

## EMPLOYMENT LAW UPDATE APRIL 2016

### Zero Hour Contracts “Banned” – the Employment Relations Amendment Act 2016

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The Employment Relations Amendment Act 2016 (the Amendment Act) came into force on 1 April 2016. This Act originally started life as the Employment Standards Legislation Bill in late 2015 and was introduced to “*make workplaces fairer and more productive, for both employers and employees*”.<sup>1</sup> The Bill sought to achieve this by amending the law in relation to parental leave, by prohibiting certain employment practices and by strengthening the enforcement of employment standards through a new sanctions regime.

#### Zero hours contracts

One amendment that has gained significant media attention is the change under the Bill “*banning*” zero hour contracts, which were common in the fast food industry in particular.<sup>2</sup> Under such contracts, an employer does not have to guarantee any minimum hours to an employee, but the employee has to work if requested to do so.

The Amendment Act now defines an ‘*availability provision*’ as an arrangement where the performance of work by an employee is conditional on the employer making work available to the employee, and the employee being required to be available to accept any work the employer makes available.<sup>3</sup> Such a provision may only be included in an employment agreement that:

- Specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and
- Relates to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.<sup>4</sup>

Furthermore, an availability provision must not be included in an employment agreement unless:

- the employer has genuine reasons based on reasonable grounds for including the availability provision and the number of hours specified in that provision; and
- the availability provision provides for the payment of reasonable compensation to the employee for making themselves available to perform work under the provision.<sup>5</sup>

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<sup>1</sup> (Report from the Transport and Industrial Relations Committee, 12 February 2016).

<sup>2</sup> <http://www.theguardian.com/world/2016/mar/11/zero-hour-contracts-banned-in-new-zealand>

<sup>3</sup> Section 67D(1), Employment Relations Act 2000.

<sup>4</sup> Section 67D(2), Employment Relations Act 2000.

<sup>5</sup> Section 67D(3), Employment Relations Act 2000.

If an availability provision does not comply with these requirements, it is unenforceable.

The Amendment Act also sets out factors which an employer must consider in assessing whether there are genuine reasons based on reasonable grounds for including an availability provision, namely:<sup>6</sup>

- Whether it is practicable for the employer to meet business demands for the work to be performed by the employee without including an availability provision;
- The number of hours for which the employee would be required to be available;
- The proportion of availability hours in relation to the agreed hours of work.

An availability provision may be practicable for an employer in the hospitality industry where someone is required to cover a shift on short notice, such as a waitress who has phoned in sick. In these circumstances it may be impracticable for the employer to employ someone on a casual basis because the employee would not have an obligation to come to work when requested. This type of arrangement would be likely to constitute a genuine reason.

In determining the compensation which should be paid under the availability provision, an employer must have regard to all relevant matters, including:<sup>7</sup>

- The number of hours for which the employee is required to be available;
- The proportion of availability hours in relation to the agreed hours of work;
- The nature of any restrictions resulting from the availability provision;
- The rate of payment under the employment agreement for the work for which the employee is available;
- If the employee is remunerated by salary, the amount of the salary.

If the employee is remunerated by salary, the parties can agree, that the salary includes compensation for the employee making themselves available for work.<sup>8</sup>

If the provision does not provide for the payment of reasonable compensation, the employee is entitled to refuse to perform work in relation to those availability hours.<sup>9</sup>

New Zealand's ban of zero hour contracts has gained media attention worldwide, as it is a practice common in other Commonwealth countries including the United Kingdom.

However this ban is not intended to prohibit employers from engaging employees on genuine casual arrangements where employers have no obligation to offer work and employees have no obligation to accept any work offered to them. It is only intended to prohibit the type of arrangements where there is a lack of mutual obligation, in particular where the employee does not have equal rights in the employment relationship.

### **Compensation for shift workers**

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<sup>6</sup> Section 67D(5), Employment Relations Act 2000.

<sup>7</sup> Section 67D(6), Employment Relations Act 2000.

<sup>8</sup> Section 67D(7), Employment Relations Act 2000.

<sup>9</sup> Section 67E, Employment Relations Act 2000.

The Amendment Act also introduces an obligation to pay reasonable compensation to shift workers if their shift is cancelled without the required notice.

An employer must not cancel a shift unless the employment agreement specifies:<sup>10</sup>

- A reasonable period of notice that must be given before the cancellation of a shift; and
- Reasonable compensation, which must be paid to the employee if the employer cancels a shift without giving the specified notice.

In cancelling a shift, the employer must give the employee the notice specified under the employment agreement or pay the employee the specified compensation.<sup>11</sup>

The period of notice to be given must be determined having regard to all relevant factors including:<sup>12</sup>

- The nature of the employer's business;
- The nature of the employee's work; and
- The nature of the employee's employment arrangements, including whether there are agreed hours of work in the employment agreement and if so, the number of guaranteed hours of work among those agreed hours.

The Amendment Act also sets out matters which must be considered in determining the amount of compensation to be specified:

- The period of notice specified in the employee's employment agreement;
- The remuneration the employee would have received for working the shift;
- Whether the nature of the work requires the employee to incur any costs in preparing for the shift.

If the shift is cancelled and the employment agreement does not comply with these requirements, or the employee was not notified of the cancellation until the start of the shift, or the shift has begun but is cancelled, an employee is entitled to what they would have earned for working the shift.<sup>13</sup>

There are many other significant changes made by the Employment Standards Legislation Bill which will affect employers and employees. Employers should obtain appropriate advice to ensure they are complying with their obligations, and understand what, if any, changes they may need to make to their business to ensure compliance.

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<sup>10</sup> Section 67G(2), Employment Relations Act 2000.

<sup>11</sup> Section 67G(3), Employment Relations Act 2000.

<sup>12</sup> Section 67G(4), Employment Relations Act 2000.

<sup>13</sup> Section 67G(6), Employment Relations Act 2000.