

Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill

Government Bill

As reported from the Transport and
Industrial Relations Committee

Commentary

Recommendation

The Transport and Industrial Relations Committee has examined the Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill and recommends by majority that it be passed with the amendments shown.

Introduction

This bill amends Part 6D of the Employment Relations Act 2000 by removing the legislated minimums prescribed for rest breaks and meal breaks, and replacing them with a requirement for employers to

- either provide meal breaks and paid rest breaks, or take compensatory measures
- encourage employers and employees to agree in good faith on rest break and meal break arrangements

- ease the requirements regarding the timing and the number and duration of breaks, in order to make the criteria for what constitutes a break more flexible
- provide that rest and meal breaks can be subject to restrictions in certain circumstances.

The bill provides flexibility for employers and employees to agree on compensatory measures instead of a break, such as later start or earlier finish times, or time off at an alternative time.

Employer obligations under the Health and Safety in Employment Act 1992, which require employers to provide and maintain a safe working environment, will continue to apply.

Compensatory measures must be reasonable

The majority of us recommend that new section 69ZEB be inserted (clause 5) to make it clear that compensatory measures where rest breaks or meal breaks are not provided must be reasonable. In the bill as introduced clause 4 would amend section 69ZC of the principal Act to define a compensatory measure as “a measure that is designed to compensate an employee for a failure to provide rest breaks or meal breaks”. It provides that compensatory measures include (without limitation) time off work at an alternative time during the employee’s work period, for example by means of a later start or earlier finish time, or the accumulation of time off in lieu.

Employee’s entitlement to rest and meal breaks

The majority of us recommend that proposed section 69ZD(2)(a) (clause 5) be amended to make it clear that employees and employers may agree to restrictions on breaks. If there is no agreement, the existing threshold set out in the bill should continue to apply.

In the bill as introduced proposed section 69ZD(2) provides that an employer may impose certain restrictions on an employee’s breaks where it is reasonable and necessary having regard to the nature of the employee’s work. The majority of us note that this is a high threshold, which appropriately recognises that the right to impose restrictions on breaks should be exercised sparingly, particularly since meal breaks may be unpaid.

However, proposed section 69ZD(2) would not recognise instances where employers and employees mutually agree to restrict breaks and it is practicable to do so, but the restrictions do not meet the high test set out in the bill. Is it possible that there may be instances where restrictions have been mutually agreed (compensated or otherwise) that may not meet the threshold in proposed section 69ZD(2) as introduced.

Relationship between Part and employment agreements

In the bill as introduced proposed section 69ZG(2) provides that an employment agreement that excludes, restricts, or reduces an employee's entitlements under section 69ZD(1) or section 69ZEA has no effect to the extent that it does so; but the employment agreement does not meet the definition of an illegal contract. The intention of this section is that an employment agreement should not, except in accordance with the bill, exclude or restrict an employee's entitlement to breaks or, where breaks are not provided, to compensatory measures. For example, a provision in an employment agreement that required an employee to take no breaks, and did not provide compensatory measures, would exclude an employee's entitlements and therefore have no effect.

Proposed section 69ZG does not extend to actions under section 69ZD(2) relating to restrictions on breaks, section 69ZD(3) relating to the payment of breaks, and proposed section 69ZE relating to the timing and duration of breaks. The majority of us recommend that proposed section 69ZG be amended to cover such actions.

The term "restrict" is used elsewhere in the bill with a specific meaning that is different from that intended in proposed section 69ZG(2). To avoid the possibility of confusion, the majority of us recommend that the term "restricts" be removed, except in reference to new section 69ZG(3), which enables restrictions only in accordance with section 69ZD(2).

New Zealand Labour and Green Party minority view

The Labour and Green Parties oppose this bill because we believe it is unjustified, unfair and unworkable.

Labour re-established minimum standards for rest and meal breaks to protect the health and safety of wage and salary earners, to reduce the risk of accidents, and to improve the quality of work and productivity in all workplaces.

A minimum standard for rest and meal breaks is fundamental to decent work and a basic requirement, especially as New Zealand has few other working hours protections.

The Labour and Green Parties believe this bill will bring back uncertainty for both employers and employees about statutory minimum requirements for meals and rest breaks.

