Employment Relations Amendment Bill – Key Points

General comments

None of the provisions in the Bill will assist businesses to grow. None of them will help get vulnerable and unemployed people into jobs. All of them add cost to business, which inevitably drives business to cut jobs and to invest more heavily in labour replacing technology.

The changes the Bill makes are not simply putting back things that were once there as has been claimed. The changes in the Bill in fact are a platform for greater changes later. Fair Pay Agreements and tightening rules around passing on for example

Furthermore, new provisions, added to the ones that have returned, have a vastly different effect than in the past.

For example returning the 30 day rule (where new employees are covered by a collective agreement for the first 30 days of their employment) on its own would have caused no real issues. But, coupled with new provisions on expanded coverage clauses and a requirement to publish pay rates, unions will control the pay and conditions of non-union members as well. And when the passing on rules are tightened unions will derive revenue from non-union members as well.

Inconsistency with the law

The Bill is inconsistent with the objects of the Employment Relations Act because it contains provisions that will create conflict, increase complexity and increase the probability of litigation.

The Bill's compulsion to conclude collective employment agreements is in direct contravention of the Right to Organise and Collective Bargaining Convention 1949, which says collective bargaining should be voluntary. The last Labour government ratified this convention in 2003, compelling NZ to comply with it.

Some specific concerns

90 Day trial periods

This is the most common concern; it affects employers of all sizes in every industry.

The labour market is very tight. Many people seeking jobs would not have been successful in earlier times. Many are marginal in terms of skills, experience and attitude. And too many of those who are currently unemployed are not even seeking work.

Contrary to the views of some, 90 day trial periods are not about growing the number of jobs but about increasing young, inexperienced and unemployed persons' share of existing jobs.

Employer organisation surveys say most employers value trial periods, especially given the small labour pool left to choose from in today's tight labour market. Employers spoken to have said they will stop employing marginal applicants if trial periods become too constrained.

Trial periods benefit the unemployed more than any other group. At the very least, trial periods be available to any business where they are seeking to recruit someone who is currently unemployed (as opposed to someone coming from other employment).

Note: CTU submissions have argued for complete repeal of 90 day trial periods; this would deny a lot of currently unemployed people a chance they already struggle to get.

Unions

Less than 10% of the private sectors is unionised and it is clear many employers are largely unaware of how the Bill's changes may affect them. Many non-unionised employers have expressed real concern when they understood that it takes just two employees to join a union and seek a collective agreement to enable all the effects of the Bill. This was not an issue in the past when a collective agreement did not have to be concluded but the provisions of the Bill make it a very real issue in the future. Increased coverage and the advent of Fair Pay Agreements add to the issues.

The changes mean that the less than 10% of unionised workers, through their unions, can set the conditions of employment for the remaining 90%. Apart from anyone else, this is likely to be of concern to "millennial" employees who are characterised as valuing their freedom to choose the rules that apply to them.

This concern is exacerbated by the Bill provisions for paid time off for union delegates

Both unionised employers, and those that might be, are very concerned that workplace delegates will have extensive authority to take time off their job to undertake union duties, on full pay. The Bill contains little ability to restrain the use of this authority. At the very least there needs to be some mechanism to balance the legitimate needs of delegates to represent their members with the equally legitimate need for employers to maintain a productive workplace.

Note: the CTU submission to the Bill recommends extending the Bill's provisions by broadening the time workplace union delegates can take paid time off to include "other union business" not just business involving union members in the workplace. This would be tantamount to unions getting more paid officials at employers' expense and no employer looks forward to having to pay an employee to work for someone else.

Employees

Employers will have to pass information about new employees to unions, before they are employed. Suffice to say that there is a real risk of individual rights to freedom of choice and privacy being breached under the proposed provisions.

Discrimination

The reverse onus of proof in existing section 119 of the Employment Relations Act means employers will have to prove they did not discriminate against an employee because of their union membership, rather than the employee having to prove that discrimination did occur. This creates potential for unintended consequences.

For instance, performance management of poor employees can be stymied by claims of discrimination that have to be proven false before proceeding with the performance management. This is bound to end in litigation, contrary to the object of the Act.

Collective bargaining

Under the Bill's provisions, unions can make an employer stay at the bargaining table until they agree to a collective agreement. This includes MECAs, which unions can initiate before employers have a chance to initiate bargaining for a SECA.

Note: CTU submission argues for the Bill to make it clear that the duty to conclude relates to the type of bargaining referred to in the notice of initiation i.e., if bargaining is initiated for a MECA then a MECA must be concluded.

Collective agreements will cover the work described in the coverage clause, even if it is done by non-union members. Non-union employees whose work is covered by the collective agreement will not be able to negotiate individual terms and conditions that are inconsistent with the collective agreement, including pay. This includes new employees after the first 30 days of their employment.

Note: the CTU submitted that the Bill should also require collective agreements to specify pay rates for each category of work covered by the employment collective agreement as well as the specific criteria under which increases would be awarded during the term of the agreement.

With or without the CTU's recommended changes, the Bill largely removes the capacity of individual employees to independently bargain over their conditions of employment, in direct contravention of the objects of the Employment Relations Act. This is not well understood by many employers, particularly those with no experience of unions in their workplace.

Removal of partial pay for partial strikes.

Other than locking employees out and not paying them at all, employers will be unable to take action against employees who take low level industrial action. The CTU have also submitted that the Bill should also repeal the requirement for notice to be given before any strike action is taken be it full or partial strikes. The Bills provisions and the recommendations from the CTU can only exacerbate the situation in times of industrial tension, and is not conducive to productive workplace relationships, which is what the Employment Relations Act is all about.

Meal breaks

The Bill's default provisions effectively make employees take breaks at same time if they have not agreed to stagger them.

Many employers will need to renegotiate their employment agreements to ensure they can keep running continuously.

The Bill makes meal breaks a significant industrial tool as meal breaks are usually part of wider collective bargaining. Inability to take action against low level industrial action (partial strikes) means employees who force disruption by taking their breaks simultaneously will be protected.

Ultimately this means that the power to ensure business continuity (which is essential to productivity) is in the hands of employees and their unions. This is hardly conducive to improved productivity.

Protection for vulnerable workers

The Bill removes the exemption from the "vulnerable worker" provisions[1] for small businesses. This will add to the complexities faced by such businesses when contracting catering, and cleaning services.

Most employers are concerned at the implications, albeit that relatively few are affected at present.

Note: the CTU submission argues that the Bill should also permit the Minister (rather than Parliament as at present) to add to the list of groups covered by the "vulnerable worker" provisions was adopted. This would permit rapid expansion of the use of Part 6A, potentially making contracting in or out ineffective in areas beyond catering and cleaning.

Conclusion

Overall, the Bill does not advance the prospects of the high wage high performing economy both workers and employers aspire to.

The specific changes the Bill makes are counterintuitive when talking about the Governments desire to encourage "high performance high engagement" workplaces. A fundamental requirement for this is a high trust, collaborative workplace. The Bill encourages the opposite.

Exemplar businesses such as Air New Zealand achieved high performance high engagement status without the proposed changes in the law. They are therefore not essential.

Furthermore, AirNZ has emerged from a decades long history of industrial tension and litigation with its unions, and the new approach is as much an escape from the past as it is embracing the future. Most businesses have no such histories and will need to be convinced of the value of "high performance" approaches, which are predicated on high levels of trust between workers and their employers. Trust cannot be enforced.

The Bill should not proceed

[1] Essentially these require that employees can transfer their employment to the new contractor unless they don't want to.