



Achieving Sustainable Compliance

THE DEPARTMENT OF LABOUR'S POLICY ON THE ENFORCEMENT OF EMPLOYMENT STANDARDS

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FOREWORD

This policy statement is for anyone who may have an interest in the role of the labour inspector as the regulator of minimum employment standards in New Zealand workplaces.

New Zealand's workplaces are many and varied, and this policy statement does not attempt to describe every enforcement response by the Department of Labour. Instead, it sets out key principles and processes involved in compliance activity to assist employers and workers to understand a range of responses to situations that arise in a workplace.

The Department's goal is to support sustainable compliance through education, engagement and enforcement. Through the decisions labour inspectors make we aim to support fair and effective workplaces now and into the future.

Labour inspectors seek to create an atmosphere of understanding and trust at the same time as they apply departmental policy and practice guidance in the exercise of their discretion.

This policy statement is one of the ways we hope to create transparency about the way we deliver our services and ultimately contribute to high quality and productive workplaces in New Zealand.

THE PURPOSE OF THIS STATEMENT

This policy statement outlines how and why the Department of Labour responds to non-compliance with the requirements set out in the following legislation:

- The Employment Relations Act 2000
- The Equal Pay Act 1972
- The Holidays Act 2003
- The Minimum Wage Act 1983
- The Parental Leave and Employment Protection Act 1987
- The Volunteers Employment Protection Act 1973
- The Wages Protection Act 1983.

It is important for people with obligations under these laws to understand how and why we choose to respond to non-compliance. It is also important to outline our overall approach to enforcement in order to guide the development of more detailed internal operating systems and procedures.

This policy statement is supported by internal operational guidelines and procedures and complements other information and support services to employers and employees.

A glossary of technical terms is provided at the back of this policy.

OPERATING ENVIRONMENT

New Zealand's wealth and social capital is largely created by people through their work. The Department of Labour (the Department) is involved in all aspects of the development of work, and the delivery of greater value to the economy and society through that work.

The Department's strategic framework defines "productive work and high quality working lives" as its high level outcome. An intermediate outcome is that "New Zealand workplaces will raise the value of work and the quality of working lives". These outcomes give force to the objectives for the Department and for labour inspectors.

THE DEPARTMENT OF LABOUR'S COMPLIANCE OBJECTIVE

The aim of the Department in regulating compliance with minimum employment standards is:

- to rectify identified non-compliance with legislation, through a range of enforcement tools
- to provide information and advice to employers and employees in order to raise awareness of rights and obligations in employment law
- to bring about sustained compliance by employers and employees.

New Zealand has ratified the International Labour Organisation Convention 81 on Labour Inspection (1947). That instrument requires that New Zealand maintain an adequately resourced and independent system of labour inspection in industry and commerce. The functions of the labour inspection system, as defined by the Convention, are: to enforce the legal provisions relating to conditions of work and the protection of workers; to inform and advise employers and workers on how they can best comply with the laws; and to advise the competent authority of defects or abuses not specifically covered by existing legal provisions.

Our main objective as a regulator is to improve New Zealanders' working lives and New Zealand's economic and social well-being. Sustainable compliance with the minimum code through a system of labour inspection fosters the growth of high quality, productive places of work.

THE DEPARTMENT OF LABOUR'S ENFORCEMENT ROLE

The Department of Labour plays a leadership role in promoting, influencing, motivating, educating and informing those involved in workplaces. Sustainable compliance contributes directly to this leadership role.

Enforcement of employment entitlements is one component of the Department's approach to workplace compliance. An enforcement action begins when the labour inspector believes a business has not complied with the relevant law, where discussions have failed to resolve the problem, and an investigation has been undertaken. Where a regulatory response is required, labour inspectors will make choices about the most appropriate approach from a mix of available options.

The functions of the labour inspector are defined in the Employment Relations Act 2000 to include determining that the relevant law has been complied with; taking all reasonable steps to ensure compliance; and supporting employers, workers and other people to comply through the provision of information and education. Labour inspectors are employees of the Department and are guided by a code of conduct and specialist guidance on best practice. They are trained and resourced to do their job with professionalism, integrity and impartiality.

