



BRIEFING

Draft Employment Relations Amendment Bill: Approval for introduction

Date:	15 January 2018	Priority:	High
Security classification:	In Confidence	Tracking number:	1681 17-18

Action sought		
	Action sought	Deadline
Hon Iain Lees-Galloway Minister for Workplace Relations and Safety	Provide feedback on the attached Cabinet paper by 16 January 2018. Agree to lodge the final Cabinet paper with the Cabinet Office by 10:00am on 18 January 2018.	18 January 2018

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Jivan Grewal	Manager, Employment Relations Policy	04 896 5999	[REDACTED]	✓
Steve James	Senior Policy Advisor	04 896 5628		

The following departments/agencies have been consulted
State Services Commission, Ministry of Education, Ministry of Health, the Treasury, Ministry of Social Development, Ministry for Women, Ministry of Justice, Te Puni Kōkiri and the Ministry for Pacific Peoples, the Department of the Prime Minister and Cabinet (PAG)

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



BRIEFING

Title

Date:	15 January 2018	Priority:	High
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Purpose

To provide you with the draft Employment Relations Amendment Bill and draft Cabinet paper to seek approval to introduce the Bill to the House.

Executive summary

On 18 December 2017, Cabinet approved policy decisions to implement the Government's 100 day commitments in workplace relations. This included 14 proposals to restore key protections and minimum standards to workers, as well as strengthen collective bargaining in the workplace.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that on 18 December 2017, Cabinet approved policy decisions relating to the Government's 100-day commitments in workplace relations, to restore core minimum standards and protections to workers, and strengthen collective bargaining in the workplace

Noted

Matters requiring further policy decisions from Cabinet

- b **Note** that there are three further matters provided for in the Bill that require Cabinet policy approval

Noted

- c **Agree** that a union representative does not require consent to access the workplace if union employees work at the workplace or the collective agreement covers the work at the workplace

Agree / Disagree

- d **Agree** that an employer will be liable for a penalty imposed by the Employment Relations Authority where they either fail to provide the completed form to the union or fail to notify the union where an employee does not complete the form.

Agree / Disagree

- e **Agree** to provide for transitional periods for amendments in the Bill which require time for employers, employees and unions to adjust their processes and systems in order to comply with the new provisions, to account for active bargaining at the point of commencement and where existing rights and matters before the Employment Relations Authority or Employment Court apply.

Agree / Disagree

Further decisions arising from drafting

- f **Note** that Cabinet authorised you to make minor and technical changes to the Bill that give effect to the overall policy intent agreed by Cabinet;

Agree / Disagree

- g **Agree** to include in the Bill the ability for employers to refuse information about the role and function of the union in limited circumstances where doing so would be illegal or where the costs involved would be unreasonably excessive;

Agree / Disagree

- h **Agree** to provide for a prescribed form for a new employee to make an active choice about their union membership, and ability to opt out of providing this information to the relevant union, using the existing regulation-making power in the Employment Relations Act 2000;

Agree / Disagree

Cabinet paper

- i **Agree in principle to** the attached Cabinet paper and draft Employment Relations Amendment Bill, subject to further discussions with your office regarding the outstanding issues;

Agree / Disagree

- j **Note** that we will provide you with a final Cabinet paper and copy of the Bill on 17 January 2018 to lodge with the Cabinet Office by 10:00am on 18 January 2018.

Agree / Disagree

Jivan Grewal
Manager, Employment Relations Policy
MBIE

..... / /

Hon Iain Lees-Galloway
Minister for Workplace Relations and
Safety

..... / /

Background

1. On 18 December 2017, Cabinet approved policy decisions for 14 proposals for the Government's 100 day commitments in workplace relations, and invited you to issue drafting instructions to the Parliamentary Counsel Office (PCO).
2. We provided PCO with drafting instructions for the *Employment Relations Amendment Bill* (the Bill) on 22 December 2017 and 3 January 2018 to give effect to the proposals. A draft Bill is attached for your consideration as **Annex One**.
3. In order for the Bill to be introduced to the House within the Government's 100 day commitment, it is scheduled to be considered by the Cabinet Legislation Committee on 25 January 2018. A draft Cabinet paper is attached for your consideration as **Annex Two**.

