

NEWSLETTER

Issue 1
February 2010 – April 2010

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Employment Update

The employment law landscape is an area of reform that the National Government has targeted since taking office. Listed below are some of the recent changes and proposals for change in employment law that may affect you.

Definition of Serious Harm

The Minister of Labour, Hon. Kate Wilkinson, announced in December 2009 that the Government proposed to amend the definition of serious harm under the Health and Safety in Employment Act 1992. The definition of serious harm is important as an employer or person in control of a workplace must, where serious harm has occurred, report this immediately to the appropriate authority – the Department of Labour, The Civil Aviation Authority or Maritime New Zealand.

The proposed definition of serious harm will contain

three main categories of harm:

- *Trauma injury* – physical harm arising out of a single accident or event and defined by the degree of physical incapacity,
- *Acute illness or injury* – requiring treatment by a medical practitioner and caused by exposure to workplace hazards, and
- *Chronic or serious occupational illness or injury* - physical or mental harm requiring hospital admission, in-patient surgery, or able to be confirmed by a specialist medical diagnosis.

It is expected that the proposed definition will be clearer and easier to use and will remove the gaps in coverage of certain types of harm or hazard which currently exist.

Report on Workplace Deaths

In December 2009 the Government ordered a report into workplace deaths. At that time there had been 31 workplace deaths in 2009 - all of which were men.

Most of the deaths remain under investigation. The Department of Labour has been asked to identify whether there are any common underlying causes and whether employers had failed to meet their obligations to keep employees safe.

Holidays Act Review

The review of the Holidays Act 2003 was received by Minister of Labour Hon. Kate Wilkinson in December 2009 and the Government intends that proposals for change will be introduced to a select committee for comment this year.

Some of the proposals may include:

- the opportunity to trade 1 week of annual leave for cash,
- a change in the method of calculating holiday and sick leave entitlements, and
- the transfer of public holidays to another day.

Watch this space for further updates!

Rest and Meal Breaks

Since 1 April 2009 employees have been entitled to compulsory rest and meal breaks after a certain number of hours of work. Many workplaces met or exceeded the compulsory minimums, however for

some workplaces the compulsory prescription of rest and meal breaks presented difficulties and significantly affected their workplaces.

The Rest Breaks and Meal Breaks Amendment Bill, while maintaining an entitlement to rest and meal breaks, proposes that:

- employers and employees may agree on the timing of the breaks rather than the timing being prescribed by legislation,
- employers may not have to provide a complete

break from work duties in situations where the employee is a sole attendant, and

- where a break cannot reasonably be provided the parties may agree that time off is given at an alternative time, for example an employee may start later or finish earlier in the day.

The Government hopes that this relaxation of the requirements will provide employers with the flexibility to schedule their rest and meal breaks in a way that best suits their industry.

Trust Beneficiaries' Rights to Information

How much information should beneficiaries under a trust be given, and what information are they entitled to? In many trusts the settlors and trustees are Mum and Dad and the beneficiaries are the children. Usually the children are kept informed and advised of the assets in the trust and the question of what information should be disclosed to the beneficiaries is often not an issue.

Questions may arise as beneficiaries get older or where communication between trustees and beneficiaries is limited or has broken down. The beneficiaries may become suspicious of the actions of the trustees and demand financial statements and other financial information from the trustees.

Trustees are not legally required to show beneficiaries all Trust documents, although in many cases trustees will for example supply a copy of the Trust Deed, information and explanation as to investments, financial statements and accounts of the Trust.

Historically it was thought that a beneficiary under a fixed trust ("fixed beneficiary") had an entitlement to view trust documents and information, and a beneficiary under a discretionary trust ("discretionary beneficiary") did not. Under a fixed trust the number of beneficiaries and the share they will receive are defined. Under a discretionary trust the trustees may use their discretion as to who will be a beneficiary and what share a beneficiary will receive. The reasoning therefore was that a fixed beneficiary has an entitlement to Trust property, whereas a discretionary beneficiary merely has the right to be considered as a beneficiary.

