

# **Employment Relations (Restraint of Trade) Amendment Bill**

Member's Bill

As reported from the Education and Workforce Committee

## **Commentary**

### **Recommendation**

The Education and Workforce Committee has examined the Employment Relations (Restraint of Trade) Amendment Bill and recommends by majority that it not proceed. We recommend all amendments unanimously.

### **Introduction**

This is a Member's bill in the name of Helen White MP. It would amend the Employment Relations Act 2000.

This bill seeks to prohibit employees who earn less than three times the minimum wage from being subject to restraint of trade provisions in employment agreements. A restraint of trade provision prevents an employee from working in their field or for a competitor after their employment ends (non-competition restraint of trade). They can also restrict former employees from contacting or dealing with former clients or hiring former employees (non-solicitation restraint of trade).

Some employees could still be subject to a restraint of trade provision under the bill as introduced. If the employee earns greater than three times the minimum wage, in order to have an effective restraint the employer would be required to compensate them an amount equal to half of the employee's weekly earnings for each week that the restraint of trade provision remains in effect. The bill would also limit the length of time that a restraint of trade provision can remain in effect to a maximum duration of six months.

## **Legislative scrutiny**

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

## **Proposed amendments**

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

## **Restraint of trade provision**

Clause 4 would insert new section 67I which is the interpretation section. This section defines a restraint of trade provision as a provision that prohibits or restricts a former employee from contacting or dealing with employees or clients of their former employee's business under subsection (b)(ii).

We are concerned that the word "contacting" could be misleading. Prohibiting people from making contact of any kind is unusual and likely unenforceable. We recommend amending this definition to include the phrase "in the course of business". This would provide enough context to make the definition narrower and more useful.

## **Limiting employees who can be subject to restraint of trade provisions**

Clause 4 would insert new section 67J which would prevent employers from requiring employees to comply with restraint of trade provisions. In the bill as introduced, subsection 1(a) provides that a restraint of trade provision would only have effect if the employee's average weekly earnings exceed the threshold weekly rate. The threshold weekly rate is defined in the bill as an amount that is three times the minimum weekly adult rate prescribed under section 4 of the Minimum Wage Act 1983 (clause 4).

We note that the minimum wage rate is subject to change, and often changes on an annual basis. A change to the minimum wage rate would affect whether an employee is above or below the wage threshold in the bill. We consider that this could cause unnecessary disputes. We therefore recommend amending new section 67J in clause 4 of the bill to clarify that a restraint of trade provision would have no effect unless the employee's average weekly earnings exceed the threshold weekly rate on the day that their employment ends.

## **Calculating average weekly earnings**

New section 67I provides that an employee's average weekly earnings would be calculated using the formula set out in subsection (2). This formula is not consistent with that in the Holidays Act 2003 which is used for paying annual holiday entitlement when employment ends. This misalignment could affect workability for existing payroll systems; for example, it would require payroll providers to split pay period data for restraints of trade.

We therefore recommend amending section 67I(2) to align the formula for calculating an employee's average weekly earnings as much as possible with the formula in the Holidays Act for calculating an employee's annual holiday entitlement when their employment ends.

### **Restraint of trade compensation payments**

Clause 4 would insert new section 67J which would require an employer to compensate an employee who earns greater than three times the minimum wage to have an effective restraint. Subsection (2) in the bill as introduced sets out that a restraint of trade would not have effect unless reasonable compensation has been paid to the employee.

We consider that in the bill as introduced it is unclear whether compensation would be paid as a complete lump sum payment or as an ongoing payment. We feel that this could be open to interpretation and cause confusion about when compensation payments must be made.

We therefore recommend amending new section 67J(2) to clarify that compensation must be paid in full, by the later of five working days after the employee's employment ends or five working days after notice is given that the employer intends to apply the restraint (see below). This would make clear that the compensation must be paid out at once, and would ensure that payment is completed in a timely manner.

### **Notice period for restraint of trade compensation**

We consider it important that employees have certainty as to whether a restraint of trade would apply, whilst also balancing the employer's need for time to fund the payment.

We therefore recommend that an employer give notice if they are going to require an employee to comply with a restraint of trade. We recommend inserting section 67J(2A) to ensure that the employee is notified in writing by whichever of the following dates comes first:

- two weeks after either party gives notice to end the employment
- two weeks after the date on which the employment ends
- two weeks before the end of a fixed-term employment.

This would provide some certainty for employees as to whether a restraint would apply and it would also give employers time to consider whether to apply the restraint and pay the compensation.

