

Immigration New Zealand Update

On 1 April 2017, the Ministry of Business, Innovation and Employment (MBIE) will enforce stand-down periods for non-compliant employers who breach employment standards. Those employers will not be able to recruit migrants for a period of time after an infringement.

On Thursday 23 February, the Minister for Immigration and Workplace Skills and Employment announced measures to restrict access to migrant labour by employers who have incurred employment standards-related penalties. These new measures demonstrate that the exploitation of workers - including migrants who may be less likely to be aware of their rights and entitlements than New Zealand workers - will not be tolerated.

New Zealand employers must comply with New Zealand's regulated minimum employment standards, and this is reflected in current immigration instructions. The new measures will provide a defined threshold and will mean that, in situations where an employer has incurred a penalty for a breach of employment standards, there will be a set stand-down period preventing them from recruiting migrant labour for either six months, one year, 18 months, or two years, depending on the severity of the breach.

The intention is not to restrict access to migrant labour for minor and inadvertent breaches, and so the threshold is set at formal infringement notices and above. The threshold for non-compliance will be when an employer or director or officer of the employer has incurred an employment standards-related penalty.

For employers who have incurred penalties or infringement notices before 1 April 2017, while no formal stand-down period will be applied, INZ will have a list of these employers and visa applications will be judged against immigration instructions which require compliance with employment law.

Questions and Answers

WHY AREN'T NON-COMPLIANT EMPLOYERS ALREADY RESTRICTED FROM EMPLOYING MIGRANTS?

All employers have to comply with regulated minimum employment standards and this is reflected in current immigration instructions. But there isn't a clear threshold set for when non-compliance with employment standards becomes unacceptable for immigration purposes (as opposed to non-compliance of a very minor or accidental nature).

These new measures provide a threshold and will mean that, in situations where an employer has incurred a penalty for a breach of employment standards, there will be a set stand-down period preventing them from recruiting migrant labour for either six months, one year, 18 months, or two years, depending on the severity of the breach.

WHAT KIND OF PENALTY IS INCLUDED?

Employment standards-related penalties extend from formal infringement notices issued by the Labour Inspectorate (following a Labour Inspectorate investigation) through to penalties issued by the Employment Relations Authority or the Employment Court, or banning order issued by the Employment Court.

Employers issued with penalties as a result of private actions taken by employees either through the Employment Relations Authority or the Employment Court are also included.

WHAT IF A BREACH IS MINOR?

The threshold for non-compliance does not include employers at the very minor end of breaches, such as those who have entered into an enforceable undertaking with the Labour Inspectorate, have mostly adequate wage and time records and demonstrate a desire to comply. The intention is not to restrict access to migrant labour for minor and inadvertent breaches, and so the threshold is set at formal infringement notices and above.

HOW WILL THIS BE GIVEN EFFECT TO?

The Minister will make an addition to the existing immigration instructions.

A list of non-compliant employers will be produced and maintained by the Labour Inspectorate and shared with Immigration New Zealand to ensure that employers on the list are not able to recruit migrant labour.

Employers who meet the threshold for non-compliance will be informed of their stand-down period preventing them from recruiting migrant labour, and when their non-compliant status will expire

WHAT RIGHT OF REPLY WILL AN EMPLOYER HAVE WHO'S HAD A STAND-DOWN PERIOD IMPOSED?

There are various means currently available for employers to challenge all final enforcement action decisions. These range from:

- the right to request a hearing at the District Court for infringement notice
- challenging an Employment Relations Authority determination seeking a hearing at the District or Employment Court
- appealing a District or Employment Court decision.

If, as a result of an employer's challenge, the decision regarding their penalty is overturned, then the employer would again become eligible to recruit migrant labour.

HOW WILL THE LENGTH OF THE STAND-DOWNS BE DETERMINED?

The stand-down period will be proportionate to the seriousness of the breach, and therefore the penalty amount. There will be a fixed gradation aligned with the level of the penalty. For example, when a penalty is issued to a company:

- a 6 month stand-down will apply for a penalty up to and including \$1000
- a 12 month stand-down will apply for penalties over \$1000 but less than \$20,000
- an 18 month stand-down will apply for penalties of \$20,000 and over but less than \$50,000
- a 24 month stand-down will apply for penalties of \$50,000 and above.

HOW MANY EMPLOYERS WILL THIS AFFECT?

A precise figure is not available but the figures for those employers who incurred penalties over the past year give a rough indication of the potential number of employers who might meet the non-compliant threshold.

- 47 infringement notices (with 20 issued to employers of migrants) were issued by the Labour Inspectorate in the six months since infringement notices took effect in July last year.
- 72 penalties (with 25 of those issued to employers of migrants) were issued in 2015/16 financial year by the Employment Relations Authority for cases filed by the Labour Inspectorate.
- 16 penalties were issued to employers of migrants by the Employment Relations Authority for cases taken independently of the Labour Inspectorate 2015/16 financial year.

WHAT TYPE OF EMPLOYERS WILL THIS AFFECT?

The new measures will apply to all employers intending to recruit migrant labour, including those employers who are: supporting work visa applications and approvals in principle; seeking accredited employer status or supporting residence class visa applications based on employment; and employers who are part of the Recognised Seasonal Employer scheme.

HOW WILL THE PROPOSAL AFFECT BUSINESSES WHO RELY ON MIGRANT WORKERS?

The changes will not increase the powers of either labour inspectors or immigration officers. There will be no impact on compliant employers. There will, however, be an impact for some non-compliant employers who may consider the ability to recruit migrant workers as an entitlement rather than a privilege.

Improving the process for restricting access to migrant workers for non-compliant employers should also help to improve access for those employers who are compliant, creating incentives for employers to ensure they are complying with all their employment obligations.

WHAT HAPPENS IF EMPLOYERS ARE FOUND TO BE NON-COMPLIANT AND ALREADY HAVE MIGRANT WORKERS IN THEIR EMPLOYMENT?

These employees will be able to work out the duration of their work visa, but will not be granted further work visas to work for the non-compliant employer.

WILL THERE BE FLEXIBILITY TO ALLOW FOR SITUATIONS WHERE LABOUR MARKET NEEDS CHANGE – SUCH AS A HIGH DEMAND FOR CERTAIN SKILLS AS A RESULT OF EARTHQUAKES, FOR EXAMPLE?

Yes. As is currently the case, there is flexibility for situations such as changing labour market needs following an earthquake or other significant event. In such situations, where an employer is deemed to be non-compliant but specific circumstances may warrant an exception, the Minister of Immigration (or a delegated decision maker) would be able to grant a visa as an exception to immigration instructions. This would mitigate the risk of restrictions being applied in circumstances that were patently unreasonable, manifestly disproportionate or not in the national interest.

WILL THIS ONLY AFFECT EMPLOYERS WHO ARE PENALISED THROUGH THE LABOUR INSPECTORATE?

No. Employers who are taken to the Employment Relations Authority or to the Employment Court independently of the Labour Inspectorate will also be subject to stand down periods.

WILL THIS NEW MEASURE ONLY PROTECT MIGRANT WORKERS – NOT LOCAL WORKERS?

Local workers are protected by the existing employment standards regulatory and penalty regime. The right to recruit migrant workers is an additional privilege for employers and so we are putting constraints on that to ensure that non-compliant employers can't have ready access to the international labour market as well.