The labour inspectors have a range of tools for responding to non-compliance. These tools include the power to conduct an investigation; to enter into a voluntary and enforceable undertaking with a business that commits to resolve breaches of relevant legislation; to issue an improvement notice or demand notice that requires the business comply with the law; and, to seek a penalty action for non-compliance with a range of statutory obligations.

In some cases, a matter being investigated may fall within another jurisdiction, where the responsibility lies with the New Zealand Police, Inland Revenue or the Department's Immigration Service. In such cases, the Department liaises with the relevant people to ensure the most appropriate management of the

investigation. There may be cases where a number of investigations are being managed concurrently according to the relevant legislative responsibilities.

The Department aims to influence businesses to become compliant with the law. This means there is a strong focus on supporting employers through the provision of education and information and by addressing the systems and practices that underpin compliant workplace practices. Labour inspectors will first assist employers to understand and meet their obligations and they will enforce when they do not.

A labour inspector's enforcement response is shaped by both policy and judgment. An important document that guides labour inspectors in exercising their discretion is the *Labour Inspection Operational Manual*. This manual steers inspectors through the filtering and prioritising of inquiries, describing decision-making parameters in the initial inquiry phase and the investigation process. The options available to labour inspectors include direct intervention, guided self-resolution, and circumstances where it may be appropriate that no further action will be taken.

Achieving Sustainable Compliance: The Department of Labour's policy on the enforcement of Employment Standards is a policy statement that sits alongside other policies and procedures to inform our labour inspectors' judgment.

THE DEPARTMENT OF LABOUR'S ENFORCEMENT PRINCIPLES

The role of the labour inspector is to protect employees in workplaces through a range of responses from proactive engagement with a firm to the enforcement of statutory minimum employment rights. The role also includes providing information and assistance to workplaces to support sustained compliance.

When considering an enforcement response, both informal and formal options may be applied. The approach of the inspector is to be firm but fair and in the course of their work they will make judgements and choices about which enforcement option to use, who the focus of enforcement might be, and the intensity of the enforcement response. In making judgements and choices about enforcement options, they are guided by a framework of policies, procedures and principles. These are outlined as follows:

Consistency

Consistency of approach does not mean uniformity. It means taking a similar approach in similar circumstances to achieve similar ends. We will respond consistently when dealing with similar cases – but our approach will also reflect the specific circumstances of each case.

Action proportionate to the non-compliance

Our enforcement response will be proportionate to the seriousness and extent of any breach. This means that decisions about the resources applied to a problem

and the nature of the action taken by an inspector will be influenced by the seriousness of the matter, the scale of the problem and the history of the case. For instance, a greater resource, or firmer stance, may be chosen where the problems are geographically widespread, or systemically imbedded in an organisation.

Public accountability

In certain cases, public expectation of accountability through formal processes is heightened. Situations may arise where large numbers of employees are involved or serious deprivation results from non-compliance and in these instances different and more appropriate actions are more likely.

We will ensure our expectations of employers and employees are made clear. We will also assist parties to understand our approach to enforcement and provide an opportunity at every stage to ask questions.

We will periodically review and audit enforcement decisions to ensure they are consistent with this guide and any other relevant policies and procedures, and we will maintain internal systems designed to learn from our enforcement activities.

Enforcement activity can generate considerable public interest and this may result in people and organisations outside the Department requesting details of inspections, investigations and prosecutions. We will manage any such requests in accordance with the Employment Relations Act 2000 (section 233(5)), the Official Information Act 1982, the Privacy Act 1993 (where relevant) and common law principles of reasonableness in relation to the exercise of our discretion.

Fairness

Our enforcement responses will be fair, impartial and undertaken with the highest integrity. In practice, this means we will ensure any person directly affected by our decision-making will have an adequate opportunity for representations to be made and considered before a final decision is made. We will also ensure our decision-making is reasonable given the circumstances, unbiased, conforms to the principles of natural justice, and is consistent with any previous representation(s), or is in accordance with the way in which other, similar cases have been handled.

