



# Changes to the laws on employment relations and holidays





## About the Department of Labour

The Department of Labour provides information and investigates problems to do with employment and workplace health and safety. We can help employers and employees with:

- › Employment conditions
- › Minimum legal requirements
- › Problem resolution
- › Health and safety
- › Ways to work better
- › Labour market information

## More information

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

## Disclaimer

This document is a guide only. It should not be used as a substitute for legislation or legal advice. The Department of Labour is not responsible for the results of any actions taken on the basis of information in this document, or for any errors or omissions.

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# Introduction

Changes to the Employment Relations Act 2000 and the Holidays Act 2003 were passed by Parliament in November 2010.

The changes introduced a wide range of legislative amendments. It is important for employers and employees to be aware of the changes and how they affect them.

Most changes for both Acts will come into effect on **1 April 2011**. The changes coming into effect on other dates are:

- › clarification of leave entitlements during a business close-down period has already come into force
- › the requirement for employers to retain a signed copy of the employment agreement or the current signed terms and conditions of employment comes into effect on 1 July 2011.

This guide provides a plain English summary of the major changes and information about how you can obtain further details or help.

## Changes to Employment Relations Act 2000 at a glance

### The main changes to the law include:

- › Changes to union access to workplaces
- › Clarifying that employers may communicate with employees during collective bargaining
- › Requiring employers to retain employment agreements
- › Extending the trial period provision to all businesses
- › Changes to the personal grievance provisions
- › Measures to promote early problem resolution, mediation in disputes and changes in relation to the Employment Relations Authority and Employment Court

- › Changes to Labour Inspectors' roles and powers
- › Extending and increasing penalties.

You can view the Employment Relations Amendment Act 2010 at [www.legislation.govt.nz](http://www.legislation.govt.nz)

## Changes to the Holidays Act 2003 at a glance

### The main changes to the law include:

- › Changes to the calculation of payments for public holidays, alternative holidays, sick leave and bereavement leave
- › Allowing employees to ask to cash up a maximum of one week of annual holidays
- › Changes to transferring the observance of public holidays
- › Changes to when employees can take alternative holidays
- › Requirements regarding requesting proof of sickness or injury
- › Clarification of entitlements during a closedown period
- › Other changes including penalties for non-compliance and definitions of payments and allowances.

You can view the Holidays Amendment Act 2010 at [www.legislation.govt.nz](http://www.legislation.govt.nz)

## Department of Labour advice

As well as this guide to the law changes, a number of information resources, such as printed and electronic fact sheets and FAQs and the online tools, are being updated to reflect the changes.

To receive updates when new information is available subscribe at: [www.dol.govt.nz/subscribe](http://www.dol.govt.nz/subscribe).



# Changes to the Employment Relations Act 2000

## Union access to workplaces

Union representatives intending to visit a workplace will be required to gain the permission of the employer first. This permission may not be unreasonably withheld.

The employer must respond within one working day after the request is received. If the employer decides not to grant access, they must provide written reasons for this decision no later than one working day after the date of the decision.

If the employer does not respond within two working days of the request, consent for the union representative to enter is deemed to have been given.

If an employer denies consent but does not provide reasons in writing for the refusal, or unreasonably withholds consent, the employer could be subject to a financial penalty imposed by the Employment Relations Authority.

## Communications during bargaining

The Act is amended to clarify that an employer is able to communicate directly with his or her employees – including communicating about the employer's proposals for the collective agreement – while bargaining for a collective employment agreement.

Such communications must be consistent with the duty of good faith in section 4 of the Act. Section 32 of the Act sets out what the duty of good faith requires in the specific context of bargaining. Among other things, the union and employer must:

- › recognise the role and authority of any person chosen by each to be its representative or advocate; and
- › not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the

representative or advocate are acting for, unless the union and employer agree otherwise; and

- › not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining.

## Requirement to retain and provide a copy of the terms and conditions of employment

Employers will be required to retain a signed copy of the employment agreement or the current signed terms and conditions of employment. Where an employer has provided an employee with an intended agreement the employer must retain the "intended agreement" even if the employee has not signed it or agreed to the terms and conditions specified in the intended agreement. An intended agreement cannot be treated as the parties' employment agreement if the employee has not signed the agreement or not agreed to the terms and conditions specified in the intended agreement.

