

# Employment and Health & Safety Law in New Zealand

2021

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**3** partners  
**10** professionals

## Specialists in:

Occupational  
Safety and Health  
Employment relations  
Investigations  
Collective bargaining  
Dispute resolution

## Ranked with:



*"In demand for its depth of expertise in health and safety regulatory compliance, including dealing with investigations by regulatory bodies. Advises on various aspects of employment law, including restructurings, contractual issues and performance management, as well as having extensive litigation experience. Has a strong presence in the public sector and represents major New Zealand public sector employers. Active in post-employment restraint, including breach of confidentiality and settlement agreements. Growing practice in misconduct, bullying, pay equity and sexual harassment allegations. Represents multinational companies and offers noteworthy expertise in the construction industry."*

*Legal 500 Asia Pacific 2021*



## Key points about employment law in New Zealand



Employment relationships in New Zealand are structured around binding contracts negotiated and entered into between employers and employees, but with their terms and the legal framework extensively regulated by legislation.





## The detail

### The Employment Relations Act

The Employment Relations Act 2000 (**'the Act'**) is the principal statute that governs all employment relationships and agreements. The key features of the Act are:

- the underlying duty of good faith, which is a crucial element of the employer/employee relationship, including bargaining for individual and collective employment agreements;
- unions have rights of access to workplaces in relation to union matters and workplace safety;
- employers must hold a copy of signed employment agreements, and maintain accurate and up-to-date wage and time records;
- minimum entitlements and standards must be included in employment agreements;
- certain categories of 'vulnerable employees' have special protections if an employer sells, transfers, or contracts out all or part of its business (which may include a right to transfer to a new employer);
- workers may request flexible working arrangements, and employers must consider requests in good faith; and
- all employees may raise a 'personal grievance' if they consider the employer has breached its obligations, and these can be pursued as legal claims.

There are a number of other statutes which contribute to the landscape of employment law, among which are the Minimum Wage Act 1983, the Human Rights Act 1993 (which contains laws against discrimination on a range of protected characteristics), the Holidays Act 2003 and the Health and Safety Work Act 2015.

#### TERMINATION

Generally, an employer cannot terminate employment except for cause, for example where the employee's position is redundant, or for poor performance or misconduct.

Any termination must be the act of a fair and reasonable employer, both substantively and procedurally. This generally requires employers to investigate any concerns, to raise concerns with the employee, and provide the employee an opportunity to respond (with a representative or support person present if they wish). The employer should genuinely consider the employee's response prior to making a decision.

An employee can terminate an employment relationship by resigning, provided that they give notice as required by their employment agreement.

#### REDUNDANCY

Restructuring the business may result in an employee being dismissed. Employers are entitled to make employees redundant as part of their right to manage their business as they see fit (provided they act fairly and reasonably).

## DISPUTE RESOLUTION AND PERSONAL GRIEVANCES

Employees can raise a personal grievance against their employer on a number of grounds, including where they believe that they have been subject to an unjustified disadvantage, or if they have been unjustifiably dismissed.

The Act encourages employers and employees to attend mediation to resolve any disputes in the first instance. If unsuccessful at mediation, the parties can file proceedings in the Employment Relations Authority, which makes decisions based on the merits of a case. If a party is dissatisfied with an Authority determination, they can appeal to the Employment Court.

The Employment Relations Authority and the Employment Court can order a range of remedies, including reinstatement to the employee's former position, payment of lost wages, and compensation for injury to feelings or loss of another benefit. Reinstatement is the primary remedy under the Act, and so where an employee asks to be reinstated, the Authority or Court will respect that wish where practicable and reasonable to do so.

## COLLECTIVE BARGAINING

The Employment Relations Act actively promotes collective bargaining, however individual agreements are permitted and are common outside traditionally unionised industries.

Unions have exclusive rights to represent their members in matters relating to the collective interests of the workers, including collective bargaining. In accordance with specific procedural requirements, unions may call employees out on strike to garner leverage during collective bargaining, or in relation to health and safety concerns.

Union membership is optional, and employees who are not members will remain on individual employment agreements.

Union members can also be employed on individual employment agreements, provided the terms are no less favourable than those of the collective agreement.

