

K&L GATES



# New Zealand Employer Guide

2024

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# INTRODUCTION

Following the peak of the COVID-19 pandemic, 2023 has seen a return to more typical “business as usual” employment law trends.

Many employers have embarked on ambitious post-pandemic workforce restructures and are tackling difficult issues relating to generative artificial intelligence, working from home and hybrid work arrangements. Employers seeking to encourage employees to “return to office” are in some cases facing opposition, from employees and unions alike.

The new fair pay agreements regime, introduced in late 2022, also poses new challenges. It is seen as one of the most significant changes in New Zealand employment legislation in the last three decades. New Zealand employers also continue to face a shortage of talent, particularly in sectors such as tourism, hospitality and technology. While some immigration law restrictions have eased since the pandemic, attracting talented workers to New Zealand continues to be a contentious and political issue.

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# EMPLOYMENT RELATIONSHIP

## I. PRE-EMPLOYMENT

### Immigration/Visa Requirements

Employers must ensure their employees are lawfully allowed to work in New Zealand.

Foreign workers must have visas to live and work in New Zealand on either a temporary or permanent basis. There are a number of different types of visas, all of which are administered by Immigration New Zealand.

With New Zealand borders now fully reopened, there are two commonly used work visas: the Specific Purpose Visa (SPV) and the Accredited Employer Work Visa (AEWV).

The SPV includes senior or specialist employees who are seconded to work for a New Zealand entity. This visa can be granted for up to 36 months; it is temporary, and no local advertising of the role is required before it is granted.

To secure an AEWV, the employer should ideally be a New Zealand entity, which is accredited by Immigration New Zealand. Once accredited, there is an application process; depending on the role and its remuneration, the employer may need to show that the role was advertised locally and no suitable New Zealanders were available for the job.

### Reference/Background Checks

An employer is permitted to contact a prospective employee's referees and previous employers to gather and verify information (with the authorisation of the applicant). Offers of employment can be conditional on receiving this information (if not yet obtained when the offer is made).

### Police and Other Checks

Criminal history checks may be undertaken with the authorisation of the applicant. Offers of employment can be conditional on receiving this information (if not yet obtained when the offer is made).

### Medical Examinations

Medical examinations or alcohol and drug tests are permitted, with the applicant's consent, if reasonably necessary to determine fitness for a particular job. Offers of employment can be conditional on receiving this information (if not yet obtained when the offer is made).

### Minimum Qualifications

Employers may ask for minimum qualifications to ascertain an applicant's suitability for a role.

## II. TYPES OF RELATIONSHIPS

### Employee

Individuals can be employed on a full-time or part-time basis, on a fixed-term or ongoing contract, or on a casual basis. Fixed-term and casual employees can only be employed in certain circumstances pursuant to the Employment Relations Act 2000. Termination obligations of the employer and other employee entitlements may be different depending on the basis on which employees are employed.



## Independent Contractor

Businesses often engage “self-employed” independent contractors on a fee-for-service basis. A business will usually engage the contractor by means of an independent contractor or consultancy agreement with the individual or with the individual’s business.

## Labour Hire

Employers use labour hire workers most commonly for short-term periods of work and in industries such as construction. A business (the client) will usually engage a labour hire company by means of a service provider agreement with the labour hire company. Labour hire workers are employed by the labour hire company, not the client. However, the client can be joined to personal grievance claims against the labour hire company in some circumstances, where the client is determined to be a “controlling third party”.

## III. INSTRUMENTS OF EMPLOYMENT

### Agreements

Every employee must have a written employment agreement that has been negotiated in good faith and signed before the commencement of employment. Employment agreements can be either individual (i.e., agreed to between the employer and employee) or collective (i.e., agreed to between unions, employers and employees).

Employment agreements cannot be unilaterally varied by an employer, and good faith bargaining obligations apply to bargaining for any variation.

The Employment Relations Act 2000 provides for certain mandatory provisions in employment agreements, such as details provisions that address the process for resolution of disputes and grievances, and which outline the required process that an employer will follow to protect employees in relation to any possible sale, transfer or the contracting out of a business.

### Codes or Rules

There are currently no centralised industrial instruments setting out industry-specific minimum pay and employment conditions.

However, in 2022, the Fair Pay Agreements Act 2022 became part of New Zealand employment law. This act introduced a new system of industry-wide bargaining for industry or occupation-based minimum employment conditions that would be set out in “fair pay agreements”, which would apply across all employees in the relevant industry or occupation.

At the time of writing, unions have applied to initiate bargaining for fair pay agreements in a handful of industries, and the bargaining process for those agreements is in its early stage. If there is a change in government in New Zealand’s general election in October 2023, it is likely that the Fair Pay Agreements Act will be repealed in its entirety.

