

Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill

Government Bill

Explanatory note

General policy statement

This Bill amends the Employment Relations Act 2000 (the **principal Act**) to implement government policy on relaxing rest break and meal break provisions for employees. Relaxing legislative provisions on rest breaks and meal breaks through this Bill will move the focus from prescription to flexibility, encouraging employers and employees to negotiate in good faith about workable arrangements regarding how rest breaks and meal breaks should be taken. Under the Bill, there will be a requirement either for meal breaks and paid rest breaks or compensatory measures. The Bill introduces flexibility for workplaces to time rest breaks and meal breaks to suit service or production continuity, as far as is reasonable, with an employer being able to determine the arrangement where agreement cannot be reached. In particular, it provides for those circumstances in which it is necessary for breaks to have some restrictions on them because of the nature of work being undertaken. The Bill also provides flexibility for employers and employees to agree that, instead of a break, there will be compensatory measures (for example, later start or earlier finish times or time off in lieu).

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. The Act comes into force on the day after the date on which it receives the Royal assent.

Clause 3 states that the principal Act being amended is the Employment Relations Act 2000.

Part 1

Amendments relating to entitlement to rest breaks and meal breaks

Clause 4 amends section 69ZC, which is an interpretation provision, by inserting a definition of compensatory measure. A compensatory measure is defined as a measure that is designed to compensate an employee for a failure to provide rest breaks and meal breaks. It includes (without limitation) a measure that provides the employee with time off work at an alternative time during the employee's work period, for example, a later start time, an earlier finish time, or an accumulation of time off work that may be taken on 1 or more occasions.

Clause 5 substitutes *new sections 69ZD to 69ZEA*, which relate to an employee's entitlement to rest breaks and meal breaks, the timing and duration of the breaks, and compensatory measures.

New section 69ZD(1) requires an employer to provide an employee with rest breaks and meal breaks that—

- provide the employee with a reasonable opportunity for rest and refreshment and to attend to personal matters during the employee's work period; and
- are appropriate for the duration of the employee's work period.

Subsection (2) provides that the employee's entitlement to rest breaks or meal breaks may be subject to restrictions, but only if—

- the restrictions are reasonable and necessary, having regard to the nature of the employee's work; and
- they relate to certain matters.

Subsection (3) clarifies that an employee's entitlement to rest breaks is to paid rest breaks.

New section 69ZE deals with the timing and duration of rest breaks and meal breaks. *Subsection (2)* provides that if an employer and

employee cannot agree on when the employee is to take his or her breaks or on the duration of the breaks, the employer may specify reasonable times and durations that, having regard to the employer's operational environment or resources and the employee's interests, enable the employer to maintain continuity of service or production. *New section 69ZEA* is a new provision that relates to compensatory measures. It provides that an employer is not required to provide rest breaks and meal breaks in accordance with *new section 69ZD(1)*—

- to the extent that the employer and employee agree that the employee is to be provided with compensatory measures; or
- to the extent that, having regard to the nature of the work performed by the employee, the employer cannot reasonably provide the employee with rest breaks and meal breaks.

Part 2 Related amendments

Clause 6 consequentially amends section 69ZF, which is a penalty provision, to insert cross-references to *new sections 69ZD(1) and 69ZEA*.

Clause 7 substitutes *new sections 69ZG and 69ZH*, which deal with the relationship between Part 6D of the principal Act and employment agreements and other enactments. The main change is to insert cross-references to *new sections 69ZD(1) and 69ZEA*.

Regulatory impact statement

Executive summary

The current provisions for rest breaks and meal breaks in Part 6D of the Employment Relations Act 2000 (the **principal Act**) appear to be overly prescriptive in practice in relation to what constitutes a genuine break and the extent of flexibility about when rest breaks and meal breaks may be taken. Workplaces in some sectors are experiencing difficulty implementing rest breaks and meal breaks that comply with the legislation and do not compromise service and production continuity.

It is proposed to relax the rest breaks and meal breaks provisions of the principal Act to—

- require employers to either provide meal breaks and paid rest breaks or compensatory measures:
- encourage employers and employees to agree in good faith on rest break and meal break arrangements:
- ease requirements in order to increase flexibility in what is considered to constitute a break.