In *Schmidt v Rosewood Trust Ltd* the Privy Council held that a beneficiary's entitlement to seek disclosure of trust documents is based on the Courts' inherent jurisdiction to administer Trusts rather than

whether the beneficiary is a fixed beneficiary or a discretionary beneficiary. Both fixed and discretionary beneficiaries can apply to the Court for disclosure of Trust documentation.

Where a beneficiary applies to the Court for disclosure of a Trust's documents, the Courts will, in exercising their discretion, balance the interests of trustees, beneficiaries and third parties. The beneficiaries do not have an absolute right to information. The Court will consider the nature of the information and the interests of all the beneficiaries.

Information which the Courts have in the past provided to beneficiaries include:

- copies of the Trust Deed,
- financial accounts and statements of the Trust,
- any Deeds of Variation of Trust Deed, and Deeds of Retirement and Appointment of Trustees,
- valuations of assets of the Trust, and
- legal opinions related to beneficiaries rights and the interpretation of a Trust Deed's provisions.

In exercising their discretion, the Courts will consider such factors as issues of personal and commercial confidentiality and sensitivity, whether limitations need to be placed on the use of the documentation or information, whether some documents should be withheld in full or in part, and what impact the disclosure will have on the trustees, the beneficiaries or third parties.

There will no doubt be times when a trustee will refuse a beneficiaries' request for trust information. This decision is more likely to be respected and accepted where the trustee and beneficiary have developed a history of communication and respect. As trustee, if you are unsure as to what type of Trust information you need to disclose to the beneficiaries, we recommend you seek legal advice beforehand.

Franchise Agreements

Franchising is a business model in which one business (the franchisor) allows a separately owned business (the franchisee) to use their systems, brand name and other intellectual property rights in return for royalties and other considerations.

The advantage for a franchisee is that they theoretically get the benefit of a proven and tested business model.

According to *Franchise Information New Zealand*

around 80% of franchised businesses still operate after 5 years compared with only 20% of independently started businesses. The franchisor, on the other hand, is able to expand their business without providing the capital and taking on the risk.

The association between the parties is symbiotic. The franchisee relies on the franchisor and the other franchisees to maintain the reputation of the brand. The document that gives rise to the relationship is the franchise agreement which sets out the conditions upon which the franchise is to operate. The franchise agreement sets out the:

- fees to be paid, both upfront and ongoing,
- duration of the agreement and renewal rights,
- intended territory or market,
- dispute resolution procedure, and
- rules relating to the on-sale of the franchise.

In order to assist the franchisee and to ensure consistent quality of service amongst franchises there is usually a franchise manual that provides operational details. This manual contains the business model, with most agreements requiring strict adherence to it.



Fundamentally, franchise agreements should be approached like any other contract and needs to clearly reflect the arrangement

between the parties. Clauses that are unnecessary to the functioning of the relationship need to be carefully examined by an independent lawyer, preferably one with franchise experience. Many franchise agreements, particularly with large firms, be prepared to decline to sign contracts that contain onerous and one-sided terms.

There are a number of common pitfalls within franchise agreements. For example, the franchisee needs an exclusive territory within which the franchisor may not grant any other franchise licenses. Clauses that allow reduction of this territory by the franchisor are common and should be considered carefully. Also, the franchisor should specify the steps they will take to protect the intellectual property rights being paid for. The exact method of calculating the royalties needs to be specified as well as penalties for late payments. Clauses that allow for early termination are very common and need to be clearly understood. Agreements that limit the liability of the franchisor to the franchisee are cause for concern, particularly when related to obligations for marketing, training, and disclosure statements in the negotiation phase.

There is no specific franchise legislation to protect franchisees, however around half of franchisors abide by a self regulating code of conduct that aims to “promote high standards of franchise conduct” and does offer some protection against unreasonable and unfair conduct on the part of the franchisor.

Real Estate Agents Act 2008

The Real Estate Agents Act 2008 came into force on 17 November 2009, replacing the 1976 Act and introducing a new regulatory regime. The Act’s purpose is to promote and protect consumers’ interests and “promote public confidence in the performance of real estate agency work”. Some of the important changes under the new Act are outlined below.



