

Employment Relations Amendment Act – significant changes now in effect

The Employment Relations Amendment Bill has received royal assent and is now in force. This article explores key changes employers need to be mindful of.

The Employment Relations Amendment Bill introduced a suite of reforms that materially reshape key aspects of New Zealand employment law and introducing new risks and opportunities for employers. So, what does this mean for your business? Below is a brief overview of the key changes and practical implications to be mindful of when making decisions.

New "specified contractor" test

A new statutory "specified contractor" category now applies to workers who meet all criteria. If the test is met, the individual is excluded from the definition of "employee", limiting the ability to challenge their status.

The criteria are:

- a written agreement stating the individual is an independent contractor or not an employee
- the worker is not restricted from performing work for others (except while performing work for the business)
- the worker either
 - is not required to work at specific times or days or minimum hours, or
 - can subcontract the work (with limited or no vetting requirements)
- the arrangement cannot be terminated simply because additional work is declined
- the contractor has a reasonable opportunity to obtain independent advice before entering the agreement.

This change applies immediately to new and pre-

existing arrangements, (although claims lodged prior to the law change will be considered under the old law)., Employers should:

- review existing contractor arrangements to determine whether current employee roles may fit the criteria and therefore be more suitable as contractor arrangements; and
- update contractor agreements where they wish to take advantage of this change.

High income threshold for dismissal claims

Where an employee earns \$200,000 or more total remuneration per annum ("high earner"), an employer wishing to terminate the employee is not required to uphold the good faith requirements of providing access to information about the decision or an opportunity to comment on that information. If terminated, high earners can no longer raise a personal grievance for unjustified dismissal or unjustified disadvantage if the grounds relate to the dismissal.

The framework applies immediately to new high earners unless the parties agree otherwise. For existing high earners, it applies after a 12-month transition period, unless both parties agree to adopt it earlier or to opt out once the period ends.

Employers should:

- consider whether they wish to apply this framework
- review existing arrangements to ensure they are not unintentionally contradictory. For example, a clause requiring employers to follow fair processes prior to dismissal could still give high income earners the ability to challenge dismissal for breach of contract.
- anticipate that a high earning employee may ask for something in exchange for forfeiting their right to raise a dismissal grievance (for example, a severance payment or longer notice period.)

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We anticipate high earners will be more creative with employment claims including for disadvantage grievances unrelated to dismissal, contractual breaches and discrimination.

Changes to grievances

There is now a stronger focus on employee conduct when remedies are assessed. If an employee's actions contributed to the situation giving rise to the grievance, the employee cannot be reinstated or awarded compensation. If the employee's conduct amounted to serious misconduct, no remedies are available.

Furthermore, when assessing justification, the Authority or Court must consider whether the employee obstructed the employer's ability to follow a fair process.

A dismissal or action also cannot be found unjustified solely because of procedural defects, if those defects did not result in the employee being treated unfairly.

Employers should note that in theory, this should reduce the success of grievances where the employee contributed to their dismissal. However:

- legal changes that limit employee rights to pursue legal action are strictly interpreted and we expect the Authority and Courts will continue to closely scrutinise employer processes
- while remedies such as compensation or reinstatement will not be available where there is contribution, employees may still claim lost wages or costs and may claim compensation for other grievances unrelated to the dismissal where there is serious misconduct
- there remains uncertainty about how "serious misconduct" will be defined in practice.

Removal of the 30-day rule for collective agreements

Employers are no longer required to employ new non-union employees under the terms of an applicable Collective Agreement (if one exists) for the first 30 days.

The obligation to provide new employee information to the union (unless the employee objects) has also been removed.

However, employers must still provide new employees with information about any applicable collective agreement and information on how to contact the union.

Employers with a union presence should:

- review collective agreements to assess if the 30 day rule is contractually included
- provided the 30 day rule is not contractually included, employ non union employees on individual employment agreements from the outset
- to do this, update offer letters, template employment agreements and processes to reflect this change.

Want to know more?

If you have any further questions about what the Act means for you or your business, please contact our specialist Employment Team.