



## COVERSHEET

<b>Minister</b>	Hon Iain Lees-Galloway	<b>Portfolio</b>	Workplace Relations and Safety
<b>Title of Cabinet paper</b>	Updating employment regulations to reflect the Employment Relations (Triangular Employment) Amendment Act 2019	<b>Date to be published</b>	14 July 2020

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
21 May 2020	<i>Updating employment regulations to reflect the Employment Relations (Triangular Employment) Amendment Act 2019</i>	<i>Office of the Minister for Workplace Relations and Safety</i>
26 May 2020	<i>LEG-20-MIN-0064 – Employment Relations Amendment Regulations</i>	<i>Cabinet Office</i>

### Information redacted

**YES / NO [select one]**

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## In Confidence

Office of the Minister for Workplace Relations and Safety

Cabinet Legislation Committee

## Updating employment regulations to reflect the Employment Relations (Triangular Employment) Amendment Act 2019

### Proposal

- 1 This paper seeks authorisation for submission to the Executive Council of the Employment Relations Authority Amendment Regulations 2020 and the Employment Relations (Prescribed Matters) Amendment Regulations 2020.
- 2 The Cabinet Legislation Committee (LEG) is being asked to make decisions on minor and technical matters of policy. These decisions fall within the scope of minor policy issues that LEG can consider.

### Relation to government priorities

- 3 These are minor and routine changes to regulations, to reflect:
  - 3.1 legislative changes made by Parliament in 2018 and 2019, and
  - 3.2 current practices of the Employment Relations Authority (the Authority).
- 4 Updating employment regulations in this way is consistent with Government expectations for regulatory stewardship by departments.

### Background

*The Triangular Employment Act commences this year*

- 5 The Employment Relations (Triangular Employment) Amendment Act 2019 (Triangular Employment Act) progressed through Parliament as a Member's Bill sponsored by Kieran McAnulty. It received Royal assent on 27 June 2019 and will come into force on 28 June 2020.
- 6 This law change will address a gap in current legislation as applied to employees in triangular employment situations (eg labour hire). Currently, employees can only bring a personal grievance – such as for harassment or discrimination – against their employer. For people in triangular employment situations this limits their ability to raise a grievance, as the actions that lead to them taking a claim may be those of the 'controlling third party' they are working for, rather than the person actually employing them.
- 7 The new law will amend the Employment Relations Act 2000 to allow either an employee or an employer to apply to the Authority to join a 'controlling third party' to an employee's personal grievance claim. The Authority will be able to apportion responsibility for providing remedies between the responsible parties, reflecting the degree to which the employer and the controlling third party contributed to the grievance.

*Employment Relations Authority procedures are prescribed in regulations, and some require changes to reflect the new law*

- 8 As with other similar bodies, aspects of the Authority’s procedures are set out in regulations. The Employment Relations Authority Regulations 2000 specify, for example, that certain types of applications must use particular forms which are published as a schedule to the regulations themselves. The Triangular Employment Act creates new processes which should be reflected in the prescribed forms.

**Proposed regulatory changes to reflect the Triangular Employment Act**

- 9 Officials have worked closely with members of the Authority to determine the regulatory changes needed for the Authority to implement the new triangular employment provisions.

- 10 Two substantive changes are recommended:

10.1 **Create a new application form.** Under the new provisions, before a third party can be joined to a personal grievance, applicants must demonstrate to the Authority that the third party was a ‘controlling third party’ as defined in the Act, and establish an arguable case that the controlling third party’s actions caused or contributed to the grievance. The existing generic application form (Form 1) is not suitable for such applications. Prescribing a detailed application form for joinder applications will assist the Authority by stepping applicants through the statutory criteria, and prompting applicants to provide all relevant information to the Authority.

10.2 **Create a new ‘statement in reply’ form.** Alleged ‘controlling third parties’ will be able to respond to the joinder application before the Authority decides whether to join them to proceedings. The existing ‘statement in reply’ form (Form 3) is unsuitable for use in these circumstances because it only envisages disputes involving two parties. The proposed new form reflects the triangular employment terminology in the principal Act and will provide clarity for respondents.

- 11 The proposed Employment Relations Authority Amendment Regulations 2020 would implement these changes.

**Other minor changes to employment regulations**

- 12 Making the amendments above also provides an opportunity to do some routine maintenance on other parts of employment regulations, to ensure they are up-to-date and user friendly. The proposed changes are outlined below.

*Table 1: Other minor changes to employment regulations*

Proposed change	Rationale
Modernise the Employment Relations Authority Regulations 2000 by deleting or updating	Authority members have identified several aspects of the current regulations that are outdated. For example, applicants are asked to

references to outdated practices and technology (eg fax numbers)	provide fax numbers (seldom used); to provide two copies of all documents (now unnecessary); and to address their application to a specific Authority location (now unnecessary as case management is centralised).
Revoke obsolete parts of the Employment Relations Authority Regulations 2000	Several regulations still refer to section 50(k) of the Employment Relations Act 2000, which (when in force) allowed parties to apply to the Authority for a determination that collective bargaining had concluded. This section was repealed in 2018, so the regulations that refer to it are no longer required.
Amend the Employment Relations (Prescribed Matters) Regulations 2000 to reflect the repeal of section 95A of the Employment Relations Act (authorising pay deductions for partial strikes)	The form that businesses are required to use when notifying the Ministry of Business, Innovation and Employment of strikes or lockouts refers to a now-repealed definition of 'partial strikes'. I recommend that the regulations be revised to reflect the repeal in 2018 of section 95A, while continuing to require businesses to provide information on the nature of strike action (ie complete vs partial strikes).

