

Employment Relations (Protection for Kiwisaver Members) Amendment Bill

Member's Bill

Explanatory note

General policy statement

Since it became operational in 2007 the KiwiSaver scheme has attracted large numbers of New Zealanders and today has approximately 3 million active members. With such a vast membership, it is important that the workers who contribute to the scheme are protected by robust legislative safeguards. The Employment Relations Act 2000 (the **principal Act**) contained significant protections for workers, including for those enrolled in KiwiSaver, but amendments made by the Employment Relations Amendment Act 2008 repealed certain provisions of the principal Act, exposing these workers to potential discrimination.

Currently, under the principal Act, employers are not legally obliged to offer workers enrolled in KiwiSaver the same terms of employment, salary or wages, conditions of work, fringe benefits, or opportunities for training, promotion and transfer, as a worker not enrolled in the scheme. Employers are also permitted to offset pay increases against workers' KiwiSaver contributions. These legislative loopholes have the potential to significantly disadvantage New Zealanders saving for their retirement.

The majority of employers in Aotearoa New Zealand do the right thing by their workers, but a small minority will seek to circumvent their responsibilities in order to cut costs. It is important that such actions are prevented to the greatest extent possible by our legislation. This amending Bill would restore the protections provided for by the principal Act before it was amended in 2008 and ensure that the majority of workers cannot be discriminated against simply because they are members of a KiwiSaver scheme or a complying superannuation fund.

Clause by clause analysis

Clause 1 is the title clause.

Clause 2 provides for the Bill to come into force on the day after the date on which it receives the Royal assent.

Part 1

Amendments to Employment Relations Act 2000

Clause 3 states that this Part of the Bill amends the Employment Relations Act 2000 (the **principal Act**).

Clause 4 amends section 103 of the principal Act, which sets out the grounds for a personal grievance claim. The amendment re-inserts, by way of *new subsection (1)(ia)*, the ground relating to membership of a KiwiSaver scheme or a complying superannuation fund adversely affecting an employee's employment.

Clause 5 inserts *new section 110AA* into the principal Act. This section sets out the elements required to establish whether an employee's employment has been "adversely affected" for the purposes of a personal grievance claim.

Clause 6 and the *Schedule* amend Schedule 1AA of the principal Act, which provides application, savings, and transitional provisions relating to amendments made to the Act after 1 January 2013. The amendments insert a *new Part 4* into Schedule 1AA setting out the date on which the amendments made by *clauses 4 and 5* apply to employment agreements, variations to employment agreements, and any other matters.

Part 2

Amendments to KiwiSaver Act 2006

Clause 7 states that this Part of the Bill amends the KiwiSaver Act 2006 (the **principal Act**).

Clause 8 amends section 101B of the principal Act which relates to payment by an employer of compulsory contributions to salaries and salaries. The amendment signposts the requirements and application of the amendments made to the Employment Relations Act 2000 by *Part 1* of this Bill.

Dr Tracey McLellan

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Employment Relations (Protection for Kiwisaver Members) Amendment Act **2021**.

2 Commencement

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This Act comes into force on the day after the date on which this Act receives the Royal assent.

Part 1

Amendments to Employment Relations Act 2000

3 Principal Act

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This Part amends the Employment Relations Act 2000.

4 Section 103 amended (Personal grievance)

After section 103(1)(i), insert:

- (ia) that the employee's employment has been adversely affected because the employee is a member of a KiwiSaver scheme or a complying superannuation fund (as those terms are defined in section 4 of the KiwiSaver Act 2006); or

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5 New section 110AA inserted (Adverse affect test for membership of KiwiSaver scheme or complying superannuation fund)

After section 110, insert:

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110AA Adverse affect test for membership of KiwiSaver scheme or complying superannuation fund

- (1) For the purposes of **section 103(1)(ia)**, an employee's employment is adversely affected if—

- (a) the employee is a member of a KiwiSaver scheme or a complying superannuation fund; and

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- (b) the employee's employer refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills (**comparable employees**) employed in the same or substantially similar circumstances; and

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- (c) the reason (wholly or in part) for the employer doing any of those things is that the employee is a member of a KiwiSaver scheme or a complying superannuation fund.

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- (2) Without limiting **subsection (1)**, an employee’s employment is adversely affected if—
- (a) the employee’s salary or wages are less than the salary or wages of other comparable employees employed by the employee’s employer; and
 - (b) the reason (wholly or in part) for the situation described in **paragraph (a)** is that the employer has taken into account the compulsory contributions the employer is required to make in relation to the employee. 5
- (3) To avoid doubt, for the purposes of **subsection (2)(a)**, an employee’s salary or wages—
- (a) do not include any amount that recognises (wholly or in part) compulsory contributions made by the employer in relation to the employee; but 10
 - (b) do include deductions made by an employer on behalf of the employee, being the employee’s contributions to a KiwiSaver scheme or a complying superannuation fund.
- (4) In this section,— 15
- compulsory contributions** has the meaning given in section 101B(6) of the KiwiSaver Act 2006
- complying superannuation fund** has the meaning given in section 4 of the KiwiSaver Act 2006
- KiwiSaver scheme** has the meaning given in section 4 of the KiwiSaver Act 2006. 20
- 6 Schedule 1AA amended**
- In Schedule 1AA,—
- (a) insert the Part set out in the Schedule of this Act as the last Part; and
 - (b) make all necessary consequential amendments. 25

Part 2 Amendments to KiwiSaver Act 2006

- 7 Principal Act**
- This Part amends the KiwiSaver Act 2006.
- 8 Section 101B amended (Compulsory contributions must be paid on top of gross salary or wages except to extent that parties otherwise agree after 13 December 2007)** 30
- (1) In section 101B(5)(a), replace “matters.” with “matters; and”.
 - (2) After section 101B(5)(a), insert:

- (b) **sections 103(1)(ia) and 110AA** of the Employment Relations Act 2000 apply in relation to the contractual terms and conditions of the parties to an employment relationship, subject to **Part 4** of Schedule 1AA of that Act.

Schedule
**New Part 4 inserted into Schedule 1AA of Employment Relations
Act 2000**

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Part 4		5
Provisions relating to Employment Relations (Protection for Kiwisaver Members) Amendment Act 2021		
17	Interpretation	
	In this Part,—	
	2021 Act means the Employment Relations (Protection for Kiwisaver Mem- bers) Amendment Act 2021	10
	effective date means the date that is 3 months after the date on which the 2021 Act commences.	
18	Application of provisions arising from 2021 Act	
(1)	The amendments made by sections 4 and 5 of the 2021 Act, to the extent that they relate to terms and conditions in employment agreements,—	15
	(a) apply to employment agreements entered into on or after the effective date; and	
	(b) do not apply to employment agreements entered into before the effective date; and	20
	(c) apply to variations of employment agreements entered into before the effective date, if the variations were made on or after the effective date.	
(2)	The amendments made by sections 4 and 5 of the 2021 Act, to the extent that they relate to other matters, apply—	
	(a) only to matters occurring on or after the effective date; and	25
	(b) whether or not an employee’s employment agreement was entered into before the critical date.	