



Monday 29 November 2010

Employment Law Changes

The Employment Relations Amendment Bill (no 2) 2010 and the Holidays Amendment Bill 2010 were both passed by parliament last week.

The bulk of changes to both Acts will come into effect on 1 April 2011.

The main changes to the Employment Relations Act from 1 April 2011:

- Extension of the 90-day trial facility to all employers. Currently this may be used only by employers with fewer than 20 employees.
- Union access to workplaces will be subject to the employer's consent. Consent may not be unreasonably withheld, with the employer's decision conveyed not later than the next working day.
- Clarity is provided over employers' ability to communicate directly with staff during collective bargaining, including discussing settlement offers, subject to good faith provisions.
- The 'test of justification' changes from what a fair and reasonable employer 'would' have done to what it 'could' have done. This will allow a range of reasonable responses.
- Minimum requirements for a fair and reasonable process are set out in the Act. In considering dismissal decisions, the focus will be on the merits of the employer's decision, rather than pedantic scrutiny of the process.
- Mediation services will be provided for early problem resolution without representation, which should keep costs down and simplify some situations. Formal mediation, with or without representatives, will still be available.
- The functions Labour Inspectors are included; the role one of managing complaints and supporting businesses to achieve compliant practices and systems. Authorities for Labour Inspectors are widened.
- Mediation will be promoted, with the Employment Relations Authority (ERA) giving priority to mediated cases.
- The ERA will be able to dismiss frivolous or vexatious claims, and mediators and ERA members will be able to make recommendations to parties
- Reinstatement will no longer be designated as the primary remedy in dismissal cases.
- The ERA regulations will be reviewed and will move to making the Authority more judicial, with a right to cross examine witnesses. The Chief of the ERA will be given powers to assist in consistency of decisions.
- Parties who fail to attend investigations or who otherwise employ delaying tactics may be penalised and existing maximum penalties will be doubled.

One provision comes into effect from 1 July 2011:

- Employers are required to retain a signed copy of an employee's Employment Agreement and to provide a copy to the employee on request.

The main changes to the Holidays Act from 1 April 2011:

- Employees will be able to trade one of their four weeks' annual leave for cash. The request must come from the employee and be in writing. It may not be raised in salary negotiations and may be declined without need of an explanation. It may be a full week at once, or spread out in separate requests. The cash value will be the same as if the holiday was taken.
- For employees with irregular hours of work and pay, payment for sick leave, bereavement leave, public holidays and alternative holidays will be calculated by averaging their gross earnings for the year (or lesser period of employment). There will be no change to the Relevant Daily Pay calculation for employees with regular hours and pay.
- Employers and employees will be able to agree (in writing) to transfer the observance of one or more public holidays to another identified working day/s. The identified day must be an otherwise working day and cannot be another public holiday. The transfer cannot be for the purpose of reducing the employee's entitlements and must not reduce the total number of paid public holidays the employee is entitled to in any year.
- If the parties cannot agree on when an alternative holiday is to be taken, the employer may determine –on a reasonable basis -the date it will be taken.
- Employers may require proof of illness or injury within three days of an employee taking sick leave but will have to communicate this requirement as early as possible and to pay reasonable costs in obtaining this proof. The current requirement, that the employer have good grounds for suspecting abuse before making such a request, will be removed.
- Penalties for non-compliance will be doubled to \$10,000 for individuals or \$20,000 for companies and other body corporates.

One provision comes into effect immediately:

- The treatment of holiday during a close down period is clarified. This is a clarification only, not a change and is consistent with the intent always understood by the Association.