table One: process for assessing report of dismissal under a trial period*



- We also recommend that the accreditation standard is implemented on the same date as the Job Check change. Compliance would be required from the time the employer commits to the new rule in an application to INZ i.e. when they submit a Job Check or re-accreditation application, whichever is earlier. This improves the chance that there is a solid evidential basis for proceeding with revocations. In other words, if INZ detects that an employer has used a trial period in an employment agreement with an AEWV holder or applicant, despite agreeing not to in a Job Check or accreditation application made on or after 27 November 2023, their accreditation could be revoked.

14. All accredited employers, both current and future, will be subject to this requirement, regardless of whether they have specifically committed to at the point of applying for accreditation. There will be declarations on the Job Check and employer accreditation application forms which require employers to commit to the new rule.

*Detection and enforcement of policy*

15. The accreditation policy does not currently rank breaches of accreditation requirements on a scale of gravity of offending. This is on the premise that all breaches of accreditation standards should potentially be able to lead to revocation, as the bar for accreditation is intended to be high. Requiring written evidence of a breach makes it more straightforward to assess and act on a breach (although it still likely that there is conflicting evidence and statements, as is the case with most reports). Operationally, whether a breach of this new standard will be investigated will depend on:
  - Whether a breach is detected through post accreditation checks and planned verification activities
  - Whether migrants come forward, including through established processes for reporting exploitation to MBIE
  - The nature of the evidence
  - Whether there are other breaches the employer is being investigated for.
16. In the ‘bedding in’ period after announcement, some employers will not have engaged with the immigration system when they sign the agreement containing a trial period (i.e. they have not submitted a Job Check or accreditation application). Under the proposed policy, the use of a trial period clause in recruitment when the employer has not had any Job Check or accreditation application approved since 27 November 2023 will not be a breach. This is by design because there is unlikely to be a strong evidential basis for revocation for this cohort.
17. Annex Two illustrates the timeline for this policy taking effect.

## **Interaction with the employment regulatory system**

---

18. This policy does not remove the ability for employers to use trial periods in the hiring of migrants under the Employment Relations Act. This means that migrants do not have any greater legal recourse as a result of this change in immigration policy. You advised Cabinet that if the Government wished to do this, it would need to amend the Employment Relations Act. MBIE will consider these issues in relation to any future review of the Employment Relations Act.

[Legally privileged]

19. Legal professional privilege  
[Redacted text]

Legal professional privilege

## Clarification of threshold for suspending accreditation

---

22. In 2021, the then Minister of Immigration agreed that an employer's accreditation could be suspended if they, or their key people, had an investigation or case pending for any breach that would prevent them from being accredited if proven [2021-2254 refers].
23. The policy paper and subsequent immigration instructions did not contain a clear definition of what constitutes an investigation or case for the purposes of suspending accreditation. Consequently, there is a risk of employers challenging a suspension if it is not based on a formal investigation by MBIE investigations teams.
24. We consider that the policy intent was that INZ should be able to suspend an employer's accreditation in a situation where an MBIE regulator is taking active steps to confirm whether the employer or its key people are compliant with the specified immigration, employment and business standards.<sup>1</sup> This is regardless of whether that activity is undertaken by a dedicated investigations team, and would include verification and compliance activities. If you agree to this broader interpretation of 'investigation', the immigration instructions at Appendix 1 will be amended to include reference to any active verification, compliance or investigation activity.
25. This clarification will provide INZ with a clearer basis in instructions to suspend accredited employers. Suspension puts in place alerts on Job Check and AEWV applications submitted by accredited employers, providing greater assurance that applications are not being approved while the employer is being investigated. If this clarification is not reflected in immigration instructions, some processes are still in place to apply scrutiny to accredited employers where a formal investigation has not been opened, but suspension provides greater assurance. Suspension does not prevent existing work visa holders from continuing to work for the employer.

### Scope of suspension

26. We note that suspension is a discretionary tool which is intended to be used to prevent further harm occurring before an employer's accreditation is revoked and/or they are prosecuted. Currently, suspension is available where an employer may be breaching one of a specified list of immigration, employment and business standards. Breaches of these standards are generally quite serious, for example being subject to a stand-down<sup>2</sup>, or employing someone without a visa.

---

<sup>1</sup> Note that, if a breach is identified and this results in a prosecution, the employer's accreditation will remain suspended until the outcome of the prosecution.

<sup>2</sup> In March 2020, Cabinet agreed to expand the employer stand-down list to cover low to mid-level Immigration Act offences, like failing to provide documents or employing a person without a visa. Cabinet also agreed to immigration infringement offences [DEV-20-MIN-0034 refers]. These offences have been introduced through the Worker Protection (Migrant and other Employees) Act which comes into force on 6 January 2024. This does not directly affect AEWV accreditation policy, but technical changes to immigration instructions are needed and proposed instructions will be provided in due course.

27. Further analysis is required to determine whether there should be additional grounds for suspension established within immigration instructions, for example where an accredited employer is may no longer be a viable and genuinely operating business or is not completing settlement support activities. MBIE will consider this further after the review of the Accredited Employer Work Visa scheme is completed. This requires balancing the intent of having clear and transparent rules, with having a wide discretion to act in a range of scenarios.

## **Clarification of requirement not to pass on recruitment costs to migrant workers**

---

28. In 2019, Cabinet agreed that accredited employers must commit to paying all costs and fees for the recruitment of foreign workers [DEV-19-MIN-0228]. This has been reflected in immigration instructions as a requirement that the employer not pass certain costs on to 'AEWV holders'. This could be read as allowing employers to pass on costs to visa *applicants*, as they do not hold an AEWV, which is inconsistent with the policy intent. It is therefore recommended that immigration instructions be amended to clarify that that these costs must not be passed on to AEWV holders or applicants.

## **Next steps**

---

### **Proposed amendments to immigration instructions**

29. MBIE recommends amending employer accreditation, Job Check and Accredited Employer work visa immigration instructions, to include a restriction on the use of trial periods in employment agreements, and clarification of the accreditation suspension threshold, as set out in Annex One.
30. Proposed additions to immigration instructions are highlighted for ease of reference. Deletions have not been highlighted. Highlighting will not appear in the published versions of the amended Operational Manual.

### **Communications**

31. MBIE is preparing to communicate the 90 day trial period policy to employers and migrants. This will include updates to the Immigration New Zealand website and changes to Job Check and accreditation application forms to provide notice of this policy and include it in the list of acknowledgements made by the applicant. MBIE is also scoping potential changes to Employment New Zealand and [business.govt.nz](https://www.business.govt.nz) content.



**Annex One: Proposed amendments to Temporary Entry instructions,  
effective on and after 27 November 2023**

---



## Annex Two: timeframe for application of 90 day trial policy

