

Employment Law Services

Post Election Snapshot for Employers

We now have a National-led Government, with support on confidence and supply from ACT, the Maori Party and United Future. So what changes can we expect in employment law?

Given the “ostensible” move to the right on the political spectrum, some may expect to see changes of the kind seen in the early 90s with the introduction of the Employment Contracts Act. However, this is unlikely to be the case, at least for now. National’s stated aims are to expand job opportunities, let business grow and treat all parties fairly (the employee *and* the employer). Kate Wilkinson, the new Minister of Labour, has previously stated National wants to change the direction away from what National views as more and more detailed prescription of the bargaining process and attempts to legislate against “necessary processes of change in the commercial world”.

Clearly, National will want to make some changes, but they are likely to be less dramatic than in previous times. National’s apparent centrist position on the political spectrum aside, the Government won’t want to make the same mistake that former PM John Howard made across the ditch with WorkChoices and the global credit crisis will also act as a severe handbrake.

The 49th Parliament was formally opened by the Governor-General on 9 December 2008 and his speech set out the Government’s legislative plans.

Labour’s leftovers

Two Bills of note have been reinstated. The Employment Relations Amendment Bill (no 3) proposes significant changes to the ERA in relation to casual and fixed term employees and employees in ‘triangular’ employment relationships. At the time this Bill was put forward, businesses warned against increased costs of construction and the management of large events – such as the Rugby World Cup – if it were to be passed. Given National’s commitment to helping businesses grow and highlighting the importance of events like the World Cup in boosting the New Zealand economy, it is unlikely to allow this Bill to proceed.

The second reinstated Bill is the Minimum Wage and Remuneration Amendment Bill. This Bill proposes amending the Minimum Wage Act 1983 to extend its provisions to apply to payments made to independent contractors who are remunerated at below the minimum wage. National consistently opposed the Bill while in opposition and as such this Bill is even less likely to succeed now that they are in power.

Another leftover of the Labour Government’s proposed changes to employment law is a report published by a Public Advisory Group, appointed by the Minister of Labour in 2007, to provide independent advice to the Ministers of Labour, Social Development and Employment, and Economic Development, on the adequacy of redundancy law. The group issued in its report three major recommendations for the then

Labour-led Government to consider:

- a statutory requirement for redundancy compensation based on the length of service and notice (including options for introducing a statutory “minimum” formula);
- extensions to the “Security in Change” initiative and the need for wider policies to help activate the labour market; and
- encouraging (but not requiring) the notification to government agencies of potential or upcoming redundancy situations.

The former Government’s preference at the time was for some sort of statutory minimum that would be subject to consultation via a discussion document process, which was to be prepared by the Department of Labour for release in April 2009. It will be surprising if the National-led Government continues with this process especially given its recent commitment to increase benefits for certain people affected by redundancy. In all likelihood the report will probably fall by the wayside.

National’s Changes

John Key has issued a list of first 100 day actions. Most of these actions involve the economy, law and order, education and health portfolios. However, this will include passing a transitional relief package [*refer to our article below outlining the proposed scheme*] for those worst hit by redundancy and instructing public service chief executives to do a line-by-line review of department’s spending (expect to see some redundancies in the public sector).

Over a longer term view, don’t expect a repeal of the ERA, but the main changes in employment law that we should see are as follows:

1. ***Trial periods for new employees***

Small employers (those with 19 or fewer staff) can agree with new employees to have a 90 day trial period. Employers can terminate the employment relationship for poor performance during this trial period. While mediation will still be available during this period the employee cannot bring a personal grievance if they are dismissed during this trial period. National has said that the obligations of good faith and rules of natural justice would still apply but it is unclear how an employer would be held to account in the absence of a personal grievance. One restriction under the trial period is that employers won’t be able to hire and fire the same employee every 90 days and dismissal can be for performance reasons only (ie termination for something other than poor performance (eg redundancy) would be able to be challenged in the Authority in the usual way). The law will be passed through all its stages before Christmas and we will provide details of this when the new law is available.

2. ***Annual leave***

National proposes changes to the Holidays Act so that employees can “cash in” their fourth week of annual holiday entitlement. However, any cashing in can only be at the employee’s request and the employer cannot raise it during employment agreement negotiations.

3. **Unions and collective bargaining**

A significant change proposed by National is for workers to be able to bargain collectively with their employer without having to belong to a union. A group of workers could collectively negotiate with their employer via elected employee representatives. National plans to continue allowing union access to workplaces with the employer's consent, which cannot be unreasonably withheld (keep an eye out for how "unreasonably withheld" will be defined).

4. **A review of the Holidays Act**

Prior to the election National promised to appoint a working party to review the Holidays Act, focusing on "relevant daily pay" (used in the calculation of payment for public holidays, alternative holidays, sick leave and bereavement leave) with a view to reducing compliance costs for employers. Kate Wilkinson has said that "the current way in which holiday entitlements are calculated is not the fairest and is not the easiest".