Further decisions

4. A number of issues have arisen during the drafting process that require your decision. Most of these changes fall into your authorisation from Cabinet to make minor and technical changes to the Bill that align with the overall policy intent.
5. Three proposals are new and require Cabinet approval to be included in the Bill. They are:
 - a. removing the requirement for union representatives to gain consent from an employer to access a workplace where employees are members
 - b. provision for a penalty if the employer fails to pass on information about an employees' active choice about joining a union at the end of the 30 day period
 - c. transitional provisions to effectively implement the provisions in the Bill.

Further policy proposals and decisions requiring Cabinet approval

Union representatives' access to the workplace

6. Union representatives are entitled to enter a workplace for purposes related to the employment of its members or related to the union's business. This is an important part of the right to freedom of association. Following the 2011 changes to the Act, union representatives must gain consent from employers in order to access the workplace. Employers must not unreasonably withhold consent, but must advise the union representative of their decision no later than one working day following the request. Consent is treated as being obtained if the employer does not respond to the request within two working days.
7. Although consent may only be declined in very limited circumstances, anecdotal evidence suggests some employers may use the notification and consent process to delay access to the workplace.
8. The union will then be required to take action to challenge the reasonableness of the refusal, a process that is likely to take considerable time and in many cases be uneconomic.
9. This can be detrimental in circumstances where employees have reported concerns to union representatives and those union representatives cannot access the workplace to investigate those concerns or support members. The notification and consent process can create unnecessary costs and delays.
10. The proposal would revert to the previous position in law, where union representatives were able to access the workplace without consent where their members are employees. The proposal would retain the conditions around access to a workplace, which was broadly

unchanged by the 2011 amendments. This requires that union representatives access a workplace at reasonable times and in a reasonable way taking into account normal business operations, comply with reasonable health and safety or security requirements in accessing the workplace and produce and hold identification when accessing a workplace. The proposal would also retain the provision that if a union representative cannot find an employer, they must leave information about their entry in a prominent place.

11. There is a concern that unfettered access may lead to unintended consequences. This may involve harming the security of New Zealand, undermining health and safety practices or in exceptional circumstances the investigation or detection of offences. To mitigate that, I also propose to retain the current restrictions on the right of access, which include situations where access would prejudice the security or defence of New Zealand, or the investigation or detection of offences, and on certain limited religious grounds.
12. Reverting to the previous position will improve the ability of union representatives to perform their roles effectively, while retaining a reasonable level of control and oversight of all personnel present at a workplace. I do not consider there will be significant impacts as a result of this change. Previous anecdotal evidence of workplace access prior to the 2011 amendments suggests most union representatives and employers worked together to find appropriate times and circumstances for visits.
13. We recommend monitoring the changes to assess whether stakeholder feedback indicates there have been any unintended consequences or confusion about the exact rights for union officials. If this is the case, we recommend undertaking further guidance at a later date in the form of a code of employment practice to help employers, unions and employees to better understand the provisions.
14. A draft Regulatory Impact Statement is attached as **Annex Three**.

Employees to be provided with a choice after first 30 days of employment

15. Cabinet agreed to reinstate the 30 day rule, which means new employees who are not a member of the union must be employed on terms and conditions that are not inconsistent with the collective employment agreement. In addition, Cabinet agreed that employees should be given a choice after this initial period to either remain on their individual employment agreement or join the union and be employed on the collective. An employee's choice would then be communicated to the relevant union, unless the employee objects.
16. In order to ensure compliance with this provision, an employer may be liable for a penalty by the Employment Relations Authority if they either fail to provide the completed form to the relevant union, or where the employee does not complete the form, failure to notify the union that the employee did not complete the form.
17. The Cabinet paper attached seeks decisions on the new penalty provision created.

Transitional provisions

18. The draft Bill includes transitional provisions in order to:
 - a. provide time for employers, employees and unions to become aware of their new rights and responsibilities contained in the provisions
 - b. account for active bargaining at the time the Bill receives royal assent
 - c. preserve matters before the Employment Relations Authority or Employment Court
 - d. ensure the provisions do not have retrospective effect.
19. Where a transitional period is required, the timeframe has generally been set at four months following the date of royal assent of the Bill. Given the current anticipated legislative

timeframes for the Bill, the four month transitional period for many of the proposals is intended to align with the beginning of 2019. In the event there are changes to the timing of the Bill's Royal Assent, these timeframes may have to be reconsidered to align with a suitable time for parties to come into compliance with the new provisions. The following proposals currently include a four month transitional period in the Bill:

