

WE KNOW

HUMAN RESOURCES

AVAILABILITY PROVISIONS

QUICK GUIDE

This Quick Guide provides summarised information on Availability Provisions under the Employment Relations Amendment Act 2016.

OVERVIEW

As a response to the “zero-hour contracts” issue and concerns about other unfair employment practices the Government introduced a package of measures in the Employment Standards Legislation Bill during 2015 which eventually resulted in amendments to a number of employment-related statutes. For an overview of those amendments, see [“April 2016 – A Big Month for Employment Law Changes”](#).

This Quick Guide deals with one aspect of those reforms – recording agreed hours of work and ‘availability provisions’ in employment agreements.

What is an availability provision?

Prior to 1 April 2016 an employment agreement need only provide – amongst other matters - “an indication of the arrangements relating to the times the employee is to work”. It was not necessary to have agreed hours or guaranteed hours.

It is still not necessary. What has changed though is that an employer can no longer simply require employees to *be available* for certain hours without first providing for guaranteed hours of work **and** without having a genuine reason **and** without providing reasonable compensation.

In specifying *agreed hours of work* the employment agreement must include any or all of the following:

- the number of work hours that are guaranteed
- the days of the week on which the work is to be performed
- work start and finish times
- any flexibility in start and finish times/days of the week when the employee will work (i.e. that start and finish times and days when the employee is to work might vary).

An availability provision is required where the employer wants to be sure an employee will work when needed without any ability, as with a casual agreement, to refuse the employer’s offer of work. For foregoing the right to refuse, the employee’s agreement must both guarantee some hours of work and provide reasonable compensation for being prepared, when asked, to work other agreed, but non-guaranteed, hours. This situation can be compared to the call-out system that has existed for many years of which it is essentially a codified version.

Without an availability provision in an employment agreement where some hours are not guaranteed, an employee cannot be required to work beyond the guaranteed hours and no action can be lawfully taken against an employee who refuses to do so.

“Availability provision” is a generic term that will, in reality, come in different forms, e.g. standby and callout provisions are forms of availability provision. So are clauses in an employment agreement that state that an employee is expected to work reasonable overtime if required. Unfortunately, as with much new law (and

particularly legislation made in haste), there may be a range of views as to what the legislation requires and the Courts will be left with the unenviable task of resolving conflicting views.

The changes do not affect true casual employment – where there is no mutual obligation to offer or accept work on any occasion. Here – as now – it is sufficient to simply provide for an indication of the arrangements relating to the times the employee is to work. However, where hours of work are agreed they must be recorded in the employment agreement.

Requirements for an availability provision

In order to have an enforceable availability provision an employer must have **genuine reasons based on reasonable grounds** for its inclusion and the number of hours specified in the provision. In satisfying this requirement an employer must have regard to all relevant matters, including –

- Whether it is practicable to meet business demands without including it
- The number of hours the employee would be required to be available
- The proportion of ‘available’ hours to agreed hours

Furthermore, the availability provision must provide for the payment of **reasonable compensation** having regard for all relevant matters, including –

- The number of hours the employee is required to be available
- The proportion of ‘available’ hours to agreed hours
- The nature of any restrictions resulting from the provision
- The rate of payment provided by the employment agreement for the work for which the employee is available. If paid by salary, the amount of that salary.

Salaried Employees

In determining reasonable compensation an employer and an employee who is remunerated for agreed hours of work by way of a salary may agree that the employee’s remuneration includes compensation for the employee being available for work under an availability provision. Employers must ensure that if more than 80 hours are worked in any fortnight, the salary paid is sufficient to provide at least the Minimum Wage Act’s hourly rate for every overtime hour.

Do I need an availability provision?

No – if there are no *agreed hours* and you don’t require an employee to be available for certain hours

No – if you only have *agreed hours* and there is no *requirement* that employees *be available* for additional hours

Yes – if you require employees to *be available* for hours or periods of time in addition to agreed hours.

Existing Agreements – Transition Period

The requirements for the inclusion of availability provisions come into effect from 1 April 2016. All agreements entered into on and from that date must comply. Agreements entered into prior to that date must comply by no later than 1 April 2017.

For further information regarding this or other aspects of Employment Relations/Human Resources, please contact The Chamber email info@cecc.org.nz or phone 03 366 5096.

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