### **Defining compensation**

The compensation that an employer would be required to pay an employee who is subject to a restraint of trade provision is called "reasonable compensation". New section 67I(1) defines "reasonable compensation" as a payment separate from any salary, wages, or other benefit connected to employment, and amounting to no less

than half the average weekly earnings of the employee for each week that the restraint of trade provision would apply.

We consider that the use of the word “reasonable” in relation to compensation could be confused with the subjective or objective concepts of reasonableness in law. We therefore recommend replacing the term “reasonable” with “ROT” (restraint of trade) to improve clarity and avoid confusion.

### **Raising a personal grievance**

Clause 5 of the bill would amend section 103(1)(h) of the Employment Relations Act 2000 which relates to personal grievance. An employee can raise a personal grievance if they have been disadvantaged by the employment agreement not being in accordance with certain sections of the Act.

The bill would amend this section to also include section 67J. We noted that the language used in section 67J of the bill is not consistent with the other sections referred to in section 103(1)(h) of the Employment Relations Act. Section 103(1)(h) of the Employment Relations Act allows a personal grievance if the contract was “not in accordance” with the relevant provisions. The bill as introduced states the restraint of trade would have “no effect” unless certain conditions are met.

To avoid any issues with the language not being aligned, a new personal grievance ground was drafted. We recommend inserting this subsection (ia) after section 103(1)(i) to ensure that the use of language is consistent.

### **National Party view**

We are opposing this member’s bill based on the following reasons:

- unreasonable restraints of trade are already unenforceable by law
- the proposed bill is trying to address inequity issues (access to affordable legal advice) rather than legal issues, by adding more legislation.

### **ACT Party view**

ACT is opposing this bill. We believe that this bill has the potential to discourage entrepreneurship and will end up doing the complete opposite of what the member is planning to achieve. We believe the bill will disproportionately favour larger businesses, as they will have greater access to resources. This means that these larger businesses may be able to poach talent from smaller competitors, further increasing their dominance in the market. More regulation through this bill has the potential to cause harm to New Zealand small and medium-sized enterprises by adding more complex regulations. It is crucial that we do not over burden both businesses and employees with complex regulation and allow both to be able to decide what is best for them in regards to restraint of trade without government intervention.

## **Labour Party view**

The Labour Party supports this bill. In New Zealand, restraints of trade commonly appear in individual agreements of which there is no public scrutiny because they are contained within private contracts. We remain ignorant of the number of people impacted in New Zealand but the international data from Australia and the United States suggests at least one in five people are likely to be subject to a restraint.

## **Productivity**

The evidence that such measures as this law change work to boost real wages, allow career development, and enhance productivity is available, because similar measures have been present for some years in various states of America, like Oregon, California, and Hawaii. The positive impact has been compared to neighbouring states, which have not adopted such measures. Since curbing the use of restraints of trade, Oregon, California, and Hawaii have prospered economically. This is attributed, in part, to the restriction on restraints because they create a pool of workers and this is attractive to new industries. Thus the law change has supported highly desirable growth industries like the tech sector. It is also clear small businesses are much better off because they have a pool of employees available.

## **Importance for low and middle-income New Zealanders**

Most importantly, it is clear from the studies of the impact of law changes like the one before us, that workers are significantly better off, with wages rising in real terms because of their portability of employment. In particular, this is true because they can advance their career and ask for a pay rise.

The practice of restraining workers who are paid relatively low wages is an international trend and the Labour Party does not consider it fair or reasonable. It is often the practice of including a restraint in the contract of workers who will not be able to afford to challenge them legally. These workers need the certainty of a ban on such a covenant as the right to challenge a restraint is beyond many ordinary workers' means.

## **Falling behind other jurisdictions**

The problems caused by restraints of trade are now so well recognised overseas that the Federal Trade Commission has just banned non-compete clauses for almost all workers. The evidence is that such a problem exists here too and will grow and hurt the incomes of New Zealanders and the productivity of our economy if we let it go unchecked.

## **Supporting a genuinely free market**

Finally, these clauses are anti-competitive and so the law change should have the support of any party which seeks to have a truly free market.

It is clear from the evidence heard in select committee that there is an issue that needs to be addressed, particularly for low-paid workers. The Labour Party calls on

the Government to address this issue, particularly given the need for ordinary New Zealanders to earn a decent living at this time.