The employer is required to provide a copy of the agreement on request of the employee.

Labour Inspectors can issue notices regarding any breaches of the requirements for employment agreements and give employers seven working days to fix the issue. Otherwise a financial penalty can be imposed by the Employment Relations Authority.

The intention of the provision is to ensure that an employee has access to the employment agreement and that the employment agreement is maintained for enforcement purposes.

The Act is already explicit about the need for an employment agreement to be in writing and to include elements such as the name of the employee and a description of the work to be performed.



## Extending the trial employment period

The provision for an employee trial period of 90 days or less currently applies to employers with fewer than 20 employees. From April 1, 2011, the trial period provisions will be extended to cover all employers, regardless of the number of employees in the business.

## Changes affecting cases investigated by the Authority

### The “test of justification” in personal grievances

The test of justification is the test applied in assessing the fairness of an employer’s actions usually in relation to a dismissal or other disciplinary action.

The Employment Relations Authority or Court must consider the following minimum requirements of a fair and reasonable process in making a decision as to whether or not the actions of the employer were what a fair and reasonable employer *could* have done in all the circumstances. This is change to the Act which previously required that the Authority or Court must consider what a fair and reasonable employer *would* have done.

The Authority or Court must consider whether the employer:

- › having regard to the resources available, sufficiently investigated the allegations against the employee
- › raised his or her concerns with the employee
- › gave the employee a reasonable opportunity to respond to those concerns
- › genuinely considered the employee’s explanation (if any) in relation to the allegations.

Other factors may be taken into account by the Authority or the Court.

The change recognises that there is a range of fair and reasonable responses that could be made by an employer when considering a dismissal or other actions.

The law also makes clear that an employer’s action cannot be viewed as unjustified solely because of mistakes made in the process, if those mistakes were minor, and they did not result the employee being treated unfairly.

### Reinstatement as a remedy

Reinstatement is a remedy that restores the employee to the situation they were in prior to a dismissal. Prior to the Amendment Act the law required the Employment Relations Authority to provide for reinstatement where practicable. It was the primary remedy where sought by an employee in a personal grievance.

From 1 April 2011 reinstatement will no longer be the primary remedy. However reinstatement will be retained as a remedy where practicable and reasonable.

## Early problem resolution without representation

A change to the Act clarifies that employers and employees can take up an option to secure a quick and low cost solution to a problem before a more formal mediation event. For instance, parties could obtain an assessment from a mediator of the risk of proceeding with, or defending, a claim. This might take place over the phone or at the worksite and may take place without formal representation if the parties request it.

Most mediation events take place through a relatively formal process that involves representation by professional advocates. However, given the choice, some parties may be able to settle their differences quickly at a lower cost than a formal process.

## Promoting mediation

The Act is amended so that the cases of parties who have already been to mediation (but have not settled or only partially settled their dispute) are given priority at the Employment Relations Authority. The Authority will also continue to prioritise some other cases which are not amenable to mediation, such as sexual harassment cases or a Labour Inspector demand notice on minimum employment entitlements.



## Recommendations by a mediator or Authority member

Department mediators and members of the Employment Relations Authority will have a new power to make written recommendations to the parties at the request of the parties. The recommendation will be about how the problem is solved.

Parties must agree in writing to a mediator's recommendation and that recommendation will be final and enforceable under section 149 *unless* one or both parties notify the mediator within a specified timeframe.

The same process applies to recommendations from an Authority member.

The parties have time to consider whether or not to accept the recommendation. The onus, therefore, will be on the parties to say whether they accept or reject the recommendation. If one or both parties do not accept it, the mediation or Authority investigation will continue. The parties can request a different mediator continue the mediation or a different Authority member continue the investigation.

## Reinforcing minimum employment entitlements in problem resolution

This change to the Act states that the Employment Relations Authority must actively consider whether it is appropriate to direct to mediation services a matter that is brought by a Labour Inspector which relates to an employee's minimum entitlements.