## DISCRIMINATION

Employers have a number of obligations under the Human Rights Act 1993, including not to discriminate against employees on any of the following grounds:

- Sex
- Marital status
- Religious or ethical beliefs
- Race
- Ethnic or national origins
- Disability
- Age
- Political opinion
- Employment status
- Family status
- Sexual orientation

Discrimination claims will commonly arise out of situation involving:

- Job applications
- The drafting of terms and conditions of employment
- The provision of training
- Promotions or transfers
- Termination of an employee's employment
- The retirement of an employee



## INDEPENDENT CONTRACTORS IN NEW ZEALAND

Independent contractors are responsible for their own tax obligations and not entitled to the rights and protections provided to employees. However, the status of an independent contracting arrangement can be challenged, and it is the 'true nature' of the relationship rather than that which is ostensibly set out in any agreement which will be assessed by the courts. An employment relationship may be determined to exist for tax and entitlement purposes even if that was not intended by either party.

## Key points about Health and Safety in New Zealand

The Health and Safety at Work Act 2015 ('**HSWA**'), imposes obligations on a range of people and entities in respect of work, workplaces, and people in or near places of work.

The business or other organisation that is doing the work is known as a PCBU.

The PCBUS and any other persons with management or control of a workplace (whether they are an employer or not), are primarily responsible for the health and safety of the workplace and those within it, or otherwise affected by the work.

Each PCBU must ensure, so far as is reasonably

practicable, that the health and safety of workers, and others within the vicinity of the place of work, is not put at risk. PCBUs that exercise certain activities, for example, if they are involved in the design, manufacture or supply of plant, substances and structures, have further specific obligations in relation to those activities.

Further, individuals in senior governance and leadership positions with significant influence over the management of a PCBU have personal duties as officers. Officers must exercise due diligence to ensure that the PCBU complies with its health and safety duties described above. The extent of the officer's duty depends on the nature of the business, and the officer's position and responsibilities within it.

Workers have duties to take reasonable care for their own health and safety, the safety of others, and to comply with a PCBU's reasonable health and safety instructions, policies and procedures.

WorkSafe New Zealand is the New Zealand health and safety regulator. Failure to comply with duties under the HSWA is a criminal offence, investigated by WorkSafe and prosecuted in the District Court. The Act provides strong penalty provisions, with fines of up to NZ\$3million for companies, and up to NZ\$600,000 and/or five years' imprisonment for individuals.



## Accident compensation

New Zealand has a comprehensive no-fault system of compensation provided by the Accident Compensation Act 2001 ('**ACA**'). Those who suffer personal injuries are entitled to cover under the Act, regardless of whether the accident occurred in the workplace. However, they are barred from claiming damages arising from their injury. Most physical injuries are covered, however mental injuries are only covered in very limited circumstances. The bulk of benefits provided under ACA constitute payments for medical treatment and weekly compensation.

The scheme is administered by the Accident Compensation Corporation (**ACC**) and funded by levies paid by employers, employees, and self-employed people. Employers have two categories of obligations in respect of compensation:

1. The payment of levies into the work account in respect of every employee to cover the cost of work accidents; and
2. The payment of 80% of wages to the injured employee for the first week an employee has off work as a result of an accident.

The levies that an employer must pay depend on the category of work undertaken. The levy determined by ACC may be adjusted in light of an audit of a particular employer's safety management practices and the Accident Compensation (Earners' Levy) Regulations 2015. This is intended to promote good health and safety practices. ACC is required to consult the public before implementing any changes in rates and regulations, and before making any recommendations to the Government.

## Deductions for tax, Accident Compensation premiums, and 'KiwiSaver'

Employers are required to deduct PAYE (Pay As You Earn) tax from employees' remuneration. This includes deductions for income tax and accident compensation premiums (representing employee contributions to fund ACC cover).

With limited exceptions, employers are also obliged to enrol employees into a compulsory pension savings scheme called 'KiwiSaver', and to make deductions from employee remuneration for that purpose as well as offering an employer contribution. Currently, employees must contribute a minimum of 3% of their salary or wages, with the employer also required to make a 3% contribution on top.

Other than the employer ACC levy, and the minimum employer contribution to KiwiSaver, New Zealand does not currently have any payroll or other employment tax which employers have to pay over and above an employee's salary and wages.

Employers must account for PAYE to the Inland Revenue Department. Failure to do so can attract penalties, and may amount to a criminal offence.

## Independent Contractors in New Zealand

It is possible for individuals to be engaged as contractors rather than employees. Such individuals are recognised as being in business in their own right and having an arms-length relationship with those engaging them. Consequently they do not receive employment entitlements. For tax, ACC, levies, and holidays entitlements, it is important to accurately distinguish between employees and independent contractors.

