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18 September 2023

Committee Secretariat
Education and Workforce Committee
Parliament Buildings
Wellington

Via online form.

Re: Employment Relations (Restraint of Trade) Amendment Bill Submission

Dear Committee Secretariat,

The Association of Digital Service Providers Australia New Zealand (DSPANZ) welcomes the opportunity to make this submission on behalf of our members and the business software industry. This submission has been prepared with input from the Digital Advisory Group - Payroll Working Group.

About DSPANZ
Digital Service Providers Australia New Zealand is the gateway for the government into the dynamic, world-class business software sector in Aotearoa New Zealand and Australia. Our 90+ members range from large, well-established companies to new and nimble innovators working at the cutting edge of business software and app development on both sides of the Tasman.

Our submission provides feedback on the proposed operationalisation of the restraint of trade provisions, specifically about introducing the term "average weekly earnings" used to determine the validity of a restraint of trade provision and the payment of reasonable compensation for the term of the restraint.

Introducing this term will lead to unnecessary confusion and potential incorrect usage amongst employers due to its name being the same as a commonly used term in the context of the Holidays Act 2003 (HA), which has a different meaning and calculation.

Additionally, we submit that rather than introduce a new term for the restraint of trade provisions, existing calculations and values already commonly used by employers and held in payroll systems be used instead to reduce the cost of compliance.

Recommendation

1. The "average weekly earnings" term used in the Bill should be changed to avoid confusion with the same term used in the Holidays Act 2003. We recommend

dropping the word average and simply defining the term as “weekly earnings” instead.

2. To avoid the introduction of a new calculation that will need to be calculated within payroll systems, leading to higher compliance costs, existing values already held in payroll software should be considered where they provide the same policy outcomes. For the purposes of subsection (1), “weekly earnings” could be defined as the higher of the average weekly earnings or ordinary weekly pay as at the end of employment, where these terms have the same meaning as defined in Sections 5 and 8 of the Holidays Act 2003.
3. Clarification as to whether compensation payable for restraint of trade provisions are included in Gross Earnings under S14 of the Holidays Act 2003 and are to be included in the calculation of Kiwisaver under the Kiwisaver Act 2006, and clarification on the date that employment ends is requested to avoid misinterpretation of the Bill which would lead to non-compliance.

DSPANZ also recommends that the Ministry of Business Innovation and Employment (MBIE) establish a representative to engage payroll software providers on payroll-related policy. Engaging early with payroll software providers on such items would enable MBIE to understand the operational feasibility and help with compliance.

DSPANZ welcomes the opportunity to provide further feedback on our submission. Please contact Maggie Leese for more information.

Yours faithfully,

Matthew Prouse
President & Director
DSPANZ.

Background
S67I of the proposed Bill introduces the term "average weekly earnings". This term is used for two purposes in the Bill:

1. It prevents a restraint of trade provision from having effect unless the employee's average weekly earnings exceed the threshold weekly rate (three times the minimum adult minimum weekly wage).
2. It sets what is considered reasonable compensation, meaning a payment of not less than half of the employee's average weekly earnings for each week (or part week) that the restraint of trade provision applies.

Average weekly earnings is further defined in S67I(2) as:

a = b / (c - d)

Where
a is the employee's average weekly earnings
b is the employee's gross earnings received from the employer in the 52 week period preceding the end of the employment
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; and
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—
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:
iii. on leave without pay with their employer's agreement.

Unnecessary confusion
The term "average weekly earnings" is a commonly used term in payroll and has meaning specific to the calculations of annual leave under the Holidays Act 2003 (HA). Specifically, average weekly earnings is defined in S5 as 1/52 of an employee's gross earnings. This definition is not the same definition or calculation as that introduced in the Bill.

We believe using this term will likely cause confusion amongst employers when determining this new value for restraint of trade provisions because of the naming confusion and could lead to the wrong value being used.

Existing values can be used with the same effect resulting in reduced compliance costs
The "average weekly earnings" definition in the Bill appears to define a "fair" average of what the employee would earn in a week by reducing the divisor by the weeks that an employee receives no earnings from their employer through either being on paid weekly compensation, parental leave or any leave without pay with their employer's agreement.

To calculate this new value, employers would typically turn to payroll software. In its current state, the Bill adds costs to software providers to modify their software systems to provide the new value for employers to use. The market ultimately bears these costs. While achieving policy goals as intended is a required outcome, we believe that implementation alternatives that achieve the same outcomes at reduced costs should be considered.

