

National Labour Law Profile: New Zealand

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General legal framework

New Zealand's legal system is not based on an enacted legal constitution. Legal rights and obligations in New Zealand stem primarily from statutes enacted by the New Zealand Parliament and from the common law developed by the Courts that make up New Zealand's judiciary. Statutes applying in various areas of the law (although not in employment law) are also increasingly incorporating principles set out in the Treaty of Waitangi. This Treaty was entered into in 1840 by representatives of Great Britain and a large number of Maori Tribes in New Zealand.

From a constitutional perspective, the most significant statute is the New Zealand Bill of Rights Act 1990. This Act seeks to affirm, protect and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. This Act expressly recognises a number of fundamental rights including the freedom of expression, the freedom of association and the freedom of movement.

Web links to the Constitution: <http://www.uni-wuerzburg.de/law/au000000.html>

Labour legislation

A general overview

New Zealand labour law derives from two sources; statute (Acts of Parliament) and common law (principles developed by Courts and Tribunals). There are a series of statutes that make up what is frequently referred to as the "minimum code". This series of statutes sets out the minimum entitlements of New Zealand employees.

Of these statutes, the most important is the Employment Relations Act 2000, enacted on 2 October 2000 (the "ER Act"). The ER Act repealed the Employment Contracts Act 1991 (the "ECA"). The ECA attracted considerable international attention when it was enacted in 1991 and subsequently, because it adopted a classical contractual approach to the employment relationship and was based on the assumption that employers and employees had equal bargaining power. Although opinion on the value of the ER Act remains divided in some sectors, the predominant view is that this latest Act introduces a considerably more orthodox and moderate approach to labour market regulation.

The ER Act is supplemented by a number of other statutes that have implications for the employment relationship and the labour market (see the next section below). Where litigation or disputes arise between parties to employment relationships, and those disputes involve the interpretation or application of one or more of these statutes, the task of interpreting and applying the statute falls to the Employment Relations Authority, the Employment Court and the New Zealand Court of Appeal. On matters relating to labour law, there is no appeal from the New Zealand Court of Appeal to the Privy Council (unlike in a number of other areas of New Zealand law).

Although these various statutes establish the minimum entitlements of New Zealand employees, they do not amount to a “Labour Code” in the true sense of the concept. There is considerable scope for courts to apply and develop common law principles. For the most part, these principles derive from the British common law.

Collective agreements and individual employment agreements also record rights of obligations of employers, employees and their representatives and are enforceable under the ER Act. Although these documents are binding on the parties concerned, they do not constitute "law" as such.

Major Sources of Labour Law

The [most important statutes applying to the labour market and to the employment relationship in New Zealand](#) are:

The ER Act - this Act enacts a number of core provisions on freedom of association, recognition and operation of unions, collective bargaining, collective agreements, individual employment agreements, employment relations education leave, strikes and lockouts, personal grievances, disputes, enforcement of employment agreements, the Mediation Service, the Employment Court, the Employment Relations Authority and labour inspectors;

The Bill of Rights Act 1990 - sets out fundamental freedom such as freedom of association, freedom of peaceful assembly, freedom of expression and the like;

The Holidays Act 1981 - sets out minimum entitlements to three weeks paid annual holiday; five days special leave (for sickness, bereavements and the like) for each 12 month period of employment; and 11 days of public holidays per year;

Parental Leave and Employment Protection Act 1987 - sets out entitlements of employees to parental leave (at this stage unpaid, although there is currently a proposal before the New Zealand Parliament for the introduction of paid parental leave);

Minimum Wage Act 1983 - sets out minimum wage rates for employees;

Privacy Act 1993 - sets out various privacy principles including those on the collection, use and disclosure of personal information. Personal information includes information held about employees;

The Equal Pay Act 1972 - an Act which seeks to remove and prevent discrimination, based on the sex of an employee, in the rates of remuneration paid to employees;

The Health and Safety in Employment Act 1992 - this Act requires employers and employees to take steps to maintain a safe work place;

The Accident Insurance Act 1998 - this Act sets out the no fault scheme in New Zealand whereby employees who suffer an injury at work have an entitlement to compensation from a State funded insurance scheme. As a result of this scheme, employees are not able to sue at common law for compensatory damages for such injuries;

The Human Rights Act 1993 - this Act expressly prohibits discrimination on certain stated grounds including sex, race, family status, political opinion and the like. The ER Act expressly incorporates these prohibitions into the employment context.