Real Estate Agents Authority

A Real Estate Agents Authority (“Authority”) has been established as an independent Crown entity to replace the Real Estate Agents Licensing Board. It will be responsible for such matters as licensing, receiving complaints, disciplinary action, regulating standards, and consumer information. The Associate Minister of Justice Hon. Nathan Guy has stated that the public will now be able to access the Authority to gain impartial and easy to understand information and that the Authority will provide a robust, transparent complaints and disciplinary process.

Licensing

Every person engaged in real estate agency work must apply for a licence on a yearly basis. There will be a public register of licensees that will record

whether the licensee has been disciplined in the last three years. This will allow consumers to make informed choices when choosing an agent.

Code of Conduct

The Authority will establish a Code of Conduct that will set minimum standards of behaviour by which all licensees must abide.

New Complaints and Disciplinary Processes

The Authority will establish Complaints Assessment Committees, as required, to more effectively deal with complaints and investigate allegations about licensees. Each committee will have three members and will investigate complaints, make determinations about complaints, promote resolution of complaints, lay and prosecute charges before the Real Estate Agents Disciplinary Tribunal, refer complaints to other agencies where appropriate, as well as inform complainants about decisions and publish decisions.

Real Estate Agents Disciplinary Tribunal

The Real Estate Agents Disciplinary Tribunal (the “Tribunal”) has been established, and is independent of the Real Estate Institute with members being

appointed by the Minister. The Tribunal will hear and determine claims brought by a Complaints Assessment Committee and will hear any subsequent appeals against the Committee's decisions.

The hearings are to be held in public and appeals of Tribunal decisions will be heard in the High Court. The Tribunal may:

- suspend or cancel a licence,
- impose a fine of up to \$15,000 in the case of an individual or up to \$30,000 in the case of a company,
- order agents to pay compensation of up to \$100,000 or have their licence cancelled or suspended.

Snippets

Court Ordered Mediation for Civil Disputes

The Government announced in November 2009 that it will carry out a pilot scheme in the High Court in Auckland that will see parties referred to court-ordered private mediation for civil disputes.

The pilot scheme will consist of 50, one-day mediations carried out by private mediators. A panel of between 12 and 15 mediators, who hold legal qualifications and current practicing certificates, will be established.



Currently mediations are carried out by Associate Judges, however the Government would rather see Associate Judges spend time on cases that require judicial attention rather than mediating disputes.

A review of the scheme will take place after the pilot scheme has ended. If court-ordered private mediations prove successful, they may become the best way to deal with civil disputes.

The Government will be looking keenly at the outcome of the use of private mediators. The scheme has the potential to significantly increase the speed and quantity of civil cases dealt with in the High Court.

Disclosure Obligations

Real Estate Agents are now required to provide certain information to clients such as disclosing conflicts of interest, and making disclosure of all discounts and rebates the agent will receive.

Agents must provide an approved guide to clients who are entering into agency agreements or agreements for sale and purchase. The guide will provide a plain language explanation of the document and the implications of signing it.

Agency Agreements

Clients must be given a copy of an agency agreement within 48 hours of signing. In the case of a sole agency agreement the client will now have a cooling-off period, until 5pm of the day following signing, to elect to cancel the agreement.

Fleming Foster News!

We have re-located our office to Level 3, van den Brink House, 652 Great South Road, Manukau City. Our new telephone number is 262-0330. Client Parking is available.

We are saying goodbye to Tom Fleming who is retiring after 38 years of practice. He started in 1972 with McVeagh Fleming in Manurewa as we then were. Tom will remain as a consultant to the firm.

Ross Sly has been made an Associate. Ross joined us in February last year and works predominantly on property and commercial matters.

Denise Schmidt has joined Fleming Foster and will work on private client matters. Denise is a qualified English solicitor and is about to be admitted to the bar in New Zealand.

All the best for 2010 we look forward to being of assistance in the near future.

FLEMING FOSTER SOLICITORS Manukau

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If you have any questions about the newsletter items, please contact us, we are here to help.