



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Regulatory Systems (Workplace Relations) Amendment Bill

06/12/2016

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1 Introduction

- 1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Regulatory Systems (Workplace Relations) Amendment Bill (Bill).
- 1.2 This is an omnibus bill containing technical amendments intended to clarify and update provisions in the Employment Relations Act 2000 and the Parental Leave and Employment Protection Act 1987. The Law Society's submission focuses on technical drafting issues and suggests changes to better achieve the purpose of the Bill.

2 Employment Relations Act 2000 – Part 1 of the Bill

Section 142W amended—Involvement in breaches

- 2.1 Clause 4 is intended to amend section 142W of the Employment Relations Act 2000 (ER Act) to clarify the circumstances in which a person is regarded as being involved in a breach of employment standards, where the breach is committed by a company, partnership, limited partnership, or sole trader.
- 2.2 The Departmental Disclosure Statement at paragraph 3.4 states that “the amendment brings the provision in line with the original policy intent. As [section 142W is] currently drafted, the provision could be read that only officers of the employer could be found to be involved in a breach, i.e. that third parties who do not hold a position in the employer could not be found to be involved in a breach”.
- 2.3 Insofar as section 142W relates to a person who holds a position in an entity (that breaches employment standards), the proposed amendments to section 142W(2) and (3) make it clearer that the person will be treated as being involved in a breach only if they are an officer of the entity.
- 2.4 However, the proposed amendments are not clear in relation to *third parties* who do not hold a position in the entity that committed the original breach also being able to be found to be “involved in the breach” if they carry out any of the actions in section 142W(1).
- 2.5 The lack of clarity could be resolved by adding a subclause (5) that states:
 - (5) For the avoidance of doubt, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, and a person who does not hold a position in the entity has carried out any of the actions in section 142W(1), then that person can be found to be involved in a breach.
- 2.6 Alternatively, the provisions could be amended to specify those persons who cannot be found to be involved in a breach.
- 2.7 Furthermore, if section 142W is amended by clause 4 as currently drafted, officers of the primary breacher/employer can be held liable as a person involved if they do any of the acts in section 142W(1), but other employees of the primary breacher (referred to as persons ‘holding a position’ in the primary breacher/employer) will not be liable.
- 2.8 However, third parties who may be held liable as persons involved would include anyone who could be described as a “person”. This would include not only third party corporate entities, but individuals such as officers and other employees of third parties. Therefore, non-officer employees of third parties could be held personally liable for conduct where non-officer employees of the primary breacher/employer could not be. The Law Society draws this to the attention of the Committee in case it wishes to obtain advice from officials regarding an amendment to the Bill.

Section 142W amended—definition of officer

2.9 The definition of “officer” in section 142W(3) includes:

- (e) any other person occupying a position in relation to the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

2.10 This definition differs from the definition of an officer of a person conducting a business or undertaking (PCBU) provided in section 18 the Health and Safety at Work Act 2015 (HSW Act):

- (a) means, if the PCBU is—
 - (i) a company, any person occupying the position of a director of the company by whatever name called:
 - (ii) a partnership (other than a limited partnership), any partner:
 - (iii) a limited partnership, any general partner:
 - (iv) a body corporate or an unincorporated body, other than a company, partnership, or limited partnership, any person occupying a position in the body that is comparable with that of a director of a company; and
- (b) includes any other person occupying a position in relation to the business or undertaking that allows the person to exercise significant influence over the management of the business or undertaking (for example, a chief executive); but
- (c) does not include a Minister of the Crown acting in that capacity; and
- (d) to avoid doubt, does not include a person who merely advises or makes recommendations to a person referred to in paragraph (a) or (b).

2.11 The Law Society suggests that, unless there is a good reason for the difference, the two definitions of “officer” should be consistent to avoid the situation where an individual is an officer for the purposes of the HSW Act, but not for the purposes of the ER Act.

3 Parental Leave and Employment Protection Act 1987 – Part 2 of the Bill

Section 71K amended (Start of parental leave payment)

3.1 Clause 6 is intended to amend section 71K to provide for a person’s parental leave start date where a primary carer of a preterm baby elects to forgo some or all of their entitlement to preterm baby payments and return to work in between the birth of the baby and starting their period of paid parental leave.

3.2 Under proposed section 71K(2), the start date for a parental leave payment specified in proposed section 71K(3) applies if:

- (a) a person is entitled to a preterm baby payment under section 71DA(1); and
- (b) the parental leave payment period in respect of the child has not already begun but been suspended under section 71DA(5).

3.3 The reference in proposed section 71K(2)(b) to a parental leave payment period that has not begun but has been suspended, is illogical: for a payment period to be “suspended” it would need to have commenced, otherwise, it would be “postponed” or “forgone”.

3.4 In addition, proposed section 71K(3)(b) does not accord well with section 71DA(5). This provision concerns a person who is already “receiving” a parental leave payment which subsequently must be suspended if the person becomes entitled to a preterm baby payment:

(5) If a person who is receiving a parental leave payment in respect of a child becomes entitled to a preterm baby payment in respect of that child, —

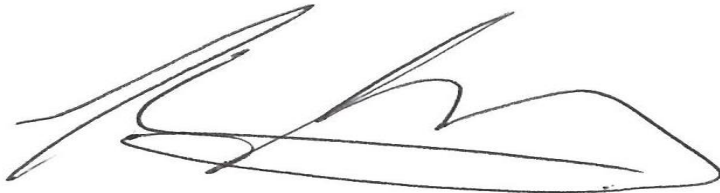
(a) the person’s parental leave payment must be suspended for the period in relation to which a preterm baby payment is made to the person; and

... (emphasis added)

3.5 The objective of the proposed amendment would more clearly be achieved if the language from page 3 of the Explanatory Note was adopted and for section 71K(2) to refer to the preterm baby payment having been “forgone” or the payment recipient having returned to work during that interim period.

4 Conclusion

4.1 The Law Society does not wish to appear in support of this submission, but is available to meet with officials advising the Committee if that would be of assistance.

A handwritten signature in black ink, appearing to be 'Kathryn Beck', written in a cursive style.

Kathryn Beck
President
6 December 2016