The law also clarifies that minimum entitlements cannot be negotiated away at mediation (thereby breaching the minimum standards). Minimum entitlements can still be a matter for consideration in mediation, but the lawful amount of those entitlements cannot be the subject of negotiation and possible reduction.

## Minors

A change to the Act will allow minors aged 16 or 17 years to sign records of settlement and for those agreements to be final and binding. This change means minors aged 16 or 17, already considered

competent to sign an employment agreement, may now sign any terms of settlement in regard to any dispute.

## Other changes to that apply to the Employment Relations Authority

A number of other changes have been made to the powers and operation of the Authority.

### **Only the court can issue freeze orders and search orders**

It has been clarified that the Authority does not have the power to issue freeze and search orders. These orders will only be able to be issued by the court.

### **Empowering the Chief of Authority to oversee its operation**

The Chief of the Authority will have further powers to oversee the Authority's operation, including Authority members' conduct and training and instructions regarding the process, timeliness, or about a matter before the Authority.

For the purposes of recommending the reappointment of a member of the Authority, the Chief of the Authority will have the ability to provide a report to the Minister of Labour in respect of the member's adherence to and compliance with any instructions.

### **Establishing statutory right of cross-examination**

There will now be a statutory right to cross-examination in the Authority. The Authority will still be able to control cross-examination where, in its view, the cross-examination is not assisting the proper investigation of a matter or is being conducted inappropriately.

### **Empowering Authority to refer cases to the Court**

The Authority will now be able to remove cases to the Court at its discretion. Cases will be able to be removed in their entirety or in part and removal will be based on existing criteria within the Act. The Court retains the power to refer matters back to the Authority.



### **Filtering out frivolous or vexatious cases**

The Authority will now be able to dismiss frivolous or vexatious claims or defences of claims. This allows the Authority to dismiss cases (or parts of cases) with little or no merit without having to go through a full investigation. A challenge to a dismissal would go to the court.

### **Cases inactive for three years may be treated as withdrawn**

Cases that have not been actively pursued or progressed by a party within three years will now be treated as withdrawn.

## **Defining the functions of Labour Inspectors**

The role of Labour Inspectors and their enforcement powers will change.

The expanded role of the Labour Inspector will encompass not only managing complaints but also supporting businesses to achieve sustainable compliance through improved practices and systems.

The functions of Labour Inspectors are now specified in the Act and give clarity and transparency to their role. Specific functions include:

- › determining whether there has been compliance with employment laws
- › taking all reasonable steps to ensure that there has been compliance
- › supporting employers and employees to be compliant with employment laws through providing information and education
- › preventing non-compliance with employment laws through assisting employers to implement systems and practices that comply with the law, and
- › providing any other services that assist employers and employees to resolve employment relationship problems.

## **Enforceable undertakings**

After a Labour Inspector has investigated a complaint, the employers will be able to enter into an *enforceable undertaking* with the Labour Inspector. This is an agreement that the employer will address a breach of any of the relevant employment laws, such as the Holidays Act 2003 and the Minimum Wages Act 1983.

The enforceable undertaking allows solutions to be negotiated in which the employer agrees to take actions that are appropriate to rectifying the breach; for instance, it may stipulate a time and wages recording system is put in place.

This is a voluntary agreement that allows the employer to improve and correct their employment relations practices. However, once agreed and signed the undertaking is enforceable and if it is breached the Employment Relations Authority may issue a compliance order, which may in turn incur a penalty,

## **Improvement notices**

The changes will introduce a process in which an improvement notice can be imposed by a Labour Inspector where there is non-compliance with employment law. A similar mechanism is currently available to Health and Safety Inspectors under the Health and Safety and Employment Act 1992.

A Labour Inspector may issue the employer with an improvement notice if they believe on reasonable grounds that any employer is failing to comply with any provision of relevant employment law. The improvement notice requires the employer to comply with the provision stated. The improvement notice will also state the steps that the employer *could* take to comply with the particular provision in law.

An employer may object to an improvement notice within 28 days of its issuing.

The notice may be withdrawn by the Labour Inspector but this does not prevent another being issued.

As with the enforceable undertaking, the improvement notice may be enforced through a





compliance order and may be subject to a penalty action. The Employment Relations Authority may consider sending the matter to mediation but must take into account whether this may involve a reduction of minimum employment entitlements.