Contract of employment

The majority of employees in New Zealand work under employment agreements of an indeterminate duration, which can be terminated for just cause. However, fixed term employment agreements are permissible provided the employer has genuine reasons based on reasonable grounds for specifying that a particular employee's employment will come to an end at the conclusion of a specified term.

Collective employment agreements must include an expiry date, which provides for a term of no longer than three years. Upon the expiry of such agreements, the employment of the employees who were covered by those documents continues on the same terms, albeit on an individual basis, until such time as a new collective agreement is agreed to, if at all.

It is also permissible to have part-time, casual, and apprenticeship employment agreements, and such agreements are enforceable in the same fashion as employment agreements of an indeterminate tenure.

There is no provision in New Zealand law for the suspension of a contract of employment in times of plant closure or economic downturn. Such cases are dealt with by way of redundancy termination. Employment agreements can, however, be suspended during industrial action where, because of strike action taken by their colleagues, there is no longer work available for particular employees. Although the employment relationship continues during periods of such suspension, the employer has no obligation to pay wages while the suspension remains in force.

Under the ER Act, the termination of any employee must be for sufficient cause and carried out in a procedurally fair manner. Where an employee's employment is terminated in a manner inconsistent with these two requirements, that employee can commence a personal grievance claim, the remedies for which include reinstatement, an award of lost wages and benefits, and compensation for humiliation and distress. Reasons for justifiable termination include redundancy (where an employee's position of employment is surplus to the requirements of an employer), poor performance, serious misconduct, and inability to perform employment due to continuing illness.

Hours of work (including overtime compensation)

Hours of work and overtime payments are matters to be agreed between each employee and their employer. The usual working week is 40 hours, although there is nothing to prevent employees and employers agreeing to a great or lesser number of working hours during the week. In many professions there is no additional payment for overtime, although in a number of blue-collar sectors, collective agreements and individual employment agreements specifically provide for overtime payments. Where employees work on one of the 11 annual public holidays, and that day is usually a working day for that employee, then by law the employee is entitled to a paid day off at a later date.

Paid leave

The entitlement to a minimum of 3 weeks paid holiday per year after 12 months continuous employment is set out in the Holidays Act, as is the entitlement to at least 5 days special leave for each 12 month period of employment after the first 6 months continuous employment. Special leave can be used for such matters as illness of the employee, his or her spouse or dependants, and bereavements.

Maternity protection; maternity leaves; paternity leave

The Parental Leave and Employment Protection Act 1987 provides minimum entitlements to unpaid parental leave for both mothers and fathers in respect of the birth or adoption of a child. The leave entitlements under the Act are for periods not exceeding 14 weeks (for maternity leave) 2 weeks (for paternity leave), a total of 52 weeks (for extended parental leave), and 10 days (special leave, which can be taken by a female employee who is pregnant, before she takes maternity leave, for reasons connected with her pregnancy).

The New Zealand Parliament is currently considering a proposal to introduce paid parental leave. The details of this proposal are still being finalised by the Government, but early indications are that the scheme may involve 12 weeks paid leave at 80% of salary.

Equality

The Equal Pay Act 1972 prohibits any employer from refusing or omitting to offer or afford any person the same terms of employment, conditions of work, fringe benefits, and opportunities for training, promotion and transfer as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description, by reason of the sex of that person.

The Human Rights Act 1993 also expressly prohibits discrimination on various grounds including sex, which includes pregnancy and childbirth, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, family status and sexual orientation.

Minimum wage fixing

Minimum wage rates are set in New Zealand through Minimum Wage Orders (Regulations brought into force under the Minimum Wage Act 1983). At present, there are separate minimum wages for workers between the ages of 16 and 20, and for workers 20 years of age and upwards. Employees aged 20 years and above are entitled to a minimum gross wage of \$302 per week, \$7.55 per hour, or \$60.40 a day depending on how they are paid. Employees between the ages of 16 and 20 years are entitled to \$182 per week, \$4.55 per hour, or \$36.40 per day.