The Act states that a written agreement is not necessarily conclusive in answering this question, however it indicates the intention of the parties. Those using contractors should bear in mind that if the status of the agreement is challenged, the Employment Relations Authority will look at the 'real nature' of the relationship.



## Jurisdiction and overseas employers

Foreign companies may employ staff in New Zealand but are required to be registered on the Companies Office Overseas Register if they are carrying out business in New Zealand and intend on hiring employees for that purpose.

Overseas companies need to be aware that their activities in New Zealand could lead to classification as a permanent establishment, requiring them to meet business tax obligations on any income-earning activity.

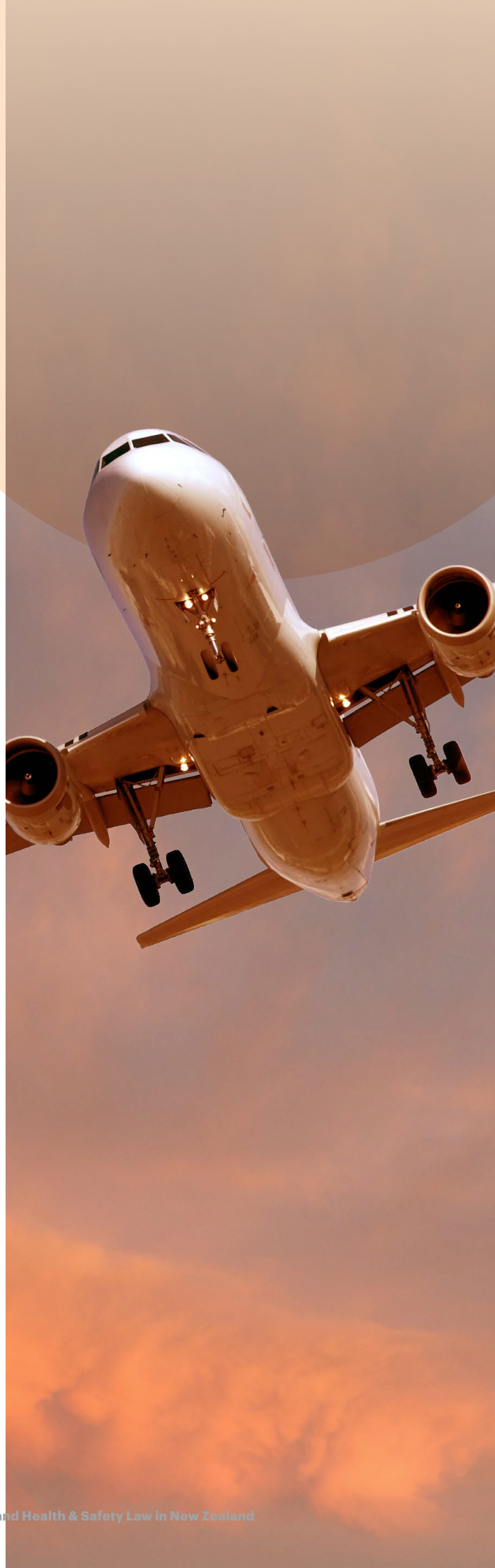
Generally, employers may choose which law applies to any employment agreement. However, notwithstanding any different choice of law, employees who are based in New Zealand will generally be entitled to the minimum standards and benefits extended by domestic employment legislation.

It is the employer's responsibility to ensure that all of its employees are legally entitled to work in New Zealand. Employees who are not citizens or residents will generally need a work visa. Such visas may limit the type of work undertaken by the worker and the length of any work in New Zealand. Foreign employees are generally subject to the same employment laws and tax requirements as domestic staff.

## Employment risks in a COVID world

Employers who manage a large number of seasonal staff, particularly those employers who offer staff accommodation need to be aware of their health and safety obligations to employees in light of the Covid pandemic. It is important that all employers remain prepared for operating at each Alert Level.

Further, a novel line of claims has arisen with regard to the approach taken with previous lockdowns. A recent decision by the Employment Court confirmed that essential service workers who did not work during the lockdown were not entitled to receive the minimum wage. However, this case could be appealed and there is continuing uncertainty as to employee's wage entitlements who could not work during the lockdown could be entitled to their full wages.







For more  
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## How we can help you



We have a large specialist employment law team with deep experience and expertise in assisting businesses at the point they are considering their first employee or contractor engagements in New Zealand, and then in supporting their actual set up. Please feel free to contact us to discuss your plans and how we can help.



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