The Holidays Act 2003 defines rates of payment for annual leave, which are described in terms of weekly rates of pay. These rates of payment ensure that an employee is not financially disadvantaged for taking a week of annual leave compared to a week had they worked. Payments for a week of annual leave must be paid at the higher of an employee's Average Weekly Earnings or Ordinary Weekly Pay, where Average Weekly Earnings is defined in S5 as 1/52 of an employee's gross earnings and Ordinary Weekly Pay is defined in S8 of the Act.

If the higher of these two values was used in the context of the restraint of trade provisions instead of the newly proposed "average weekly earnings" calculation in the Bill, we believe that the same outcome could be achieved without the need to introduce a new calculation and the associated additional compliance costs.

Example 1:
Joseph receives a base salary of $120,000 per annum and an annual bonus that varies each year depending on financial performance. For the 2022 financial year, he received a $10,000 annual bonus, which he received in January 2023. Joseph resigned in August and has a restraint of trade provision within his employment agreement.

To determine if a restraint of trade clause has effect, Joseph's employer determines whether the higher of his Average Weekly Earnings or Ordinary Weekly Pay at the end of his employment is greater than 3 times the minimum weekly wage. From the payroll system, Joseph's employer finds that at the end of Joseph's employment, his Average Weekly Earnings are $2,500, and his Ordinary Weekly Pay is $2,307.69. The higher of these two figures is compared to 3 times the minimum weekly wage of $2,724. Because $2,500 is less than $2,724, the restraint of trade provision can have no effect.

Example 2:
Mary receives a base salary of $120,000 plus monthly commission payments such that her salary varies each pay period. Mary has returned from a period of parental leave that occurred in the last 12 months. Mary resigned in August and has a restraint of trade clause within her agreement.

To determine if a restraint of trade clause has effect, Mary's employer determines whether the higher of her Average Weekly Earnings or Ordinary Weekly Pay at the end of her employment is greater than 3 times the minimum weekly wage. From the payroll system, Mary's employer found on her last day of employment that her Average Weekly Earnings was $1,730.77 (lower due to her being on unpaid parental leave for a period within the

past 52 weeks). However, her Ordinary Weekly Pay is $3,057.69 (using S8(2) of the HA). The higher of these two figures is compared to 3 times the minimum weekly wage of $2,724. Because $3,057.69 is greater than $2,724, the restraint of trade provision has effect. Additionally, Mary must be paid at least 50% of $3,057.69 for every week that the restraint of trade provision applies.

Additional clarification will reduce the risk of non-compliance

To reduce the risk of employers misinterpreting the treatment of the restraint of trade provisions, additional clarification is requested to provide certainty and reduce the possibility of non-compliance.

Is the compensation payable in relation to an employee subject to a restraint of trade provision considered part of Gross Earnings under S14 of the Holidays Act 2003 because this impacts the value of holiday pay paid on termination? While the payment may be considered a payment made under the employee's employment agreement, it is a compensatory payment for not taking up work and is not payment for work performed. It would be useful to add a statement to avoid doubt to provide certainty as to whether to include or exclude this payment from Gross Earnings. Similarly, should the compensation payable be subject to Kiwisaver? Kiwisaver contributions turn on the definition of salary and wages in the Kiwisaver Act 2006, which in turn references the definition of salary and wages in the Income Tax Act 2007 with several exceptions. Clarity on the treatment of compensation payable in relation to restraint of trade provisions and Kiwisaver is requested.

Clarity is also requested on the date that employment ends to clarify that this is the last day of work for the employee. This clarification would remove confusion where employees with these provisions have their notice period paid out and, therefore, clarify that the duration of the restraint starts from this date and not the end of the notice period if this is not worked.

Recommendation

1. The "average weekly earnings" term used in the Bill should be changed to avoid confusion with the same term used in the Holidays Act 2003. We recommend dropping the word average and simply defining the term as "weekly earnings" instead.
2. To avoid the introduction of a new calculation required to be calculated within payroll systems, leading to higher compliance costs, existing values already held in payroll software should be considered where they provide the same policy outcomes. For the purposes of subsection (1), weekly earnings could be defined at the higher of the average weekly earnings or ordinary weekly pay as at the end of employment, where these terms have the same meaning as defined in Sections 5 and 8 of the Holidays Act 2003.
3. Clarification as to whether compensation payable for restraint of trade provisions are included in Gross Earnings under S14 of the Holidays Act 2003 and are to be included in the calculation of Kiwisaver under the Kiwisaver Act 2006, and clarification on the date that employment ends is requested to avoid misinterpretation of the Bill which would lead to non-compliance.