



COVERSHEET

Minister	Hon Iain Lees-Galloway	Portfolio	Workplace Relations and Safety
Name of package	Employment Relations (Infringement Offences) Regulations 2019	Date of issue	3 May 2019

In March 2019, Cabinet agreed to make section 65(1)(a) of the Employment Relations Act 2000 an infringement offence via the *Employment Relations (Infringement Offences) Regulations 2019*. This will come into effect on 6 May 2019. This minor, technical change clarifies an infringement in line with the original policy intent and does not change an employer's requirement to have a written employment agreement for each employee. The detail of why this change was needed has been withheld to protect legal privilege. Find out more about this requirement on [the Employment New Zealand website](#).

List of documents that have been proactively released		
Date	Title	Author
13/2/2019	Issuing Infringement Notices for Breaches under the Employment Relations Act 2000	Office of the Minister for Workplace Relations and Safety
13/2/2019	Minute of Decision: Issuing Infringement Notices for Breaches under the Employment Relations Act 2000	Cabinet Office
19/3/2019	Employment Relations (Infringement Offences) Regulations 2019	Office of the Minister for Workplace Relations and Safety
19/3/2019	Minute of Decision: Employment Relations (Infringement Offences) Regulations 2019	Cabinet Office

Cabinet considered the 'Issuing Infringement Notices for Breaches under the Employment Relations Act 2000' paper on 18 February 2019 and the 'Employment Relations (Infringement Offences) Regulations 2019' paper on 25 March 2019.

Information withheld

The proactive release of the Cabinet paper 'Issuing Infringement Notices for Breaches under the Employment Relations Act 2000' was delayed to allow consideration of the subsequent Cabinet paper 'Employment Relations (Infringement Offences) Regulations 2019'.

Some parts of this information release are not appropriate to be released and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant sections of the Act that would apply have been identified and are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Section of the Act	Reason for withholding
9(2)(h)	Maintain legal professional privilege
9(2)(g)(i)	The free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty

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In Confidence

Office of the Minister for Workplace Relations and Safety

Chair, Cabinet Economic Development Committee

Issuing Infringement Notices for Breaches under the Employment Relations Act 2000

Proposal

- 1 This paper seeks Cabinet agreement to make breach of section 65(1)(a) of the Employment Relations Act 2000 (the Act) an infringement offence via an Order in Council (regulations) made by the Governor General under section 237(fb) of the Act.

Executive Summary

- 2 In April 2016, a number of changes were made to the Act to strengthen the enforcement of minimum employment standards. One of these changes was to allow labour inspectors to issue infringement notices to businesses that could not supply employment agreements upon request.
- 3 Key obligations relating to individual employment agreements are outlined in sections 63A to 65 of the Act:
 - a. section 63A highlights requirements when bargaining for an agreement
 - b. section 64 requires employers to retain copies of agreements
 - c. section 65 outlines the required form and content of agreements.

4 s 9(2)(h)

- 5 The original policy intent is that a notice can be issued where no employment agreement is produced, regardless of the reason. The vast majority of the notices issued under section 64 by the Labour Inspectorate have related to cases where there was no employment agreement in existence.

6 s 9(2)(h)

s 9(2)(g)(i)

- 7 I recommend drafting an Order in Council for regulations to be made by the Governor General that makes breach of section 65(1)(a) of the Act an infringement offence.

s
9(2)
(h)

Background

- 8 In April 2016, a number of changes were made to the Act to strengthen the enforcement of minimum employment standards (CAB Min (15) 8/9 refers).
- 9 One of these changes was to allow Labour Inspectors to issue infringement notices to businesses that could not supply employment agreements upon request. This was in response to research which indicated that 11 per cent of New Zealand employers did not have written employment agreements for all their employees¹ and the Ministry's assessment that the employment standards system did not provide sufficient mechanisms to ensure business compliance in this area.
- 10 The original policy intent of this amendment was to incentivise employers to provide employees with written individual agreements. One of the reasons for this is that the absence of an individual employment agreement makes it difficult for employees and the Labour Inspectorate to ascertain and enforce the terms and conditions under which employees are employed and for the Employment Relations Authority to resolve employment relationship problems. Infringement notices were also expected to effectively and efficiently address clear-cut and minor breaches that did not warrant referral to the Employment Relations Authority or the Employment Court.
- 11 Key obligations relating to individual employment agreements are outlined in sections 63A to 65 of the Act:
- a. section 63A highlights requirements when bargaining for an agreement
 - b. section 64 requires employers to retain copies of agreements
 - c. section 65 outlines the required form and content of agreements.
- 12 s 9(2)(h)
- 13 The infringement fine level is \$1,000 per infringement, and the maximum aggregate infringement fees an employer is liable to pay in a three month period is \$20,000. As of 1 October 2018, 69 employers have received infringement notices for being unable to provide an individual employment agreement when requested. This has resulted in a total of \$148,000 in fines.
- 14 On 1 April 2017, measures were introduced in immigration instructions so that employers who receive an employment standards-related penalty from the Employment Relations Authority or Employment Court or an infringement notice would also face a set stand-down period from the ability to support a visa application. This was to prevent employers that do not comply with employment law from recruiting migrant workers for a certain period of time. Most stand-down periods are for six or twelve months, but the maximum period a stand-down can be in force for is 24 months.