Prioritisation

We will target our enforcement activities to focus attention on particular risks associated with categories of employees, specific sectors, or work practices, where non-compliance or patterns of non-compliance are of particular concern.

THE DEPARTMENT OF LABOUR'S APPROACH TO DECISION-MAKING

The Department has a number of options available to ensure statutory compliance. However, the role of the Department is to promote fair practices and resilient workplaces and so we will generally use the minimum enforcement necessary to obtain compliance with the relevant legislation.

Compliance is a broad concept that encompasses the following approaches:

- providing information to support voluntary compliance
- direct consultation with business
- proactive inspections and auditing
- maintaining relationships with umbrella groups, such as industry associations to ensure sustained compliance
- investigation of complaints
- enforcement of legislation.

The labour inspector will generally encourage voluntary compliance by raising awareness of legal obligations. This may include seeking a commitment in writing from an employer to meet the required standards. This agreement is called an "enforceable undertaking". If the employer does not agree to enter into such an undertaking the labour inspector may issue an improvement notice that outlines the steps required for the employer to comply and timeframes for meeting the terms of the notice. If non-compliance is of a serious nature, such as when the employer has a record of similar non-compliance, is obstructive or unwilling to change, the labour inspector is more likely to use a firmer sanction or seek penalties.

Our response to non-compliance will take into account factors such as the:

- history of non-compliance
- nature of the problem
- degree of harm arising
- level of cooperation by the parties.

CASE STUDY ONE: MINIMUM STANDARDS COMPLIANCE

Peter was employed in a small furniture restoration business for five years. After he received his final pay he rang a labour inspector to lay a complaint that he had not received all his holiday pay. Peter had already contacted his employer, Donald, who said he would look into it but weeks passed and nothing happened.

The labour inspector, Sharon, spoke to Donald and obtained time and wage records and leave records. She found that public holidays were recorded as annual leave and sick leave was recorded as absence due to accidents. There were no records for the first half of Peter's employment.

Donald was upset and defensive at the suggestion that his records were incorrect. He was adamant he knew the minimum requirements in law. Sharon uncovered conflicts between Donald's records and Peter's diary notes and medical reports. It appeared to Sharon that Donald had not paid Peter all his leave. It also appeared that Peter had taken more sick leave than he was entitled to. Each held a very strong view of the circumstances. Sharon explained that as a regulator her role was independent of the parties and, even if the parties resolve some matters between them, she could still progress a claim for compliance around any outstanding issues.

Sharon had two goals: to achieve a fair result for both parties and to work with Donald to ensure that future problems would not result from poor record-keeping. She wrote a report on the minimum standards issues with her opinion on the facts as they stood. Then she spoke to both Peter and Donald about their options.

Donald and Peter accepted Sharon's report on the money owed to Peter but Donald said he could not afford to pay and he did not want any interference in his record-keeping. She explained to Donald that they could reach an agreement with him on how Peter's entitlements would be paid and some minimum requirements of record-keeping. This would be an "enforceable undertaking" under the Employment Relations Act. If he did not want to negotiate an agreement with her, she would consider issuing an improvement notice to require compliance.

Donald accepted the support of the labour inspector and he agreed to sign an enforceable undertaking. Peter received the money he was owed within an agreed timeframe and Donald began to work on a plan to rectify his record-keeping practices.

FUNCTIONS OF LABOUR INSPECTORS

The functions of the labour inspector are set out in legislation and include: determining whether the relevant Acts have been complied with; taking all reasonable steps to ensure they are complied with; supporting employers to comply with the law through the provision of information and education; and, assisting employers to implement compliant systems and practices.

POWERS OF LABOUR INSPECTORS

Labour inspectors have the following powers under the Employment Relations Act 2000 (the Act):

- to enter places of work, at any reasonable hour
- to interview any person at any premises in order to investigate alleged breaches of legislation about minimum employment standards
- to require and copy any wages, time and holiday record or any other document which records remuneration
- to question any employer about compliance with legislation.