This will improve the workability of rest breaks and meal breaks provisions and improve consistency with the overall intent of the principal Act.

Adequacy statement

A regulatory impact statement (**RIS**) was required for the initial Cabinet paper recommending changes to statutory provisions on rest breaks and meal breaks. A regulatory impact statement was not prepared at that time. Had an RIS been prepared, it would have required independent assessment by the Treasury's Regulatory Impact Analysis Team (**RIAT**).

Based on the limited information available, the current set of proposals is also likely to have a significant impact on economic growth and therefore requires independent assessment by RIAT. An RIS has been developed but not provided to RIAT for assessment. The proposed amendments to rest breaks and meal breaks provisions have been developed at speed and without significant consultation.

Status quo and problem

Under the status quo, employers and employees are encouraged to work out mutually satisfactory arrangements that fit within current legislative provisions, and can draw on the mediation services of the Department of Labour to assist them to do so. There are flexible provisions within the legislation on when breaks can be taken.

There is concern in both the public and private sectors about the workability of the rest breaks and meal breaks provisions of the principal Act. It appears likely that the current provisions may be overly prescriptive in practice in relation to what constitutes a genuine break and the extent of flexibility about when it may be taken. This appears to be limiting the capacity of workplaces in some sectors to imple-

ment rest breaks and meal breaks that comply with the legislation and do not compromise service or production continuity.

Under the status quo, an inability to reach agreement on rest breaks and meal breaks in the air traffic sector risks causing disruption to scheduled air traffic services in sole watch tower-operated regional airports to enable rest and meal breaks to be taken. These watch towers are planned to close during breaks as from 1 November 2009. This would be likely to have a negative effect on regional economies, affecting both business and tourist traffic.

There are indications the current provisions are creating difficulties in other sectors as well, particularly in sole-charge situations. Employees in such circumstances may need to maintain a level of situational awareness during breaks such that the breaks are likely to be considered to be of an insufficient nature. Amending legislation to increase the flexibility of the principal Act appears to be the safest route, legally, to address the problem.

Objectives

The objectives for considering options are effectiveness; timeliness in addressing the current air traffic control problem; consistency with the objectives of the principal Act; cost-effectiveness; minimisation of regulatory compliance cost; and minimisation of potential risks to other government priorities.

Alternative options

Enact changes to a civil aviation enactment through a rule amendment

Although this option has the benefit of addressing the present problem in sole-operated watch towers in regional airports, it carries a number of legal risks.

Exempt essential services from the requirement to comply with Part 6D

This would have the advantage of limiting regulatory impact to certain defined services. However, it carries risks of creating further pressure for ad-hoc exemptions on other provisions, and opening up ongoing requests for Ministerial intervention in particular cases. It

could also give the impression that some employers have no obligation to consider the rest breaks and meal breaks needs of their employees, encouraging a focus on gaining an exemption rather than developing workable arrangements in good faith. If it resulted in a large majority of the workforce being exempt from the requirement, it could severely undermine the purpose of having rest breaks and meal breaks provisions. There are potentially significant administration costs and regulatory compliance costs in determining the set of services to be exempted.

Repeal Part 6D of the principal Act

Under this option, Part 6D of the principal Act would be repealed so that the situation would revert to that which was in place before 1 April 2009. That is, there would continue to be a requirement on employers to provide needed rest and opportunity for refreshment during the working day under the requirements of the Health and Safety in Employment Act 1992 relating to the employer's duty of care in relation to fatigue. The current circumstances do not appear to warrant this course of action, and it would be likely to be viewed by employees and unions as a unilateral removal of an employment right. Some employers might interpret it as a mandate to withdraw appropriate rest break and meal break entitlements negotiated with employees. Repeal could also create a legislative gap by removing the element of the principal Act that provides for rest breaks required for well-being and work-life balance.

Preferred option

Under this option, the principal Act would be amended to—

- require employers to either provide meal breaks and paid rest breaks or compensatory measures:
- encourage employers and employees to agree in good faith on rest break and meal break arrangements:
- ease requirements in order to increase flexibility in what is considered to constitute a break.