Trade union regulation

By international standards, the regulation of unions in New Zealand is not excessive. The Trade Unions Act 1908 sets out the legal basis for Trade Unions. In addition, various provisions in the ER Act provide a simple process for registration and operation of unions. These include sections dealing with:

- the need for a union to file an annual return of members;
- when a society is entitled to be registered as a union;

how a society obtains registration; and
the circumstances in which a union's registration can be cancelled.

Perhaps the most notable feature of these provisions is the requirement that in order to be registered as a union, a society must be independent of, and constituted and operated at arm's length from any employer.

Unions can represent their members' collective interests and their individual interests. The minimum number of members required to form a union is 15.

Collective bargaining and agreements

In contrast to the ECA, a primary objective of the ER Act is to encourage collective bargaining. Indeed, section 3 of the ER Act states that 1 of the 2 objectives of the ER Act is to encourage compliance with ILO Conventions 87 and 98.

Collective bargaining can occur at any level within the labour market, including nationally, and at the level of industry, multi-employer, specific enterprise and enterprise. A collective agreement can, by law, bind as few as two employees.

The ER Act enacts for the first time in New Zealand a statutory duty to bargain in good faith. This duty applies to unions and employers bargaining for a collective agreement. Collective bargaining commences by the issuing of an initiating notice by either a union(s) or an employer(s). Although the duty to bargain in good faith sets out certain minimum requirements (such as the obligation to meet and consider and respond to proposals made by each party) the duty does not compel agreement on any particular term or the ultimate settlement of a collective agreement.

There is no provision for arbitration to deal with instances where parties are unable to settle a collective agreement, although mediation services are available. Both employers and employees are entitled to engage in economic sanctions (strikes and lockouts) to support their bargaining claims.

Collective agreements may contain any matter agreed to by the parties, provided it is not contrary to law or the ER Act. Collective agreements must contain certain minimum provisions including:

- a coverage clause;
- a clause dealing with the rights and obligations of employees if their work were to be contracted out or if part of the business of the employer were to be transferred or sold;
- a plain language explanation of the services available for resolving employment relationship problems;
- a variation clause; and
- an expiry date.

Where a new employee commences employment in a work place and a current collective agreement exists in the workplace that covers the type of work that employee will perform, the employee's terms and conditions for the first 30 days of their employment shall automatically be those set out in the collective agreement. At

any time during the 30 days or thereafter, the employee has the right to join the union, which negotiated the collective agreement, and upon doing so the employee becomes bound by the collective agreement. Where there is no applicable agreement in the work place, or the employee chooses not to join the union that negotiated that agreement, the employee's terms and conditions will be those set out in an individual employment agreement entered into by the employer and the employee.

Strikes and lockout regulation

Strikes and lockouts are unlawful during the tenure of a collective agreement (except in certain circumstances, such as where the strike or lockout relates to health or safety or it occurs in the last few weeks of a document's term in support of new collective bargaining).

Where employees who work in an essential service wish to strike and that strike will affect the public interest, a prescribed period of notice must be provided to the employer and the Chief Executive of the Department of Labour. Under the ER Act, mediation services are to be made available to parties in essential services before they strike so as to enable the parties to endeavour to mediate their differences and avoid industrial action. Lawfully striking employees cannot be lawfully dismissed, nor can they be discriminated against by reason of the strike.

Under the ER Act, it is lawful for an employer to ask staff members to perform the tasks of their striking or locked out employees, provided the employees asked to perform the work in question:

were already employed at the time the strike or lock-out commenced;
are not employed principally for the purpose of performing the work of a striking or locked out employee; and
agree to perform the work in question.

The mediation service, the employment relations authority and the employment court

The ER Act places a heavy emphasis on mediation. Wherever an employment relationship problem arises the parties are encouraged to attempt to resolve it through discussions amongst themselves. An employment relationship problem can be anything, which causes a problem in the employment relationship such as a personal grievance, a dispute about the operation of an employment agreement or claim of breach of a statutory entitlement. If parties are unable to resolve the problem themselves, either party can seek the assistance of a mediator from the Department of Labour.