The improvement notice cannot be issued in addition to another recovery action commenced by the Labour Inspector for the same matter, for example, if a demand notice has already been issued.

## Extending and increasing penalties

A law change extends and strengthens the rules around financial penalties.

Sections 63, 64, and 65 of the Act are amended to allow Labour Inspectors to seek a penalty where the employer is in breach of:

- › the requirement to provide the employee with a copy of the intended employment agreement
- › the new requirement to retain and provide a copy of the individual employment agreement or current terms and conditions of employment whether signed or not. (This must be preceded by written notice of the breach to the employer, allowing the employer by a seven-day timeframe for rectifying the breach)

- › the obligation to provide an individual with terms and conditions of employment that are in writing and include the provisions relating to the content of the agreement
- › a compliance order for failure to comply with an enforceable undertaking entered into with a Labour Inspector
- › a compliance order for failure to comply with an improvement notice issued by a Labour Inspector.

The law is also amended so that the maximum penalties for non-compliance are doubled to a maximum of \$10,000 for individuals and to a maximum of \$20,000 for companies and other bodies corporate.

Non-compliance with a demand notice is also addressed by providing for interest on the penalty on a demand notice where there is long-standing, or repeated, non-compliance.

The Employment Relations Authority will also be provided with the ability to penalize anyone who obstructs or delays an Authority investigation (including by not turning up to an investigation meeting).



# Changes to the Holidays Act 2003

## Payment for leave

For public holidays, alternative holidays, sick leave and bereavement leave, an employee is entitled to be paid either their relevant daily pay or average daily pay.

Relevant daily pay is the amount the employee would have received had he or she worked on the day concerned, including:

- › productivity or incentive-based payments (including commission)
- › overtime payments
- › the cash value of any board or lodgings provided by the employer.

However, it excludes payment of any employer contribution to a superannuation scheme for the benefit of the employee.

Average daily pay is a daily average of the employee's gross earnings over the past 52 weeks. That is, the gross earnings figure divided by the number of whole or part days the employee worked.

An employment agreement may specify a special rate of pay for the purpose of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave, as long as the rate is equal to, or greater than the employee's relevant daily pay.

When calculating payment for a leave entitlement, an employer should attempt to determine an employee's relevant daily pay in the first instance. If it is not possible or practicable to determine relevant daily pay, or if the employee's daily pay has varied within the pay period when the holiday or leave falls, an employer may pay his or her average daily pay. Average daily pay must be used if it is not possible to determine relevant daily pay and there is no special rate agreed to in the employment agreement.

The amount of pay does not include any extra amount that would be added by virtue of working on a public holiday.

If an employer and employee cannot agree on the amount of the employee's relevant daily pay or

average daily pay, a Labour Inspector may determine the amount.

## Changes to the calculation of payment for working on a public holiday

An employer may also use the average daily pay (ADP) to calculate an employee's pay for working on a public holiday. The only time an employer may choose to use the ADP, to calculate an employee's pay for working on a public holiday, will be when that employee's daily pay varies in the relevant pay period. This is because the trigger for using the ADP for the reason that it is 'not possible or practicable' to determine relevant daily pay will never be met when the employee actually works on the public holiday.

If the daily pay varies in the relevant pay period and the employer chooses to use the ADP to determine the employee's pay for working on a public holiday, the employer must work out the portion of the employee's ADP that relates to the time actually worked on the day (minus any penal rates) and then multiply by 1.5. This figure must be compared to the employees' relevant daily pay (including any penal rates) and the employer must pay the greater amount.

The first public holiday to be affected by the change will be Good Friday, 22 April 2011.

## Cashing up a maximum of a week of annual holidays

The law change means that employees will be able to ask for their employer to pay out up to one week of their minimum entitlement to annual holidays a year.

This can only be at the employee's request and the request must be made in writing. Employees may request to cash up less than a week at a time. More than one request may be made until a maximum of one week of the employee's annual holidays is paid out in each entitlement year (a period of 12 months' continuous employment from the anniversary of the employee's starting date.)



Any request must be considered within a reasonable time and may be declined – unless the employer has a policy that does not allow cashing up. The employee must be advised of the decision in writing and the employer is not required to provide a reason for their decision.