The Government's justification for this bill is that the current provisions are overly prescriptive and inflexible. The two examples used by the Government to justify amending this legislation—those of air traffic controllers and teachers—have been resolved under the existing legislation. Labour members heard no evidence to convince us that weakening the current law around meals and rest breaks was necessary.

In fact, evidence from an August 2010 Department of Labour report titled "The 2008 Rest and Meal Breaks Amendment to the Employment Relations Act 2000: a snapshot of the impact in the first year" shows widespread awareness and acceptance of the changes.

The report says that "in practice, employers and employees, were managing breaks to suit either the business needs of employers, the personal preferences of employees or the desire of either party for flexibility" and "the costs to employers of the break amendment appears to have been very limited. The small number of employers who had incurred costs (direct and otherwise) through the amendment considered these costs relative to benefits, to be marginally acceptable."

We have particular concerns with the bill as follows:

- removing the timing and the explicit requirement for a 10-minute paid break and a half-hour meal break will increase uncertainty and arguments between employers and employees around the timing and duration of breaks
- allowing rest and meal breaks to be taken at times agreed between the employee and employer will expose vulnerable workers to having no breaks at all

- enabling employers to provide “compensatory measures” where rest and meal breaks cannot be provided (or agreed). During the select committee process a requirement that compensatory measures must be “reasonable” was added to the bill, but Labour remains unconvinced that the necessary protections are available to ensure employees will have a break
- providing that an employer can restrict rest and meal breaks if the restrictions are “reasonable and necessary” given the nature of an employee’s work—in other words, workers can be required to work during unpaid work time.

This bill represents an overreaction to the complaints of a very few, and to issues that could have been resolved under the existing Act.

The Labour and Green members believe it is a retrograde step in New Zealand’s employment relations and we believe it will add to, rather than remove, employment relationship problems and cause unfairness to thousands of vulnerable employees.

Appendix

Committee process

The Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill was referred to us on 29 April 2010. The closing date for submissions was 11 June 2010. We received and considered 31 submissions from interested groups and individuals. We heard 14 submissions.

We received advice from the Department of Labour.

Committee membership

David Bennett (Chairperson)

Dr Jackie Blue

Carol Beaumont

Darien Fenton

Hon Tau Henare

Gareth Hughes

Moana Mackey

Allan Peachey

Michael Woodhouse

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Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Kate Wilkinson

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Employment Relations (Rest Breaks and Meal Breaks) Amendment Act **2009**.
- 2 Commencement** 5
This Act comes into force on the day after the date on which it receives the Royal assent.
- 3 Principal Act amended**
This Act amends the Employment Relations Act 2000.
- Part 1** 10
**Amendments relating to entitlement to
rest breaks and meal breaks**
- 4 Interpretation**
Section 69ZC is amended by inserting the following definition before **work period**: 15
“**compensatory measure**—
“(a) means a measure that is designed to compensate an employee for a failure to provide rest breaks or meal breaks in accordance with **section 69ZD(1)**; and
“(b) includes (without limitation) a measure that provides 20
the employee with time off work at an alternative time during the employee’s work period, for example, a later start time, an earlier finish time, or an accumulation of time off work that may be taken on 1 or more occasions”. 25
- 5 New sections 69ZD to ~~69ZEA~~ 69ZEB substituted**
Sections 69ZD and 69ZE are repealed and the following sections substituted:

“69ZD Employee’s entitlement to rest breaks and meal breaks

“(1) An employee is entitled to, and an employer must provide the employee with, rest breaks and meal breaks that—

“(a) provide the employee with a reasonable opportunity, during the employee’s work period, for rest, refreshment, and attending to personal matters; and 5

“(b) are appropriate for the duration of the employee’s work period.

“(2) The employee’s entitlement to rest breaks and meal breaks may be subject to restrictions, but only if the restrictions— 10

~~“(a) are reasonable and necessary, having regard to the nature of the employee’s work; and~~

“(a) are—

“(i) reasonable and necessary, having regard to the nature of the employee’s work; or 15

“(ii) if **subparagraph (i)** does not apply, reasonable and agreed to by the employer and employee (whether in an employment agreement or otherwise); and

“(b) relate to 1 or more of the following: 20

“(i) the employee continuing to be aware of his or her work duties, or if required, continuing to perform some of his or her work duties, during the break:

“(ii) the circumstances when an employee’s break may be interrupted: 25

“(iii) the employee taking his or her break in the workplace or at a specified place within the workplace.