Obligations of inspectors

An inspector must produce a warrant on entry to any premises and they must provide the warrant on request. On entering a workplace the inspector is bound by any reasonable health and safety requirements for that workplace. In addition, they must not disclose the contents of documents obtained under the Act as a result of the inspection for purposes other than enforcement of the relevant legislation. If the inspector is unable to locate an employer, or representative of the employer, and they conduct an investigation, they must leave a written notice for the employer before leaving the premises.

THE TOOLS FOR COMPLIANCE

The Department has a number of tools available to enforce compliance with the law. We use our professional judgement and the details of each situation to determine which option is appropriate.

Under the Act, labour inspectors have a warrant of designation, signed by the Chief Executive of the Department, which provides them with the power to take action to enforce compliance and to recover penalties in respect of the minimum code.

Facilitation

The labour inspector is involved in formal and informal facilitation of employment relationship problems. Informally, labour inspectors form opinions about compliance with legislation and work with the parties to resolve the problem, based on that opinion. This may be done by speaking individually with each party either on the phone, or through face-to-face meetings. The inspector aims to ensure that the employer and employee understand their obligations and entitlements and, where possible, how they might prevent a similar dispute arising in the future. For example, the labour inspector may facilitate parties to resolve a disagreement in relation to a request for flexible work arrangements under Part 6AA of the Employment Relations Act 2000.

Enforceable undertaking

Labour inspectors have the ability to enter into an enforceable undertaking with an employer who is not operating in a compliant manner. The undertaking is a voluntary commitment by an employer to address the non-compliance and to take any steps that the inspector considers appropriate having regard to the breach. The process allows for dialogue and negotiation about how the minimum standards are to be met. If the employer does not comply with the enforceable undertaking, the inspector may seek a compliance order to enforce the agreement and a penalty may be incurred for failure to comply with the order.

Improvement notice

Labour inspectors may issue an employer with an improvement notice that requires compliance with the law. This method of achieving compliance is most likely to be applied if the employer has first failed to reach a voluntary agreement with the labour inspector to address the breach.

The notice must set out the compliance failure, the inspector's reasons for believing the employer is failing, the steps the employer could take to comply with the provision, and the date by which the employer must comply with the notice. An employer may lodge an objection to the notice with the Authority within 28 days and the Authority will confirm, vary, or rescind the notice. The improvement notice is enforced through a compliance order and a penalty may be sought for failure to comply with the order.

Demand notices

Labour inspectors are able to issue demand notices in respect of breaches of the Minimum Wage Act 1983, the Holidays Act 2003 and parental leave legislation. A demand notice imposes a legal requirement to comply. It may be served when an employee makes a complaint to the labour inspector or the labour inspector believes, on reasonable grounds, that an employee has not received wages or holiday pay, or other money payable by the employer to the employee, under the Minimum Wage Act or the Holidays Act.

In issuing demand notices, the labour inspector must give the employer no less than seven days to comment and must be satisfied the employee is entitled to the money. They must also be satisfied that the employer is not willing to pay in a reasonable manner or within a reasonable time.

There is the ability for the Employment Relations Authority to award penalty interest on monies owed where there is long-standing or repeated non-compliance with the demand notice.

Money recovery and fines

Labour inspectors may also act on behalf of an employee to recover money payable by an employer under the Minimum Wage Act 1983 or the Holidays Act 2003.

The Employment Relations Authority or the Employment Court can authorise a labour inspector to seek arrears directly from officers of a company, if certain criteria are met.

Compliance action

A labour inspector may commence proceedings in the Employment Relations Authority for a compliance order against any employer who fails to keep, or provide when requested, a lawful wages and time record (inclusive of holiday leave), or an employment agreement. They may also commence proceedings if the employer has failed to comply with an enforceable undertaking, an improvement notice or a demand notice (see definitions above).

Determinations

A labour inspector can produce a written determination that is legally binding on the parties, subject to a right of appeal through the Employment Relations Authority (the Authority), or the Employment Court. This applies in relation to the Holidays Act 2003 in the following areas:

- defining the 'ordinary working week' or 'relevant daily pay'
- defining an 'otherwise working day'
- implementing the four-week holiday entitlement
- determining pay for working a public holiday
- determining employment continuity when an employee is reinstated within one month of dismissal.