### Collective Agreements

Collective agreements are agreements that are binding on one or more unions, one or more employers, and two or more employees. The Employment Relations Act 2000 sets out mandatory requirements in relation to the content of collective employment agreements and the process for bargaining for such agreements.

## Policies

Policies are not mandatory, but they are strongly advised. Policies that should be in place include those relating to discrimination, harassment, bullying, privacy, and work health and safety.

## IV. ENTITLEMENTS

### Minimum Employment Rights

New Zealand legislation prescribes various minimum employment rights that apply to employers and employees. Employees cannot be asked to agree to less than these minimum rights.

#### Minimum Wage

The Minimum Wage Act 1983 provides for the setting of minimum wage rates. The applicable minimum wage rate will generally depend on the age and experience of the employee, and it is typically increased yearly by way of a minimum wage order.

#### Annual Holidays

The Holidays Act 2003 provides for annual holidays for all employees.

Depending on their circumstances, employees are entitled to either:

- Four weeks' paid annual leave per year (which is calculated on a pro rata basis for part-time employees).
- An additional payment of 8% of their gross earnings to compensate them for not being able to take paid annual holidays (i.e., for casual employees or fixed-term employees whose term is for less than 12 months).

#### Parental Leave

The Parental Leave and Employment Protection Act 1987 provides for eligible employees to receive up to 26 weeks' of government-funded paid primary carer leave and 52 weeks of unpaid extended leave (less any primary carer leave taken) when a child is born or adopted. Other entitlements include partner leave, special maternity leave and a presumption that the employee's position can be kept open whilst on parental leave (other than certain limited exceptions).

#### Flexible Working Arrangements

Employees have the right under the Employment Relations Act 2000 to request flexible working arrangements. Employers have a duty to consider seriously any requests from their employees (see also below regarding hybrid/remote working arrangements).

#### Other Types of Leave

Under the Holidays Act 2003, eligible employees are entitled to:

- Bereavement leave: three days' paid bereavement leave on the death of specified persons or in the event of a miscarriage or stillbirth, and one day's paid bereavement leave on the death of any other person that the employer accepts that the employee suffered bereavement as a result of the death.
- Sick leave: 10 days' paid sick leave per 12 months of continuous service, after completion of the first six months of service.

There is no statutory entitlement to long service leave in New Zealand; however, long service leave may be agreed to as a matter of contract.

## Public Holidays

Under the Holidays Act 2003, if an employee is required to work on a public holiday, the employee must be paid time and a half of the hours worked on the public holiday. In addition, employees are entitled to one day's paid leave (an alternative holiday) if the public holiday on which the employee worked was otherwise a working day for the employee.

## Notice of Termination and Redundancy Pay

When an employer terminates a full-time or part-time employee's employment for reasons other than serious misconduct, it must provide contractual notice or payment in lieu of that notice. "Reasonable" notice must be given where the contract is silent regarding notice.

There is no statutory entitlement to redundancy pay; however, redundancy pay may be agreed to as a matter of contract.

## KiwiSaver

There is no compulsory superannuation scheme in New Zealand. However, all employers are required to enrol new employees automatically in KiwiSaver (a government-implemented long-term savings initiative). There are certain exceptions to the automatic enrolment requirement, including where the employee is not a New Zealand resident, is under a temporary contract for less than 28 days, or is on a secondment. Employers are also required to provide eligible employees with an information pack prepared by the Inland Revenue Department.

Employers are required to contribute 3% of the gross salary or wage of eligible employees who have opted into the KiwiSaver scheme and are not on a period of savings suspension.

## Family Violence Leave

Under the Holidays Act 2003, eligible employees affected by family violence are entitled to up to 10 days of paid family violence leave per year in order to deal with the effects of family violence. They can also request short-term flexible working arrangements under the Employment Relations Act 2000.

## Discretionary Benefits

### Bonuses

Employers may choose to incentivise employees by including bonus provisions in employment agreements or in a company policy. Discretionary bonuses can also be offered without any formal documentation. Bonuses are usually dependent on individual, department or business performance and are usually paid at the employer's discretion.

### Paid Parental Leave

Some employers offer paid parental leave schemes that either supplement the income provided by the legislated paid parental leave scheme (paid for by the government) or offer additional periods of paid parental leave.



# TERMINATION OF EMPLOYMENT

## I. GROUNDS

Employers considering termination of ongoing employment are required to undertake a fair process prior to making a decision and must establish that they had a valid substantive reason for reaching that decision.

Termination can be brought about by mutual agreement or when a fixed-term contract expires, provided that statutory requirements have been met.

Termination may be initiated by the employer, with or without notice, or by the employee (resignation).

## II. MINIMUM ENTITLEMENTS

### Payments/Notice

When an employer terminates a full-time or part-time employee's employment for reasons other than serious misconduct, they must provide the contractual notice or payment in lieu of notice.