## Appendix

### Committee process

The Employment Relations (Restraint of Trade) Amendment Bill was referred to the Education and Workforce Committee of the 53rd Parliament on 26 July 2023. The committee called for submissions on the bill with a closing date of 18 September 2023.

The bill was reinstated with this committee in the 54th Parliament on 6 December 2023. We received and considered submissions from 34 interested groups and individuals. We heard oral evidence from 9 submitters at hearings in Wellington and via videoconference. We also heard from the Member in charge of the bill.

Advice on the bill was provided by the Ministry of Business, Innovation and Employment. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

### Committee membership

Katie Nimon (Chairperson)

Carl Bates

Camilla Belich (from 13 December 2023)

Mike Butterick

Reuben Davidson (until 13 December 2023)

Grant McCallum

Dr Parmjeet Parmar

Hon James Shaw (from 6 March to 27 March 2024)

Hon Jan Tinetti

Teanau Tuiono (until 21 February 2024)

Hon Phil Twyford

Dr Lawrence Xu-Nan (from 27 March 2024)

Helen White also participated in our consideration of this bill.

### Related resources

The documents received as advice and evidence are available on the Parliament website.





**Employment Relations (Restraint of Trade) Amendment  
Bill**

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**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted unanimously

~~text deleted unanimously~~



*Helen White*

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Member's Bill

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**Schedule** 6

**New Part-4 7 inserted into Schedule 1AA**

**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Employment Relations (Restraint of Trade) Amendment Act **2022**.

**2 Commencement**

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

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**3 Principal Act**

This Act amends the Employment Relations Act 2000.

**4 New sections 67I to 67K and cross-heading inserted**

After section 67H, insert:

	<i>Restraint of trade provisions</i>	5
<b>67I</b>	<b>Interpretation</b>	
(1)	In <del>sections 67J and 67K</del> this section and <b>sections 67J and 103(1)(ia)</b> ,—	
	<b>12-month period</b> means the 12-month period immediately before the end of the last pay period before the end of employment	
	<b>average weekly earnings</b> , in relation to an employee, means the employee's average weekly earnings as calculated under <b>subsection (2)</b>	10
	<b>employment period</b> means the most recent period of employment in the 12-month period in which the employee was employed by the employer	
	<b>gross earnings</b> has the meaning given to it by section 14 of the Holidays Act 2003	15
	<del><b>reasonable compensation</b>, in relation to an employee who is subject to a restraint of trade provision, means compensation that—</del>	
	(a) <del>is paid separately from any salary, wages, or other benefit provided to the employee in connection with their period of employment; and</del>	
	(b) <del>amounts to not less than half of the average weekly earnings of the employee for each week (or part week) that the restraint of trade provision applies</del>	20
	<b>restraint of trade provision</b> means a provision in an employee's employment agreement that—	
	(a) operates after the employment ends; and	25
	(b) prohibits or restricts the former employee from 1 or more of the following:	
	(i) performing work in a similar field to their former employer's business;	
	(ii) <u>in the course of business</u> , contacting or dealing with employees or clients of their former employer's business;	30
	(iii) offering employment to employees of their former employer's business	
	<b>ROT compensation</b> , in relation to an employee who is subject to a restraint of trade provision, means compensation that—	35
	(a) <u>is paid separately from any salary, wages, or other benefit provided to the employee in connection with their period of employment; and</u>	

(b) amounts to not less than half of the average weekly earnings of the employee for each week (or part week) that the restraint of trade provision applies

**threshold weekly rate** means an amount that is 3 times the minimum weekly adult rate prescribed under section 4 of the Minimum Wage Act 1983.

(2) For the purposes of **subsection (1)**, **average weekly earnings** must be calculated as follows:

$$a = b / (c - d)$$

where—

a is the employee's average weekly earnings 10

b is the employee's gross earnings ~~received from the employer in the 52 week period preceding the end of the employment in the employment period~~

c is the lesser of the following:

(i) the number of weeks ~~(to the nearest week) that the employee has been employed under the employment agreement (or part weeks) in the employment period; and~~ 15

(ii) 52

d is the number of weeks ~~(to the nearest week) in the 52 week period (or, if the employee has been employed under the employment agreement for less than 52 weeks, in that shorter period) in which the employee was—~~ 20

(i) ~~being paid weekly compensation under the Accident Compensation Act 2001;~~

(ii) ~~exercising their entitlement to leave under the Parental Leave and Employment Protection Act 1987;~~ 25