Employment agreements already in place on the date the amendment Act comes into force would continue, with the new provisions in Part 6D applying to them. The new legislation would not require agreements to be renegotiated.

Relaxing the rest break and meal break provisions of the principal Act as proposed would improve the workability of the rest break and meal break provisions and improve consistency with the overall intent of the principal Act. It would also improve consistency with the flexible provision for infant feeding breaks and facilities in Part 6C of the principal Act, and consistency with provision for flexible working arrangements for people with caring responsibilities set out in Part 6AA of the principal Act.

It would have the advantage of both addressing the problem relating to sole-operated air traffic control tower staff and addressing concerns about what constitutes a break in other sectors as well. It maintains a clear signal that employees should be able to have rest breaks and meal breaks, but does not do so in a way that imposes a compliance cost on business or an administrative cost on government.

Less prescriptive provisions may create uncertainty about what the expectations are of adequate rest breaks and meal breaks, although this can be mitigated through issuing an approved code of practice.

Implementation and review

The proposed Bill is intended to receive its Royal assent no later than 30 December 2009, and come into force the day after Royal assent. Any adjustments to employment agreements flowing from the legislative change can be made as part of wider employment agreement processes.

The intended development of an approved code of practice on rest breaks and meal breaks to be issued by the Minister of Labour will provide non-prescriptive guidelines highlighting the recommended duration and frequency of rest breaks and meal breaks to assist employers and employees in negotiating arrangements that are suitable for their workplaces.

Disputes in relation to these provisions would be subject to mediation by Department of Labour mediators on request of either employers or employees. The Employment Relations Authority also has an enforcement role; for instance, it can issue fines in cases where employers are found to have failed to comply with the legislation.

The Department of Labour will develop and implement an evaluation plan on the impacts of the provisions within 12 months of enactment of the Bill.

Consultation

Officials have advised they have concerns about developing the proposed amendments to the rest breaks and meal breaks provisions of the principal Act at speed and without adequate consultation. This may result in policy being designed and implemented with unintended consequences, including unforeseen regulatory compliance impacts and administrative costs.

The following government agencies were consulted on issues and options for addressing the air traffic control disagreement about rest and meal breaks, and have been informed of the contents of this paper: the Ministry of Transport, the Department of the Prime Minister and Cabinet, the Ministry of Justice, the Ministry of Economic Development, the Ministry of Women's Affairs, the Ministry of Pacific Island Affairs, the Treasury, the Crown Law Office, the Crown Company Monitoring Advisory Unit, and Te Puni Kōkiri. The Ministry of Transport consulted the Civil Aviation Authority earlier on the issues in air traffic control towers. Due to time constraints, wider consultation with other relevant stakeholders has not occurred, including Business New Zealand and the New Zealand Council of Trade Unions, although the Bill has been discussed in general terms with these organisations.

Hon Kate Wilkinson

Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill

Government Bill

Contents

		Page
1	Title	2
2	Commencement	2
3	Principal Act amended	2
Part 1		
Amendments relating to entitlement to rest breaks and meal breaks		
4	Interpretation	2
5	New sections 69ZD to 69ZEA substituted	2
	69ZD Employee's entitlement to rest breaks and meal breaks	2
	69ZE Timing and duration of rest breaks and meal breaks	3
	69ZEA Compensatory measures	4
Part 2		
Related amendments		
6	Penalty	4
7	New sections 69ZG and 69ZH substituted	4
	69ZG Relationship between Part and employment agreements	4
	69ZH Relationship between Part and other enactments	5

The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Employment Relations (Rest Breaks and Meal Breaks) Amendment Act **2009**.
- 2 Commencement** 5
This Act comes into force on the day after the date on which it receives the Royal assent.
- 3 Principal Act amended**
This Act amends the Employment Relations Act 2000.
- Part 1** 10
**Amendments relating to entitlement to
rest breaks and meal breaks**
- 4 Interpretation**
Section 69ZC is amended by inserting the following definition before **work period**: 15
“**compensatory measure**—
“(a) means a measure that is designed to compensate an employee for a failure to provide rest breaks or meal breaks in accordance with **section 69ZD(1)**; and
“(b) includes (without limitation) a measure that provides 20
the employee with time off work at an alternative time during the employee’s work period, for example, a later start time, an earlier finish time, or an accumulation of time off work that may be taken on 1 or more occasions”. 25
- 5 New sections 69ZD to 69ZEA substituted**
Sections 69ZD and 69ZE are repealed and the following sections substituted:
“**69ZD Employee’s entitlement to rest breaks and meal breaks**
“(1) An employee is entitled to, and an employer must provide the 30
employee with, rest breaks and meal breaks that—