If an employer agrees to pay out a portion of the employee's annual holidays, the payment should be made as soon as practicable, which will usually be the next pay day. The value of the payment must be at least the same as if the employee had taken the holidays.

An employer cannot pressure an employee into cashing up holidays. Cashing up cannot be raised in wage or salary negotiations or be a condition of employment. Requests to cash up cannot be included in an employment agreement. However, an employment agreement may outline the process for making such a request. The process must meet the minimum requirements set out in the legislation.

Employers may have a workplace policy that they will not consider any requests to cash up annual holidays. This can apply to the whole or only some parts of the business. The policy can only be on whether the employer will consider any requests. It cannot be about the amount of annual holidays an employee can cash up or the number of requests an employee may make. An employer should consult with employees on the development of such a policy, and new employees of the policy when they make an offer of employment, as part of their good faith obligations.

If an employer does not have a workplace policy on cashing up that applies to the employee, they must consider any request to cash up annual holidays in good faith.

If an employer is found to have incorrectly paid out a portion of the employee's annual holidays where the employee did not request it, the employee is still entitled to take the portion of annual holidays concerned and to keep the money. The employer may also face a penalty.

If an employer has agreed to pay out a portion of the employee's annual holidays, but the employer and employee cannot agree on the proportion or payment amount, a Labour Inspector may determine the proportion or amount for them.

Employees cannot cash up annual holiday entitlements that arose before 1 April 2011. For example, an employee who becomes entitled to annual holidays in March 2011 could not make a request to cash up until they next become entitled to annual holidays in March 2012.

There are other details that employers and employees considering cashing up holidays will need to know, for example how it affects superannuation payments, income tax and what happens when there is parental leave. The Department of Labour can assist with information about parental leave and you can contact us on 0800 20 90 20. For tax related matters please contact Inland Revenue on 0800 227 774 or go to [www.ird.govt.nz](http://www.ird.govt.nz)

## Transferring public holidays

Employers and employees will be able to agree to transfer the observance of public holidays to another working day in order to meet the needs of the business or the individual needs of the employee. Such an agreement cannot reduce the number of public holidays to which the employee is entitled.

An employer and employee may agree in writing that an entire public holiday is to be observed by the employee on another calendar day or 24-hour period which would otherwise be a working day. Any request must be considered in good faith and any agreement must meet the minimum requirements set out in the legislation. These are:

- › any public holiday being transferred must be identified and otherwise be a working day for the employee
- › the day it is being transferred to must be identified or identifiable; otherwise be a working day for the employee; and not another public holiday, and
- › the purpose of the transfer cannot be to avoid paying the employee time and a half for working on a public holiday or providing them with an alternative holiday (although this may be the effect of the transfer).

Employers and employees are still able to transfer part of a public holiday, for cases where an employee is to start work on one day and finish on the following



day. For example, say an employee is to work from 10pm on 24 April to 6am on Anzac Day and from 10pm on Anzac Day to 6am on 26 April. The employer and employee can agree to treat 10pm to midnight on Anzac Day as not part of a public holiday, in exchange for treating a period of 24 hours that finishes on Anzac Day as a public holiday. The parties can agree whether the 24-hour period starts before or finishes after a work period. For instance, they could agree that it runs from midday on 24 April to midday on Anzac Day.

Once an employer and employee have agreed that a public holiday will be transferred to another day, the day the public holiday is transferred to is treated as if it were a public holiday for the purposes of the Holidays Act. The employee is entitled to a paid day off on that day and the following applies:

- › The employee is paid their relevant daily pay or average daily pay for the day.
- › If the employee works on the day the public holiday is transferred to, then they are entitled to be paid time and a half for the hours worked and to receive a whole day's alternative holiday (see the section below). An employer and employee must both agree that the employee will work on the day the public holiday is transferred to.
- › Where the employee would have been working on a day that a public holiday is transferred to but cannot work due to sickness, the payment for the day is as if they had a paid, unworked public holiday.
- › If a day that a public holiday is transferred to falls within a period that an employee is taking as annual holidays, then that day must be treated as a public holiday and not as part of the employee's annual holidays.