When an employee resigns, he or she must provide the notice specified in the relevant employment contract.

"Reasonable" notice must be given where the contract is silent regarding notice.

### Statutory Entitlements

Payment on termination includes:

- Outstanding wages/salary for hours already worked.
- Accrued annual holidays and any alternative holidays not taken.

Employers are not required by statute to pay out accrued sick leave.

## III. REDUNDANCY

### Genuine Redundancy

An employer may only terminate an employee's employment for redundancy in circumstances where an employer no longer needs a full-time or part-time employee's job to be done by anyone.

### Consultation

Statutory good faith obligations regarding consultation must be followed prior to the decision being made that an employee's position is redundant.

### Payment

An employee is entitled to redundancy pay or compensation only if it is provided for in his or her employment agreement or an applicable employer policy.

## IV. REMEDIES

### Personal Grievances

#### Time Frames for Raising Personal Grievances

Personal grievances are the primary claim raised by employees in relation to workplace disputes (although a range of other claims can be raised under legislation and common law).

There are a number of different types of personal grievance, listed in section 103 of the Employment Relations Act 2000.

Other than in relation to a personal grievance relating to sexual harassment, personal grievances must be raised within 90 days of the date that the alleged action occurred or came to the employee's attention, whichever is later. A personal grievance in the nature of sexual harassment must be raised within 12 months of the date that the alleged harassment occurred or came to the employee's attention, whichever is later.

The relevant limitation period may be varied if the employer consents to the employee pursuing a personal grievance outside of time or the Employment Relations Authority grants leave to the employee.

#### Unjustified Dismissal

Unless a small business employee (in a business with 19 or less employees) is employed on a 90-day trial period as statutorily specified and dismissed during that trial period, he or she is eligible to bring a personal grievance claim against a former employer alleging unjustified dismissal.

Remedies can vary and may include reinstatement, payment for lost wages and an award for compensation for injury to feelings. There is no maximum amount for these financial remedies in the Employment Relations Act 2000. A successful party will usually also receive a contribution to their legal costs.

#### Unjustifiable Action

Employers are prohibited from subjecting an employee to an "unjustified disadvantage". This occurs where an employee's employment or conditions of employment are affected to the employee's disadvantage due to an unjustified action of the employer. As noted above, a personal grievance must be raised within the statutory time frame, subject to exceptions.

Remedies for unjustifiable action can vary and may include an award for compensation (with no maximum amount) and a contribution to legal costs.

# BUSINESS TRANSFER AND RESTRUCTURING

## I. LEGAL REQUIREMENTS

### Transfer of Business

When restructuring occurs, New Zealand legislation prescribes rights to certain categories of employees (such as cleaners, food caterers, laundry workers, caretakers, orderlies and security guards) whose work is to be performed by another entity.

Should they elect to do so, protected categories of employees have a right to transfer to the new employer on the same terms and conditions they have under their current employment agreement.

## II. RESTRUCTURING

### Notification

Every collective agreement and every individual employment agreement must contain an “employee protection provision” that outlines the process the employer will follow in restructuring situations (including the sale, transfer or contracting out of a business).

### Consultation

Every collective agreement and every individual employment agreement must contain an “employee protection provision” that outlines the process the employer will follow in restructuring situations (including the sale, transfer or contracting out of a business).

The Employment Relations Act 2000 includes a statutory obligation of good faith, which imposes minimum consultation requirements where the employer is considering a decision which could impact the continuation of an employee’s employment. This includes the possible sale, transfer or contracting out of its business.

At a minimum, the employer is required to provide employees with access to all information relevant to the proposal (with the exception of certain confidential information) and an opportunity to comment on the information (and the proposal more generally). The employer should consider all feedback before a decision as to whether or not to proceed with the proposal is made. If the employer decides to proceed, it must also consult with employees about the implementation of that decision, including consideration of any applicable alternatives to redundancy.

# PROTECTION OF ASSETS

## I. CONFIDENTIAL INFORMATION

Most employment agreements include provisions protecting the confidentiality of an employer's confidential information, including intellectual property and information regarding clients and the business's employees.

Contractual confidentiality provisions typically restrict employees from using confidential information for anything other than their duties. These provisions can continue post-employment.

## II. CONFIDENTIAL RESTRAINTS AND NON-COMPETES

Employment agreements typically contain provisions restraining employees from using confidential information or soliciting clients or other employees after the termination of employment.

Most employment contracts for senior employees contain non-compete provisions intended to protect an employer's legitimate proprietary interests and can be enforced if reasonable in the circumstances.

## III. PRIVACY OBLIGATIONS

The Privacy Act 2020 imposes obligations with respect to how employers (referred to as "agencies") collect, use, disclose, store and give access to personal information. These obligations apply to how an employer handles personal information relating to its employees.