(iii) ~~on leave without pay with their employer's agreement.~~

d is the total number of weeks (or part weeks), if any, in the employment period that the employee was on unpaid leave for a period of more than 1 week as agreed with the employer for the purposes of section 16(3) of the Holidays Act 2003. 30

#### 67J Restriction on restraints of trade

(1) A restraint of trade provision is of no effect unless—

(a) ~~the employee's average weekly earnings exceed the threshold weekly rate; and~~

(b) the employer has a proprietary interest and— 35

(i) the provision protects the interest; and

(ii) the interest is described in the employment agreement; and

- (iii) the restrictions imposed on the employee by the provision are no greater than necessary having regard to the interest; and
- (c) the provision requires the employer, ~~at the time that the employment ends,~~ to pay reasonable ROT compensation to the employee ~~for the restrictions imposed by the provision~~ by the date specified in **subsection (2)(b)**. 5
- (2) A restraint of trade provision is of no effect unless, ~~the reasonable compensation referred to in subsection (1)(c) has been paid to the employee.~~
- (a) on the date on which the employee's employment ends, the employee's average weekly earnings exceed the threshold weekly rate; and 10
- (b) the ROT compensation is paid to the employee in full, by the date that is the later of—
- (i) 5 working days after the date on which the employee's employment ends; and
- (ii) 5 working days after the notice in subsection (2A) is given. 15
- (2A) If an employer requires an employee to comply with a restraint of trade provision, the employer must notify the employee in writing of that requirement by the earliest of the following:
- (a) 2 weeks after either party gives the other notice that the employment will come to an end; 20
- (b) 2 weeks after the date on which the employee's employment ends;
- (c) 2 weeks before the end of an employment to which a fixed term agreement applies under section 66.
- (3) A restraint of trade provision ceases to have effect on the day that is 6 months after the date on which the employment ends (or on any earlier date agreed by the parties). 25
- (4) An employment agreement that contains a restraint of trade provision that is of no effect under this section is not, as a consequence, an illegal contract under subpart 5 of Part 2 of the Contract and Commercial Law Act 2017.
- 67K Effect on law of restraint of trade, confidentiality, and fidelity** 30
- (1) Nothing in ~~sections section 67I or 67J~~ limits or affects any rule of law relating to restraint of trade, except to the extent that the rule is inconsistent with those sections.
- (2) Nothing in ~~sections section 67I or 67J~~ limits or affects the common law duties of confidentiality and fidelity. 35

**5 Section 103 amended (Personal grievance)**

~~In section 103(1)(h), replace “or 67H” with “67H, or 67J”.~~

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

(ia) that the employee has been disadvantaged by some unjustifiable action of the employer relating to a restraint of trade provision in the employee's employment agreement that, at the time of the employer's action, was of no effect in accordance with **section 67J**; or

**6 Schedule 1AA amended**

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In ~~Schedule 1AA~~ Schedule 1AA,—

- (a) insert the Part set out in the ~~Schedule~~ **Schedule** of this Act as the last Part; and
- (b) make all necessary consequential amendments.

**Schedule**  
**New Part 47 inserted into Schedule 1AA**

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**Part 47**  
**Provisions relating to Employment Relations (Restraint of Trade  
Terms) Amendment Act **2022****

**1723 Interpretation**

In this Part, ~~2022 Act~~ **2022 Act** means the Employment Relations (Restraint of Trade) Amendment Act **2022**.

**1824 Application, savings, and transitional provisions arising from ~~2022~~ **2022** Act**

- (1) The amendments made by the **2022 Act** do not apply to conduct that occurred before the commencement of that Act.
- (2) If a collective agreement (the **previous agreement**) is in force immediately before the commencement of the ~~2022~~ **2022 Act**, **sections 67I to 67K** (as inserted by **section 4** of that Act) apply to—
  - (a) any collective agreement that replaces the previous agreement, on the commencement of the replacement agreement; and
  - (b) an individual employment agreement that comes into force under section 61(2)(a), based on the previous agreement and any additional terms and conditions agreed under section 61(1), on the commencement of the individual employment agreement.
- (3) If an individual employment agreement has been entered into, or has come into force under section 61(2)(a), before the commencement of the ~~2022~~ **2022 Act**, **sections 67I to 67K** (as inserted by **section 4** of that Act) apply to the agreement from the day that is 6 months after the date on which the ~~2022~~ **2022 Act** came into force.

**Legislative history**

22 September 2022  
26 July 2023

Introduction (Bill 172–1)  
First reading and referral to Education and Workforce  
Committee