Employers may have a workplace policy that they will not transfer public holidays. This can relate to the whole of a business or some parts of the business. As part of their good faith obligations an employer should consult with their employees on the development of a policy. If employees agree, this policy could be included in an employment agreement. An employer should tell any potential new employee about the policy when they make the offer of employment.

If the employer does not have a workplace policy on transferring public holidays that applies to the employee, they must consider any request to agree to transfer public holidays in good faith.

The first public holiday to which the new law may apply is Good Friday, 22 April 2011.

The Department of Labour can help employers and employees if any disputes arise around transferring public holidays.

## Taking alternative holidays

If an employee works on a public holiday they are entitled to be paid time and a half for the hours they work and if it is an otherwise working day for the employee they are also entitled to another paid day off. This alternative holiday recognises that the employee has missed out on having a day off work on a day of national significance and enables them to take a day off at another time.

From 1 April 2011, if an employer and employee cannot agree when an alternative holiday is to be taken, the employer may determine, on a reasonable basis, the day the alternative holiday will be taken on.

The employer must give the employee at least 14 days' notice of the requirement to take the alternative holiday.

## Asking for proof of sickness or injury

Employers will no longer have to have reasonable grounds to suspect that sick leave is not genuine before requesting proof of sickness or injury within three consecutive days of an employee taking sick leave. The employer must inform the employee as early as possible that the proof is required and agree to meet any reasonable expenses in getting this proof.

## Clarification of entitlements during a close-down period

Employers can require employees to take annual holidays during a close-down period, providing they give at least 14 days' notice.



The change clarifies that where it is not clear what would be otherwise working days for an employee during a close-down period, the factors in section 12 of the Act must be considered as if the close-down were not in effect.

For example, if a business has a customary 'close-down' or 'shut-down' period that includes public holidays (as can happen over the Christmas and New Year period) then the employee is entitled to those public holidays as if they fell during a period of standard annual holidays.

This change only applies to customary close-down periods within the meaning of the Act. Employers and employees are still free to agree to other periods of discontinued operations or work and what arrangements will apply during those times.

## Other changes

### Holiday and leave records

The requirements for employers to keep accurate records of an employee's holiday and leave entitlements and payments have been updated to reflect the ability to cash up annual holidays and transfer public holidays.

Employers should ensure their holiday and leave records meet the new requirements, including keeping copies of agreements to transfer holidays or any requests to cash up annual holidays even if they were not agreed to.

### Additional factors for determining whether a day would otherwise be a working day

An 'otherwise working day' is used to determine eligibility for public holidays, alternative holidays, sick leave and bereavement leave.

If it is unclear whether a day would otherwise be a working day for the employee, these factors must be taken into account:

- › the employee's employment agreement
- › the employee's work patterns
- › whether the employee works for the employer only when work is available
- › the employer's rosters or other similar systems

- › the reasonable expectation of the employer and the employee that the employee would work on the day concerned.

The changes to the Holidays Act 2003 insert an additional factor (the 'but for' test) here:

"In determining if a day would otherwise be a working day for an employee, the employer and employee must also consider whether, but for the day being a public holiday, an alternative holiday, a day on which the employee was on sick leave, or bereavement leave, the employee would have worked on the day concerned."

The 'but for' test is not intended to change how to determine what is otherwise a working day is; it is an additional aid to help employers and employees make that determination.

### Further defining discretionary payments and allowances

There is now a definition of "discretionary payments" and "allowances".

"Discretionary payments" are payments that an employer is not bound by the employment agreement to pay the employee. They do not include amounts that the employer is bound by the employment agreement to pay the employee, including where the amount is at the employer's discretion or not specified.

"Allowances" exclude non-taxable payments to reimburse employees for any actual costs incurred by the employee in relation to their employment.

Note that discretionary payments are excluded from gross earnings (used to calculate average weekly pay and average daily pay). Allowances are included in gross earnings. Payments for cashed up annual holidays are not included in gross earnings. Payment for annual holidays taken as holidays away from work is included in gross earnings.

### Increased penalties

The amendment increases the maximum penalties for non-compliance with the Holidays Act 2003 to \$10,000 for individuals and \$20,000 for companies and bodies corporate.