If an agency has a privacy breach that either has caused or is likely to cause a person (or persons) serious harm, there is a duty on that agency to notify the Privacy Commissioner and any affected person (or persons).

## IV. WORKPLACE SURVEILLANCE

Workplace surveillance in New Zealand is largely unregulated, but the principles of the Privacy Act 2020 and good faith under the Employment Relations Act 2000 will apply.

The Privacy Commissioner recommends that employers consult with employees before introducing surveillance measures. Employers will generally be entitled to take reasonable steps to monitor employee performance, to safeguard working conditions and to secure the place of business.

## V. WORKPLACE INVESTIGATIONS

Employers use workplace investigations as a management and conflict resolution tool to determine policy breaches, misconduct or misuse of confidential information (amongst other alleged issues that may arise in, or relate to, a workplace). The conduct of these investigations is determined by common law obligations of procedural fairness, section 103A of the Employment Relations Act 2000 and the statutory obligations of good faith.

Outcomes of workplace investigations are often used to determine whether to undertake a disciplinary process, which may result in dismissal or other disciplinary action.

# WORKPLACE BEHAVIOURS

## I. MANAGING PERFORMANCE AND CONDUCT

Employment policies and agreements may provide for management of employee performance and conduct.

Under common law principles, an employer must fairly warn an employee before terminating his or her employment because of poor performance (other than extreme incidents of negligence, which may be treated as serious misconduct).

Employee misconduct may also warrant a warning, disciplinary action or, if the conduct is serious, termination of employment. Employees summarily terminated for serious misconduct do not receive all of their contractual notice entitlements on termination of employment.

## II. BULLYING AND HARASSMENT

### Bullying

Bullying is defined by the New Zealand workplace safety regulator, WorkSafe, as repeated unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.

Bullying can amount to misconduct or serious misconduct. Bullying at work may also be a basis for employee claims of unjustified (constructive) dismissal or unjustified action. Under the Health and Safety at Work Act 2015 and common law, an employer must take all reasonably practicable steps to eliminate or minimise the risk of harm to workers (or others) arising from the behaviour of employees in the workplace.

### Harassment

Harassment is behaviour that is insulting, intimidating, humiliating, malicious, degrading or offensive. There are specific definitions for sexual harassment and racial harassment in the Employment Relations Act 2000 and Human Rights Act 1993. Failing to properly manage issues of harassment may cause an employer to breach the Health and Safety at Work Act 2015.

## III. DISCRIMINATION

The Employment Relations Act 2000 makes it unlawful for an employer to discriminate against an employee on the basis of sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origin, disability, age, political opinion, employment status, family status, sexual orientation, union membership or being affected by family violence.

Employees also have recourse for unlawful discrimination through the protections in the Human Rights Act 1993. However, employees cannot pursue an unlawful discrimination claim in both the Employment Relations Authority and Human Rights Review Tribunal (an election must be made).

## IV. UNIONS

### Representation

Employees have the right to decide whether they want to join a union or not. It is illegal for an employer or any other person to put unreasonable pressure on an employee to join (or not join) a union or to discriminate against someone on the basis of union membership.



## Right of Entry

Union representatives are legally allowed to enter a workplace for purposes related to the employment of members or the union's business with the prior consent of the employer. The employer's consent may not be unreasonably withheld. Both the employer and union should deal with union visits in good faith.

## Industrial Disputation

Strikes and lockouts are only lawful under the Employment Relations Act 2000 in prescribed circumstances, such as where a collective agreement has expired and the parties have already entered a period of bargaining, or where the action is justified on safety or health grounds.

Employers may suspend striking employees without pay and may request other employees to perform the work of striking or locked-out employees (subject to certain limitations). Employers may not discriminate against employees for participating in a lawful strike.

## V. REMOTE/HYBRID WORK

### No Legislation

There is no legislation in New Zealand that prescribes specific requirements in relation to remote or hybrid work arrangements. These arrangements are commonly addressed by way of agreement (between employer and employee, outlining bespoke arrangements applicable to that individual) or under employer policies (which do not have contractual force and may be amended or withdrawn from time to time).

### Health and Safety Considerations

An employer with employees who "work from home" (WFH) for some or all of their working hours will still owe health and safety obligations to their employees when they are at home, as the home is their "workplace". WorkSafe has published guidance to support employers in complying with these obligations.

### Flexible Working Arrangements

Employees may request WFH arrangements through a flexible working arrangements request under the Employment Relations Act 2000. Employers are not required to agree to such requests, but they must have grounds to decline and follow the statutory process.

### Outside of New Zealand

Where an employee performs work on a WFH basis and is allowed to do so outside New Zealand, this can raise complex questions under tax, employment, immigration, and health and safety law. In most cases, these questions can be addressed through clear communications and within the parties' contract; however, specific advice should be taken in each case.

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