5. **KiwiSaver**

Likely amendments include:

- Reducing the rate of minimum employee contributions from 4% to 2%;
- Discontinuing the employer tax credit (\$1,043 per employee); and
- Repealing the most recent amendments to the Employment Relations Act 2000 in respect of KiwiSaver (the total remuneration amendments whereby employees may take personal grievances where they receive less salary or wages by reason of the KS membership).

Other changes have also been proposed including:

1. Retaining, but improving mediation services by ensuring it is resourced with properly qualified mediators.
2. Allowing injunctions and important questions of law to be heard in the Employment Court in the first instance – rather than having to go through the Authority first.
3. Extending the right of appeal to the Court of Appeal so that appeals are not limited to questions of law.
4. Changing the role of the Authority so that cross-examination must be allowed (ie it must act "judicially").
5. A wind-back of flexible working conditions laws.

ACT's Wish List

Of course, Act is unlikely to see any of their major policies passed into law without some significant modification but the following proposed changes give an idea of the direction Act would like the Government to go in:

1. Remove “crippling regulations” that benefit those with jobs at the expense of those without jobs and that cause involuntary unemployment.
2. Repeal the Employment Relations Act 2000.
3. Abolish all minimum wage laws and cut taxes significantly.
4. Abolish the specialist Employment Court “which has been an abject failure”, and all other specialist employment authorities, tribunals and courts.
5. Restore the common law freedom of contract between employers and employees.
6. Restore common law freedoms of association and of speech in hiring labour and in communicating with staff.
7. Replace all other regulations affecting employment with common law remedies.
8. Introduce a work test and a 40-hour work or training week on eligibility for the unemployment benefit and those on the DPB with children older than five.

National’s Transitional Relief Package – an overview

The new National-led government has responded to the increase in redundancies it expects will flow from the current economic downturn by offering a “Transitional Relief Package”.

Essentially National’s assistance package will provide financial assistance for employees made redundant provided they have been working in the same job for at least 6 months. That assistance will be available until the person gets another job (and their circumstances improve) or for up to 16 weeks whichever is the shorter period.

The assistance is targeted at people who lose their jobs, and as a result either go on to a benefit or rely on the income of a relatively low-paid spouse or partner. The relief package will initially be available for two years at which time it will be monitored to determine whether or not it should continue in whole or in part.

National expects the cost of the package is unlikely to exceed \$42 million per annum.

How does the assistance work?

The first part of the relief package will be provided with reference to the existing Working for Families scheme administered by Inland Revenue.

Working for families provides financial assistance through two main tax credits:

1. The **family tax credit**, which is paid to families whether they are working or not; and

2. The ***in-work tax credit***, paid only to families not receiving a benefit and who are in full time work. A couple must normally work 30 hours a week between them; a solo parent must work 20 hours a week. The in-work tax credit is intended to improve the position for low to middle income earners to ensure they are better off working than being on a benefit.

Under the current rules if a person is getting both payments and they lose their job they may lose their eligibility for the in-work tax credit.

National sees this as a “double whammy” as the person suffers a significant drop in income from being made redundant but they also lose eligibility for the in-work tax credit.

So National’s assistance will top up the working for families payment equivalent to the person’s maximum in-work tax credit for up to 16 weeks.

The maximum in-work tax credit is \$60/week if a family has three or fewer children. For larger families the entitlement is \$60/week plus \$15/week for each child after the third.

If the person was receiving the family tax credit they will continue to do so.

Increase to Accommodation Supplement Payments

The second part of the transitional assistance package involves an increase to the Accommodation Supplement. This is a benefit that many beneficiaries and lower income working people receive. The maximum weekly amount depends on the size of the family and the geographic area in which the family resides.

Table 1 – Current maximum Accommodation Supplement weekly payments (\$)

	Area 1*	Area 2*	Area 3*	Area 4*
3 or more person family	225	165	120	75
2 person family	160	125	75	55
any other person	145	100	65	45

* Area 1 includes Auckland and the North Shore

* Area 2 includes West and South Auckland, Tauranga, Wellington City, Nelson and Queenstown

* Area 3 includes Hamilton, Christchurch, Dunedin, Porirua, the Hutt Valley and many provincial cities

* Area 4 covers those parts of the country not covered by Areas 1-3.

Non beneficiaries have their accommodation supplement abated to reflect their income.

According to National’s advice, as at 30 June 2007, 243,000 people were receiving the accommodation supplement of whom 52,000 were lower paid workers (non beneficiaries).

As these people who have been working but are made redundant will have difficulty meeting their mortgage or rent payments, the government will increase the maximum accommodation supplement they are entitled to by up to \$100 per week for up to 16 weeks.



The actual amount of the increase in the accommodation supplement will depend on the amount of their rent, or minimum mortgage payments, and if they are not on the unemployment benefit, on the level of their spouse's income. Accommodation supplements are managed through Work and Income

Summary

It remains to be seen just how much the transitional relief package will cost and whether National's view that the costs will not exceed \$42 million per year will be accurate.

The potential cost relates to the performance of the economy and the number of jobs lost in the next two years – we will have to wait and see.

However should your organisation be in the position of needing to restructure it is important you are aware that these entitlements may be available to your employees, as National has said they are to be introduced during the first 100 days of the new government.

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