It also applies in relation to the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002 where a labour inspector may determine eligibility on the hours or earnings tests, for parental leave.

The labour inspector also has the power to bring an application to the Employment Relations Authority (the Authority), on behalf of an employee, for a determination in relation to minimum statutory employment standards. A determination can secure a final and binding obligation on the employer to comply with standards, such as the minimum wage, holidays or other statutory leave. The Authority can award penalties against the employer if the non-compliance or non co-operation is considered to be deliberate.

Finally, a labour inspector can bring an application (independently of the employee) to the Employment Court asking for a determination on whether a person is an employee or not.

Penalties

A labour inspector may seek a penalty for non-compliance with a range of statutory obligations relating to:

- the requirement to retain a copy of the individual terms and conditions of employment or the individual employment agreement, whether signed or unsigned, and to provide employees with a copy on request
- the requirement to maintain an employment agreement that meets the minimum standards for compliance

- entitlement to, and payment for, the minimum wage, annual leave, public holidays, sick and bereavement leave
- failure or keep and produce a holiday and leave record
- the failure to meet the terms of a compliance order in relation to an enforceable undertaking or an improvement notice.

Areas of specialist enforcement

- A labour inspector can issue, or decline, a permit granting an exemption from the minimum wage, under the Minimum Wage Act 1983, on the grounds that a worker *is significantly and demonstrably limited by a disability* in carrying out the job (section 8).
- Labour inspectors are empowered to enforce the Minimum Wage Act and Wages Protection Act on Foreign Charter Vessels fishing in the New Zealand Exclusive Economic Zone through Section 103 of the Fisheries Act 1996.
- Labour inspectors can use powers and policies developed for immigration purposes, for example, in relation to the Recognised Seasonal Employer Scheme (RSE). In RSE work, the labour inspector is able to seek compliance on standards which exceed the minimum provided by statute, through use of Immigration policy.

ADDITIONAL GUIDANCE

The following provides specific guidance relating to enforcement:

Systems for maintaining compliance

Employers develop systems for maintaining compliance that are both prescribed in law and developed to meet the needs of the business. Two such mechanisms are the wage and time records and employment agreements.

Employers are required to keep a wages and time record for all employees, specifying details such as: the nature of the work and the type of employment agreement covering the employee; the hours of work; and the wages paid. Not to maintain such a record is a breach of the law and a penalty may be imposed by the Authority.

A key mechanism for developing sustainable compliance is the maintenance of employment agreements which ensure that expectations are clear for parties to the employment relationship. Every employer must retain the individual employment agreement or terms and conditions of employment, whether signed or unsigned, and a copy must be provided to the employee on request. The agreement may be an individual agreement or a collective agreement (to which a union must be a party).

Application of mediation services

An employee or employer may access mediation for any employment problem; however, at times the labour inspector may also encourage the use of mediation

services to resolve a complex complaint. This may occur where there is a lack of clarity about the facts of the case or where a claim has been made by the employee and a counter-claim is lodged by the employer resulting in conflict between the parties.

Mediation is a process in which the participants, with the assistance of a mediator, consider disputed issues in order to develop options, consider alternatives and reach agreements that will accommodate their needs. This process may occur by telephone, by email, in the workplace, or in a mediation room. Mediation may assist a speedy resolution of the matter; however, it does not serve as a means to extinguish obligations to pay the employee in accordance with the minimum requirements of the law.

A labour inspector may also support an employer and employee to reach a binding agreement in writing. A recorded settlement may then be signed by a mediator to affirm the agreement. Such an agreement is enforceable by the parties in the Authority.

Cultural appropriateness

A significant proportion of the New Zealand workforce is made up of people from non-English-speaking backgrounds. As such, levels of English may vary widely and other cultural issues may need to be considered as part of the enforcement process. We will endeavour to recognise and respond to the differing needs of Maori, Pacific peoples, those from other ethnic groups, and new migrants.

