

## Enforcing Minimum Standards

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Have you ever worked for less than the minimum wage? Should we be concerned that some people do? Whatever your view, recent employment law changes promise to better protect employees whose employers have failed to pay at least the minimum wage or comply with other minimum employment standards.

### Compliance Counts

The Employment Relations Amendment Act 2016 came into force on 1 April 2016. It introduced a general obligation to keep records in sufficient detail to demonstrate compliance with the Holidays Act 2003, Minimum Wage Act 1983 and Wages Protection Act 1983. These Acts require employers to document an employee's holiday and leave entitlements, hours and days of work, and what and how they have been paid. Failing to keep records can result in penalties. An employer also risks having to disprove an employee's claims about any shortfalls.

Employers must provide a written employment agreement to staff. Previously employers could include a clause promising little in the way of hours, yet require an employee to remain available and accept offers of work (a kind of cake and eat it clause). No longer. If an employer wants to require an employee to accept offers of work, they must include an "availability provision" in the agreement that:

- Specifies agreed hours of work (such as start and finish times) that at least guarantee some hours of work;
- Ensures timeframes for which an employee remains available are genuinely necessary to meet business demand and are reasonably proportionate to the agreed hours of work; and
- Pays decent compensation for the employee's availability.

Failing to incorporate the above would make an availability provision unenforceable. An employee can reasonably refuse to work extra hours; an employer cannot treat the employee badly because of that refusal - doing so would be grounds for a personal grievance.

Any new employment agreement entered into after 1 April 2016 must comply with these and other changes. For existing agreements, parties have until 1 April 2017 (or earlier if renegotiated).

### Paying the Price

New Part 9A creates consequences for employers who breach minimum employment standards like failing to keep records or pay the minimum wage. It empowers a Labour Inspector to apply to the Employment Court directly for a declaration of a breach of minimum employment standards upon which pecuniary penalty, compensation, and banning orders, can be made.

The maximum pecuniary penalties are five times the penalties for other types of breaches. In the case of an individual, the maximum is \$50,000; for a body corporate, \$100,000 or three times the amount of the financial gain made by the breach (if greater). When setting the amount, the Court will consider the nature and extent of any loss or damage suffered by any person or the gains made or losses avoided by the person in breach. The Court will also



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consider any steps taken to remedy the effects of the breach, the circumstances involved (such as the vulnerability of the employee), and prior proven breaches. An employer cannot insure against pecuniary penalties.

Perhaps most significantly, the Court can ban a person from employing staff, being a director or holding a position with significant influence over management or administration, or being involved in hiring staff, for up to 10 years.

If found to be involved in an employer's breach, an individual may be personally liable. Potentially liable individuals include company directors and anyone occupying a position in which they exercise significant influence over the employer's management or administration. A defence may exist where an individual can show they reasonably relied on information supplied to them by another, and took all reasonable and proper steps to ensure the employer complied with their obligations.

Think you could settle? The changes bypass the normal presumption parties will attend mediation first - unless an exception applies (such as mediation being a cheaper and quicker way to clarify disputed facts).

### **Taking employment law seriously**

We recommend reviewing employment agreements and records to ensure they comply. The remedies now available to a Labour Inspector are much stronger and more costly. Getting it right really matters.



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