- 13** The majority of these proposed changes would be implemented via the Employment Relations Authority Amendment Regulations 2020. The Employment Relations (Prescribed Matters) Amendment Regulations 2020 would implement the suggested changes relating to partial strikes.

**Timing and 28 day rule**

- 14** It is desirable for the amendments to the Employment Relations Authority Regulations 2000 to come into effect at the same time as the commencement of the Triangular Employment Act (on 28 June 2020). This would allow any applicants seeking to use the new triangular employment provisions to have immediate access to the appropriate forms.
- 15** To allow this to happen, I seek authorisation to waive the 28-day rule on the basis that the amendments will have little or no effect on the public, and/or will confer only benefits on the public. I also note that:
- 15.1 these regulations were on track to meet the timeline to ensure compliance with the 28-day rule, but were delayed because of the need to prioritise COVID-19-related work;
  - 15.2 there would still be a reasonable time between notification in the Gazette and the regulations coming into force (24 days).
- 16** If a waiver is granted, both sets of amendment regulations will come into force at the same time as the Triangular Employment Act on 28 June 2020.

## Compliance

- 17 The Orders in Council comply with each of the following:
- 17.1 the principles of the Treaty of Waitangi;
  - 17.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
  - 17.3 the principles and guidelines set out in the Privacy Act 1993;
  - 17.4 relevant international standards and obligations;
  - 17.5 the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

## Regulations Review Committee

- 18 I do not consider there to be any grounds for the Regulations Review Committee to draw these regulations to the attention of the House of Representatives under Standing Order 319.

## Certification by Parliamentary Counsel

- 19 The amendment regulations have been certified by the Parliamentary Counsel Office (PCO) as being in order for submission to Cabinet.

## Impact Analysis

### Regulatory Impact Statement

- 20 Based on the information provided, the Regulatory Quality Team at the Treasury has determined that the regulatory proposals in this paper are exempt from the requirement to provide a Regulatory Impact Assessment on the basis that they have no or only minor impacts on businesses, individuals or not-for-profit entities.
- 21 No Regulatory Impact Assessment was carried out in respect of the substantive changes made by the Triangular Employment Act, because this legislation progressed through Parliament as a Member's Bill.

### Climate Implications of Policy Assessment

- 22 The Ministry for the Environment has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

## Consultation

- 23 The Employment Relations Authority was consulted on the proposed changes to the Employment Relations Authority Regulations 2000 and supports the amendments.
- 24 The Treasury, DPMC (PAG) and the Ministry of Justice were consulted on this paper.

## Communications

- 25 I do not propose to make a public announcement about these regulatory amendments as they are of a minor and technical nature.

## Proactive Release

- 26 I intend to proactively release this Cabinet paper in full within 30 business days of decisions being confirmed by Cabinet.

## Recommendations

The Minister for Workplace Relations and Safety recommends that the Committee:

- 1 **note** that the Employment Relations (Triangular Employment) Amendment Act 2019 (the Triangular Employment Act) progressed through Parliament as a Member's Bill and will commence on 28 June 2020;
- 2 **note** that the Triangular Employment Act creates new processes for personal grievance claims involving 'triangular employment' arrangements, and these processes need to be reflected in the regulations setting out the procedures of the Employment Relations Authority;
- 3 **note** that reflecting the Triangular Employment Act in regulations also provides an opportunity to make other minor changes to employment regulations, to ensure they are up-to-date and user-friendly ;
- 4 **note** the proposals in this paper constitute minor and technical policy proposals for LEG which have not previously been discussed at DEV;
- 5 **note** the proposed Employment Relations Authority Amendment Regulations 2020 will:
  - 5.1 create a new application form to be used by employees or employers who wish to join a 'controlling third party' to a personal grievance;
  - 5.2 create a new 'statement in reply' form to be used by parties responding to an application to join a 'controlling third party' to proceedings;
  - 5.3 modernise the Employment Relations Authority Regulations 2000 by deleting or updating references to outdated practices and technology;
  - 5.4 revoke obsolete parts of the principal regulations (eg regulations that refer to now-repealed sections of the Employment Relations Act 2000);
- 6 **note** the proposed Employment Relations (Prescribed Matters) Amendment Regulations 2020 will amend the form that businesses are required to use when notifying MBIE of strikes or lockouts, to remove the reference to a legislative definition of 'partial strikes' that was repealed in 2018;
- 7 **note** that a waiver of the 28-day rule is sought:

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- 7.1 so that the regulations can come into effect on 28 June 2020, to coincide with the commencement of the Triangular Employment Act;
- 7.2 on the grounds that the regulations will have little or no effect on the public, and/or will confer only benefits on the public;
- 8 **agree** to waive the 28-day rule so that both the amendment regulations referred to in recommendations 5 and 6 can come into effect on 28 June 2020 (the date of commencement for the Triangular Employment Act);
- 9 **authorise** the submission to the Executive Council of the Employment Relations Authority Amendment Regulations 2020 and the Employment Relations (Prescribed Matters) Amendment Regulations 2020.

Authorised for lodgement

Hon Iain Lees-Galloway

Minister for Workplace Relations and Safety

PROACTIVELY RELEASED