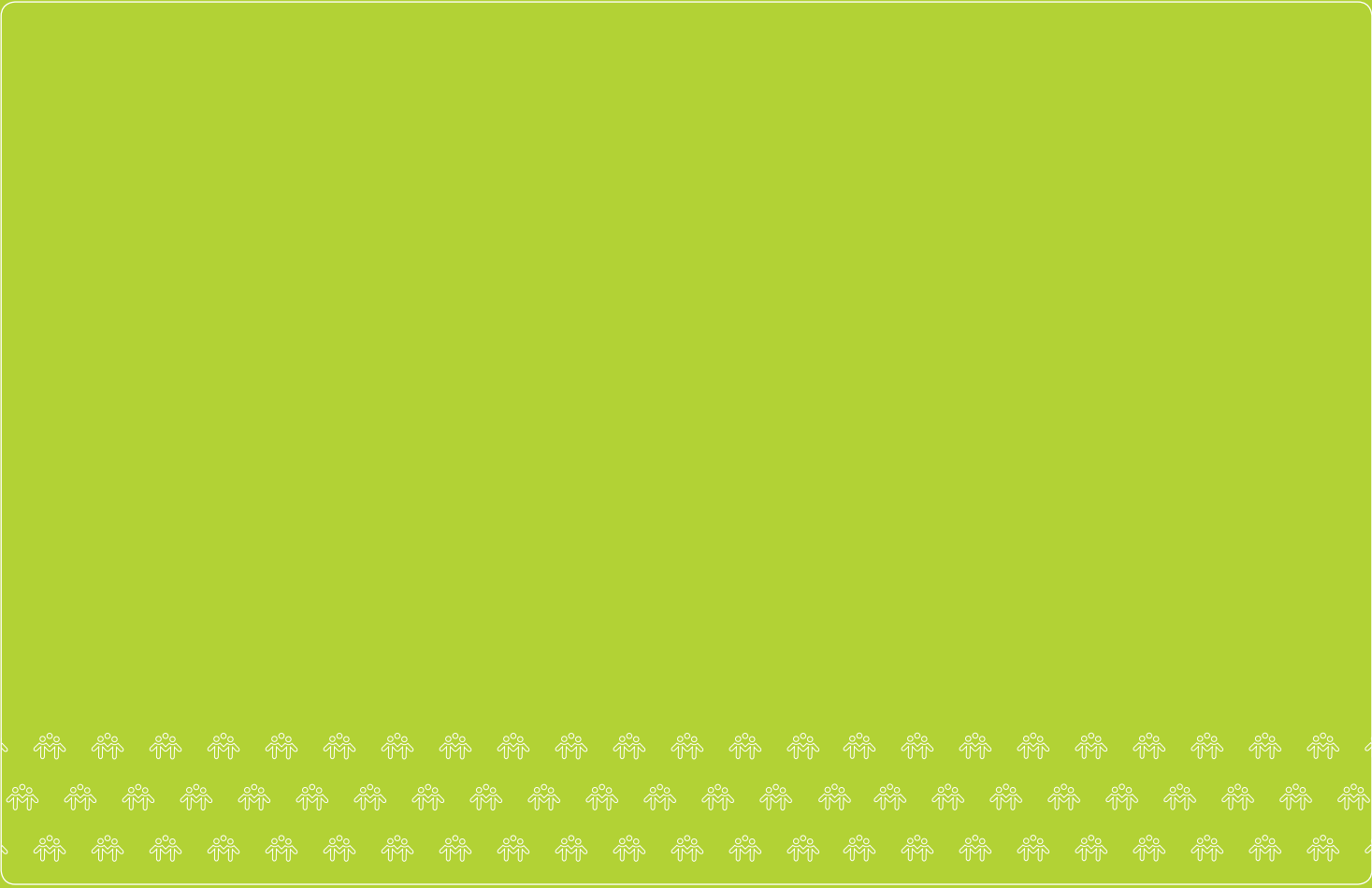
## Notes







FOR MORE INFORMATION ON EMPLOYMENT RELATIONS  
VISIT [WWW.DOL.GOV.T.NZ](http://WWW.DOL.GOV.T.NZ)



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