1 <http://mbie.govt.nz/info-services/employment-skills/labour-market-reports/national-survey-of-employers/2013-2014/summary-findings.pdf>

Concerns have been raised about the issuing of infringement notices in some circumstances

15 The original policy intent is that a notice can be issued where no employment agreement is produced, regardless of the reason. The vast majority of the notices issued under section 64 by the Labour Inspectorate have related to cases where there was no employment agreement in existence.

16 s 9(2)(h) [REDACTED] s 9(2)(g)(i) [REDACTED]

17 s 9(2)(h) [REDACTED] The lack of clarity of these sections also causes challenges for labour inspectors. For example, it appears that in the past there has not been an entirely consistent practice when taking enforcement action for failing to have employment agreements – in some situations section 64 has been used, and in others section 65.

18 s 9(2)(h) [REDACTED] However, I see value in making changes to how infringement notices are issued in circumstances where there is no individual employment agreement.

Making breach of section 65(1)(a) of the Act an infringement offence addresses issues

19 I recommend drafting an Order in Council that makes breach of section 65(1)(a) of the Act an infringement offence. Section 237(fb) of the Act allows the Governor-General, by Order in Council, to make regulations to prescribe infringement offences for the purposes of section 235A(b).

20 Section 65(1)(a) of the Act states that “the individual employment agreement of an employee...must be in writing” and s 9(2)(h) [REDACTED] If implemented, section 64 would remain an infringement offence to be used in circumstances where an agreement previously existed, but has not been retained.

The suggested approach is an effective way to reduce risks

21 s 9(2)(h) [REDACTED] s 9(2)(g)(i) [REDACTED] s 9(2)(h) [REDACTED]

22

s 9(2)(h)

s 9(2)(g)(i)

23

s 9(2)(g)(i)

s 9(2)(h)

s 9(2)(g)(i)

Although there are some risks, these can be managed

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s 9(2)(g)(i)

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An additional potential risk is that future infringement notices may be issued under the wrong section. The Labour Inspectorate would need to ensure that notices are issued under section 64 if an agreement has not been retained and under section 65 if it never existed. This would be mitigated by updating the Labour Inspectorate's internal guidance on infringement notices to reflect these changes.

Redrafting sections 63A to 65 in the Regulatory Systems Bill 3

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Although an Order in Council mitigates risk, it cannot address the imprecise and unclear wording of the sections in the Act. That is why I also intend to redraft sections 63A to 65 in the Regulatory Systems Bill 3 (RSB 3) in the medium-term.

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Redrafting these sections will enable full alignment with the original policy intent of infringement notices. It will also ensure that obligations and penalties are much clearer and comprehensible for employers, employees and the Labour Inspectorate.

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Some other minor consequential amendments may be required as a result of amending sections 63A to 65. In addition, as it is intended that sections 63A to 65 would be redrafted in a way that also addresses the issues outlined in this paper, the proposed Order in Council would no longer be necessary and may be repealed when the RSB3 changes come into effect.

Consultation

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The Treasury, Ministry of Justice, Employment Relations Authority and Department of the Prime Minister and Cabinet (Policy Advisory Group) have been consulted.

Financial implications

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No financial implications have been identified in this paper.

Human Rights Implications

31 No human rights implications have been identified in this paper.

Gender Implications

32 No gender implications have been identified in this paper.

Disability Perspective

33 No disability issues have been identified in this paper.

Legislative Implications

34 Infringement offences are listed under section 235A of the Act. To provide a new infringement offence, regulations can be made by Order in Council by the Governor-General under section 237(fb) of the Act.

35 I will bring a paper to the Cabinet Legislation Committee in late 2018 or early 2019 to seek authorisation for the submission of the regulations making section 65(1)(a) of the Act an infringement offence to the Executive Council.

Regulatory Impact Analysis

36 A Regulatory Impact Analysis was not required as it was exempt, being of a minor and technical nature.

Publicity

37 I intend to proactively release this Cabinet paper on the Ministry's website, subject to any appropriate withholding of information that would be justified under the Official Information Act 1982.

Recommendations

The Minister for Workplace Relations and Safety recommends that the Cabinet Economic Development Committee:

1 **note** that labour inspectors can issue infringement notices to businesses that cannot supply employment agreements upon request

2 s 9(2)(g)(i)

3 s 9(2)(g)(i)

4 **agree** to make breach of section 65(1)(a) of the Employment Relations Act 2000 an infringement offence

5 **invite** the Minister for Workplace Relations and Safety to issue drafting instructions to the Parliamentary Counsel Office to give effect to these recommendations

- 6 **authorise** the Minister for Workplace Relations and Safety to make decisions consistent with the proposals in these recommendations, on any issues which arise during the drafting process.

Authorised for lodgement

Hon Iain Lees-Galloway

Minister for Workplace Relations and Safety

PROACTIVELY RELEASED