- “(a) provide the employee with a reasonable opportunity, during the employee’s work period, for rest, refreshment, and attending to personal matters; and
 - “(b) are appropriate for the duration of the employee’s work period. 5
- “(2) The employee’s entitlement to rest breaks and meal breaks may be subject to restrictions, but only if the restrictions—
- “(a) are reasonable and necessary, having regard to the nature of the employee’s work; and
 - “(b) relate to 1 or more of the following: 10
 - “(i) the employee continuing to be aware of his or her work duties, or if required, continuing to perform some of his or her work duties, during the break:
 - “(ii) the circumstances when an employee’s break may be interrupted: 15
 - “(iii) the employee taking his or her break in the workplace or at a specified place within the workplace.
- “(3) An employee’s entitlement to rest breaks under this section is to paid rest breaks.
- “**69ZE Timing and duration of rest breaks and meal breaks** 20
- “(1) An employee must take his or her rest breaks and meal breaks—
- “(a) at the times and for the duration agreed between the employee and his or her employer; but
 - “(b) in the absence of such agreement, at the reasonable 25 times and for the reasonable duration specified by the employer.
- “(2) For the purposes of **subsection (1)(b)**, an employer may specify reasonable times and durations that, having regard to the employer’s operational environment or resources and the employee’s interests, enable the employer to maintain continuity of service or production. 30
- “(3) An employer must provide an employee with a reasonable opportunity to negotiate with the employer and reach agreement under **subsection (1)(a)** on the times when the employee’s 35 rest breaks and meal breaks are to be taken and on the duration of the breaks.

“(4) To avoid doubt, **subsection (3)** does not limit the requirement of the employer and employee to deal with each other in good faith as set out in section 4.

“**69ZEA Compensatory measures**

“(1) An employer is not required to provide rest breaks and meal breaks in accordance with **section 69ZD(1)**— 5

“(a) to the extent that the employer and the employee agree that the employee is to be provided with compensatory measures; or

“(b) if **paragraph (a)** does not apply, only to the extent that having regard to the nature of the work performed by the employee, the employer cannot reasonably provide the employee with rest breaks and meal breaks. 10

“(2) To the extent that the employer is not required to provide rest breaks and meal breaks in accordance with **section 69ZD(1)**, an employee is entitled to, and the employer must provide the employee with, compensatory measures. 15

“(3) If an employer provides an employee with compensatory measures that involve time off work at an alternative time during the employee’s work period, the employee is entitled to the same amount of time off work that relates to the duration of the employee’s breaks if the employee had taken rest breaks and meal breaks.” 20

Part 2
Related amendments 25

6 Penalty

Section 69ZF is amended by omitting “sections 69ZD and 69ZE” and substituting “**sections 69ZD(1) or 69ZEA**, as the case may be.”.

7 New sections 69ZG and 69ZH substituted 30

Sections 69ZG and 69ZH are repealed and the following sections substituted:

“**69ZG Relationship between Part and employment agreements**

“(1) This Part does not prevent an employer providing an employee with enhanced or additional entitlements to rest breaks and 35

meal breaks (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.

“(2) An employment agreement that excludes, restricts, or reduces an employee’s entitlements under **section 69ZD(1) or 69ZEA**—

5

“(a) has no effect to the extent that it does so; but

“(b) is not an illegal contract under the Illegal Contracts Act 1970.

“**69ZH Relationship between Part and other enactments**

Where an employee is a person who is required to take rest breaks or meal breaks by, or under, another enactment, the requirement for rest breaks or meal breaks defined by, or under, the other enactment applies instead of this Part.”

10