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National signals significant employment law repeal

It's election time and with every election comes a raft of promises about changes to employment law. Under a National-led Government mandatory meal breaks could be a thing of the past. National has pledged to repeal the Government's changes to the Employment Relations Act and initiate a review of WorkSafe.

"The only sustainable way to create new jobs is to reduce barriers, costs and uncertainty for the private sector, and in, particular, small businesses. National believes in a flexible productive workplace where workers get a fair deal and businesses are productive." (Judith Collins).

National believes that 90-day trial periods should be fully reinstated to encourage large businesses to take on new staff. It has also pledged to:

- repeal the Government's changes to the Employment Relations Act
- simplify the employment dispute resolution service
- get rid of the 'no win, no fee' provisions in the Employment Relations Act
- ensure New Zealand laws and policies get the right balance between health and safety and productivity

National is yet to detail exactly what aspects of the Government's changes to the Employment Relations Act it intends to repeal and how it intends to simplify the employment dispute resolution process. It's also not clear exactly how meal break legislation will be repealed.

Since Labour came to power it has implemented a number of changes. The Employment Relations Amendment Act 2018 reinstated the right to set rest and meal breaks and restricted 90-day trial periods to businesses with less than 20 employees. Employees in vulnerable industries were able to transfer on the current terms and conditions of employment in the event their work was restructured.

A number of changes were implemented to provide Unions with a greater ability to bargain and achieve benefits for their members. These included the obligation to conclude bargaining, the requirement to include pay rates in Collective Agreements, and provide reasonable paid time for Union delegates to carry out their duties.

Labour has also implemented the Employment Relations (Triangular Employment) Amendment Act. The Equal Pay Amendment Act is due to come into force on 7 November this year. The Fair Pay Agreement Working Group, headed by Jim Bolger, has filed its report with the Government's decision on a detailed Fair Pay Agreement system yet to come. The Holidays Act review is still a work in progress, while there have been increases to minimum wage and paid parental leave.

Labour's focus in reinstating the right to set rest and meal breaks was to ensure that employees are able to work safely and productively. Set rest and meal breaks are intended to give employees a reasonable chance during work periods to rest, refresh and take care of personal matters. These are intended to be appropriate for the length of the working day.

The legislation prior to Labour's amendments did not specify how long a rest or meal break should be. It was open for employers and employees to negotiate the length of breaks. The employer was not required to provide rest and meal breaks if a break was not practicable because of the nature of the employee's work. However, an employer was required to provided reasonable compensation if no break was given in

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situations where a break would otherwise have been appropriate.

The changes implemented by Labour in May 2019 divided work periods into two-hour blocks with an employee being entitled, as a minimum, to 10 minute paid rest breaks and 30 minute unpaid meal breaks. Exceptions applied to employers engaged in the protection of New Zealand national security or essential services. Essential services were services which, if interrupted, would endanger the life, health or personal safety of the whole or part of the population.

The requirement to pay for 10 minute breaks has been the subject of recent case-law with the Meat-work Industry leading the charge. The decision of *Ovation New Zealand Limited v NZ Meatworkers and Related Trades Union Inc* dealt with whether 'piece rates' incorporated payments for rest breaks and whether this was lawful. The Court concluded that Parliament did not stipulate the means by which payment for rest breaks would be made and therefore the employer and employee were free to agree that payments for rest breaks were to be included within the employees' piece wage. However these payments must be paid at the same rate the employee would have been paid at the time of the break.

The requirement to provide breaks also created issues in the transportation sector. Bus drivers for example became entitled to 10 minute breaks during typical driving shifts. The complexity of service planning in the public transport industry made implementing rest and meal breaks a significant challenge. A steering group was established to oversee the implementation of a Memorandum of Understanding between the Government, bus service operators and the Council of Trade Unions.

Contrary to Labour's claimed emphasis on health and safety, the amended legislation allowed employer and employee to agree on the times when the employee could take their rest breaks and meal breaks. This allowed for situations where the breaks could be taken at the beginning of the day, before work had even commenced, or at the end of the day, meaning that employees would actually leave to go home early.

The expressed purpose of providing employees with a reasonable chance during work periods to rest, refresh and take care of personal matters is not achieved when the breaks are taken at either end of the day. For a number of businesses, however, that is the only way they could comply with the law and continue to operate.

National's Workplace Relations and Safety spokesperson Dan Bidois is on the record as stating that "*the Labour Government has watered down the 90 day trial periods so that only businesses who employ less than 20 people can implement them*. *Fully reinstating the trial periods to cover firms with more than 20 employees will give businesses greater confidence to take on more staff*".

While allowing 90 day trial periods for all businesses may provide greater confidence to employ staff, it will not alter the restrictive interpretation which has been evidenced by the Employment Court since their inception. There are a number of requirements that employers must meet to ensure that the trial periods are compliant. These include ensuring that the employee has signed the relevant employment agreement containing the 90 day trial provision before starting work (including any induction period). The Court has also emphasised the obligation to ensure an employee has had an opportunity to take legal advice before agreeing to a trial period.

National and Labour's views on how we can return to a thriving economy while still in the grips of the pandemic are significantly different. So are their views on the employment legislation framework which will best achieve that outcome. We are now only a few weeks away from knowing the direction we will be heading

Want to know more?

If you have any questions about possible employment law repeals, please contact our specialist Employment Team.