“(3) An employee’s entitlement to rest breaks under this section is to paid rest breaks.

“69ZE Timing and duration of rest breaks and meal breaks 30

“(1) An employee must take his or her rest breaks and meal breaks—

“(a) at the times and for the duration agreed between the employee and his or her employer; but

“(b) in the absence of such agreement, at the reasonable times and for the reasonable duration specified by the employer. 35

- “(2) For the purposes of **subsection (1)(b)**, an employer may specify reasonable times and durations that, having regard to the employer’s operational environment or resources and the employee’s interests, enable the employer to maintain continuity of service or production. 5
- “(3) An employer must provide an employee with a reasonable opportunity to negotiate with the employer and reach agreement under **subsection (1)(a)** on the times when the employee’s rest breaks and meal breaks are to be taken and on the duration of the breaks. 10
- “(4) To avoid doubt, **subsection (3)** does not limit the requirement of the employer and employee to deal with each other in good faith as set out in section 4.

“**69ZEA Compensatory measures**

- “(1) An employer is not required to provide rest breaks and meal breaks in accordance with **section 69ZD(1)**— 15
 - “(a) to the extent that the employer and the employee agree that the employee is to be provided with compensatory measures; or
 - “(b) if **paragraph (a)** does not apply, only to the extent that 20
 - having regard to the nature of the work performed by the employee, the employer cannot reasonably provide the employee with rest breaks and meal breaks.
- “(2) ~~To the extent that the employer is not required to provide rest breaks and meal breaks in accordance with **section 69ZD(1)**, an employee is entitled to, and the employer must provide the employee with, compensatory measures.~~ 25
- “(2) To the extent that an employer is not required to provide rest breaks and meal breaks under **subsection (1)**, an employee is entitled to, and the employee’s employer must provide the employee with, compensatory measures. 30
- “(3) ~~If an employer provides an employee with compensatory measures that involve time off work at an alternative time during the employee’s work period, the employee is entitled to the same amount of time off work that relates to the duration of the employee’s breaks if the employee had taken rest breaks and meal breaks.~~ 35

“69ZEB Compensatory measure must be reasonable

“(1) A compensatory measure provided to an employee under **section 69ZEA must be reasonable.**

“(2) To avoid doubt, if an employer provides an employee with a compensatory measure that involves time off work at an alternative time during the employee’s work period, that measure is to be treated as complying with **subsection (1) if—** 5

“(a) the employee is provided with the same amount of time off work that relates to the duration of the rest break or meal break that the employee would have otherwise taken; and 10

“(b) the time off work at an alternative time is provided on the same basis as the rest break or meal break that the employee would have otherwise taken.”

Part 2 15

Related amendments

6 Penalty

Section 69ZF is amended by omitting “sections 69ZD and 69ZE” and substituting “**sections 69ZD(1) or 69ZEA**, as the case may be,”. 20

7 New sections 69ZG and 69ZH substituted

Sections 69ZG and 69ZH are repealed and the following sections substituted:

“69ZG Relationship between Part and employment agreements

“(1) This Part does not prevent an employer providing an employee with enhanced or additional entitlements to rest breaks and meal breaks (whether specified in an employment agreement or otherwise) on a basis agreed with the employee. 25

“(2) An employment agreement that ~~excludes, restricts, or reduces an employee’s entitlements under **section 69ZD(1) or 69ZEA or reduces an employee’s entitlement to rest breaks and meal breaks under **section 69ZD(1) or (3) or section 69ZE** or to compensatory measures under **section 69ZEA**—~~** 30

“(a) has no effect to the extent that it does so; but

“(b) is not an illegal contract under the Illegal Contracts Act 1970. 35

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- “(3) An employment agreement that restricts an employee’s rest breaks or meal breaks other than in accordance with **section 69ZD(2)**—
- “(a) has no effect to the extent that it does so; but
- “(b) is not an illegal contract under the Illegal Contracts Act 1970. 5

“69ZH Relationship between Part and other enactments

Where an employee is a person who is required to take rest breaks or meal breaks by, or under, another enactment, the requirement for rest breaks or meal breaks defined by, or under, the other enactment applies instead of this Part.” 10

Legislative history

27 October 2009	Introduction (Bill 91–1)
29 April 2010	First reading and referral to Transport and Industrial Relations Committee