If mediation is also unsuccessful in resolving the problem, either party can ask for a determination (a decision) from the Employment Relations Authority. The Authority has wide powers to grant remedies and to determine the merits of a particular problem. If either party is dissatisfied with the decision of the Authority, it may ask to have the matter heard afresh by the Employment Court. In limited cases, there is then a right of appeal from the Employment Court to the Court of Appeal.

Disputes between unions and employers in the context of collective bargaining or collective agreements are dealt with in the same fashion and in the same institutions as described in the previous paragraph.

In certain types of disputes, the Employment Court rather than the Employment Relations Authority has jurisdiction in the first instance to decide the claim. This includes applications for injunctions to prevent a threatened strike or lockout.

Links

[New Zealand Constitution](#)

[Full text of NZ Statutes](#)

[Information on various NZ Laws](#)

[Links to various databases in NZ](#)

[NZ Council of Trade Unions website](#)

[NZ Employers Federation website](#)

[ILO Conventions ratified by New Zealand](#)

[Comments of the ILO Supervisory Bodies on New Zealand](#)

[NATLEX ILO Database of National Legislation](#)

Official gazette

New Zealand Gazette. No. 1 (1 Jan 1859)-present; Wellington, Published for the New Zealand Government at the Printer's Office, 1859-present.

Selected publications

G. R. Barker: *An Economic Analysis of Trade Unions and the Common Law*. Aldershot, Avebury, 1997.

Butterworths Employment Law Guide. 3rd ed., Wellington, Butterworths, 1997.

P. Churchman, W. Grills (seminar leaders): *Employment Contracts Act Revisited*. New Zealand Law Society Seminar, Wellington, New Zealand Law Society, 1992.

A.J. Geare: *Industrial Relations: A General Introduction and the New Zealand System*. 3rd ed., Dunedin, Firre, 1995.

G. Davenport: The legal obligation to bargain in good faith in the New Zealand labour market : rhetoric or reality? *New Zealand Journal of Industrial Relations*. Vol. 24, No. 1 (Feb. 1999).

M. McDowell, D. Webb: *The New Zealand Legal System: Structures, Processes and Legal Theory*. 2nd ed., Wellington, Butterworths, 1998.

R. Harbridge and A. Crawford: The effects of the Employment Contract Act on representation and collective bargaining in the thoroughbred racing industry in New Zealand. *New Zealand Journal of Industrial Relations*. Vol. 25, No. 1 (Feb. 2000).

P. S. Morrisson (ed.): *Labour, Employment and Work in New Zealand* (Conference Proceedings) Victoria University, Wellington, 1994.

R. D. Mulholland: *Introduction to the New Zealand Legal System*. 8th ed., Wellington, Butterworths, 1998.

New Zealand Recent Law Review. Auckland, Butterworths, Vol. 1 no. 1 (Feb 1975) – present.

The Next Decade of Change. New Zealand Business Roundtable, Wellington, 1994.

D. R. Nolan (ed.): *The Australasian Labour Law Reforms: Australia and New Zealand at the End of the Twentieth Century*. Sydney, Federation Press, 1998.

J. B. O'Keefe, W. L. Farrands: *Introduction to New Zealand Law*. Wellington, Butterworths, 1980.

T. H. Reynolds, A. A. Flores: *Foreign Law: Current Sources of Codes and Legislation in Jurisdictions of the World*. AALL Publishing Services, Littleton Colorado, Rothman & Co., Release 1/98.

J. L. Robson (ed.): *New Zealand: the Development of its Laws and Constitution* 2nd ed. London, Stevens, 1967.

P. Spiller: *A New Zealand Legal History*. Wellington, Brooker's, 1995.

K. Toogood, P. Muir (seminar leaders): *Employment Contracts Bill*. New Zealand Law Society Seminar, Wellington, New Zealand Law Society, 1991.

R. Wilson: *The decade of non-compliance; the New Zealand government record of non-compliance with international labour standards 1990-98*. New Zealand Journal of Industrial Relations. Vol. 25, No. 1 (Feb. 2000).