- a. providing union delegates reasonable time within working hours to represent employees
 - b. the reinstatement of the duty to conclude bargaining
 - c. the requirement for employers to pass on information about the union to new employees
 - d. requiring rates of pay in bargaining and collective agreements
 - e. coverage of new employees under the terms and conditions of the collective agreement, and the notified choice to join a union
 - f. the expanded duress provisions
 - g. changes to the continuity of employment where an employee's work is affected by restructuring
 - h. the rest and meal break provisions.
20. The proposal to extend the timeframe for union activities to be considered in personal grievances for discrimination from 12 months to 18 months would come into effect six months following the date of royal assent. This would avoid the provisions applying retrospectively to activities that would not have fallen within the existing timeframe in the Act.
21. The following provisions would come into effect the day after the date of royal assent:
- a. the ability for an employee to request reinstatement as a primary remedy in a personal grievance
 - b. the provisions relating to union representatives' access to workplaces
 - c. notice timeframes for the initiation of bargaining, including the removal of the opt-out ability for multi-employer bargaining
 - d. the removal of the ability to deduct pay for partial strike action. Parts of the current Act are retained in the Bill to allow unions to continue to make enquiries to employers regarding pay deductions, and continue any underway injunction proceedings relating to pay deductions.
22. We seek your agreement to the approach behind the transitional provisions, and the timeframes associated with each proposal.

Issues arising during drafting

23. These proposals fall into your authorisation from Cabinet to make minor and technical changes to the Bill that align with the overall policy intent.

Improving access to union information

24. Under this proposal, unions may provide employers with information about their role and function in the workplace, and employers must pass this information to prospective employees at the same time they are provided with the collective agreement. The Act currently includes a penalty for employers who refuse or fail to pass on information.

25. In some situations the information provided about the role and function of the union may be inappropriate for an employer to pass on (for example, where the information is potentially defamatory or a breach of confidence). We recommend that in limited circumstances, for example where doing so would be illegal or where the costs of doing so would be unreasonably excessive, there should be an ability for an employer to refuse to pass on the information.

Prescribed forms for the 30-day rule

26. To facilitate the active choice process relating to the 30 day rule, the Bill provides that a form can be prescribed using the existing regulation making power in section 237 of the Act. This form will set out the employee's name, choice of employment agreement and opt out provision (where an employee chooses not to communicate their choice to the relevant union). An employer will be required to provide the form, as prescribed in regulations, to new employees where a collective agreement exists for that workplace, covering the work that the employee does.
27. Employees are given a set timeframe to complete the form; this is after 10 days of commencing employment and within 40 days. We consider this timeframe will give employees enough time in the role to be able to make an informed choice. Employers will then have 20 working days to provide the completed form to the relevant union.
28. Prescribing a form in regulations will require going to Cabinet to get policy decisions on the detail of the form. We expect this could be undertaken after Committee of the Whole, around August 2018.

Next steps

29. We continue receive feedback on the Bill and the Cabinet paper. These documents are being progressed but we have not yet had time to resolve all the issues raised. We will complete our revisions on the outstanding issues within the next 2 days and will provide a final Bill and Cabinet paper to your office at that stage, which will also include any revisions you wish to make to the papers. The two key issues relate to
- a. the provisions relating to the extension of the discrimination provisions for union membership. Specifically, we are considering whether these would be better dealt with within the duress provisions in the Act
 - b. the provision for pay deductions to commence when an employee decides to join the Union on the standardised choice forms.
30. We remain in close touch with your office about these issues and any other feedback.
31. Subject to your approval to the residual drafting issues, new proposals and any feedback on the Cabinet paper and Bill, we will provide you with final versions to lodge with the Cabinet Office by 10:00am on 18 January 2018.
32. The paper would be considered by the Cabinet Legislation Committee on 25 January 2018 and by Cabinet on 29 January 2018. Following approval, the Bill would need to be introduced to the House by 3 February 2018 to meet the Government's 100 day commitment.
33. We will provide talking points and background information to your office by 23 January 2018 to support a discussion at Cabinet Committee.

Annexes

Annex One: Draft Employment Relations Amendment Bill

Annex Two: Draft Cabinet Paper – Approval to introduce the Employment Relations Amendment Bill

Annex Three: Draft Regulatory Impact Statement

Annex One: Draft Employment Relations Amendment Bill

**Annex Two: Draft Cabinet Paper – Approval to introduce the
Employment Relations Amendment Bill**

Annex Three: Draft Regulatory Impact Statement