Where another agency is investigating

On occasion, an investigation to recover monies by a labour inspector may coincide with a criminal investigation involving the New Zealand Police. As a general rule, labour inspectors will pursue the action relevant to their jurisdiction, unless the compliance issues relate to the same matter and it would be more practical to conduct an investigation at the conclusion of the Police investigation.

Obstruction of inspectors

Our inspectors must be able to conduct their activities without obstruction. This supports both employers and employees, by ensuring that all the facts are available and decisions are based on the best possible evidence.

Any person who obstructs or delays, hinders or deceives an inspector while they are carrying out their lawful duties is liable on conviction by the Employment Court to a fine not exceeding \$10,000.

ACCESSING THE LEGISLATION AND OTHER INFORMATION

The Department of Labour's website, www.dol.govt.nz, also has a range of material including plain English guides to support employers and employees to understand their rights and obligations. The Department's employment

agreement builder is available online to assist employers and employees to develop their own draft agreements for negotiation.

You can also obtain information from the Department by contacting the Department of Labour Workplace Contact Centre on **0800 20 90 20** during business hours.

You can find copies of Acts of Parliament in most public libraries. They are also available for sale from Legislation Direct (www.legislationdirect.co.nz) or from selected bookshops.

One of the easiest ways to access free, up-to-date versions of legislation and regulations is online at www.legislation.govt.nz. This site is searchable and material can be printed.

GLOSSARY

The following technical terms are used in this paper:

Term	Definition
Compliance	'Compliance' refers to the continuous process of acting in accordance with the requirements of the relevant legislation.
Compliance order	A compliance order is made by the Employment Relations Authority or the Employment Court under section 137 or section 139 of the Employment Relations Act 2000.
Demand notice	A statutory demand notice may be served by a labour inspector to recover unpaid or short-paid wages or holiday pay under the Minimum Wage Act 1983 or the Holidays Act 2003 www.legislation.govt.nz .
Employment agreement	This refers to an employee's terms and conditions of employment in a collective agreement; or a collective agreement together with any additional terms and conditions of employment; or an individual employment agreement.
Employee	An 'employee' means any person of any age employed by an employer to do any work for hire or reward under a contract of service.
Employment Relations Authority	The Employment Relations Authority was established by section 156 of the Employment Relations Act 2000 as an investigation body. It is able to make

determinations about employment relationship problems and aims to promote good faith behaviour and support successful employment relationships.

Enforceable undertaking	This refers to a written undertaking by an employer to: (a) rectify the breach of any provision of the relevant Acts; or (b) pay money owed to an employee under a provision of the relevant Acts; or (c) take any other action that the labour inspector determines is appropriate having regard to the nature of the breach of the provision of the relevant Act.
Enforcement activities	These are activities that aim to reduce non-compliance, including inspection activities and the use of remedial measures.
Improvement notice	A labour inspector may issue the employer with an improvement notice if they believe on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts. The improvement notice requires that the inspector must state the steps that the employer could take to comply with the particular provision in law and a date by which the employer must comply.
Labour inspector	<p>A labour inspector refers to an employee of the Department of Labour designated under section 223 of the Employment Relations Act 2000 to be a labour inspector. The functions of a labour inspector include—</p> <ul style="list-style-type: none">(a) determining whether the provisions of the relevant Acts have been complied with(b) taking all reasonable steps to ensure that the relevant Acts are complied with(c) supporting employers, employees, and other persons in complying with the relevant Acts by providing information and education(d) preventing non-compliance with the relevant Acts by assisting employers to implement systems and practices that comply with the provisions of the relevant Acts(e) providing any other services that assist employers and employees to resolve, promptly and effectively, employment relationship problems arising under the relevant Acts.

Mediation

Mediation refers to services provided under section 144 of the Employment Relations Act 2000 by the Chief Executive of the Department of Labour, and any other mediation services that are provided (whether by the Chief Executive or any other person) to help resolve employment relationship problems. This is a process that entails resolution of problems through third party facilitation and, in some instances, through written recommendations or decisions.



⇒ More information

www.dol.govt.nz

0800 20 90 20

Information, examples and answers to your questions about the topics covered here can be found on our website www.dol.govt.nz or by calling us free on 0800 20 90 20.

