

Employment Legislation

Employment legislation influences what you write in your advertisements and the questions you ask applicants during interviews, as well as the entire employment relationship. In interviews all questions and information requested must be relevant to the job and the person's ability to do that job. How you collect and keep information, what you report back to applicants, and how you arrive at your recruitment decisions need to comply with legislation.

Please note: Disclaimer notification

Every effort has been made to ensure that the following information is correct as at the time of publication. However, the information included here is designed to address general situations and is meant as an overview of the legislation. As such, it should not be relied on as legal advice in the handling of any specific situation. Legal advice should be sought from an appropriately qualified and experienced source.

More detailed information is available on the government legislation website www.legislation.govt.nz although it can be quite difficult for a novice user of that website to find amendment acts from the original statutes. It is also not the 'official' version of the legislation, which is the printed version of the original statutes. Advice can also be obtained from the [Human Rights Commission](#) or a lawyer.

Employers need to comply with a number of Acts to ensure employees are treated fairly and equitably, feel safe in the work environment, and are not discriminated against or harassed. The most relevant ones are likely to be:

- Human Rights Act 1993 – protects from unlawful discrimination; covers what can be asked in employment interviews, exceptions that apply to the Act, grounds for harassment claims, pitfalls to avoid when hiring, fair employment and pre-employment practices.
- Employment Relations Act 2000 – to promote good employment relationships, “Good Faith” bargaining to promote good employment relationships, recognition of unions, freedom of association. The 2007 Amendment Act gives employees the right to request flexible working arrangements.
- Immigration Act 1995– offence for employer to knowingly employ someone without a work permit.
- Privacy Act 1993 – what information can be collected and stored, sources of personal information and who has access to it, includes accuracy of information, retention of information, limits on disclosure of personal information.

- State Sector Act 1988 – good employer provisions and EEO provisions for the State Sector.
- Local Government Act 1974 – employee information available; requirements for EEO policy/programme.
- State Owned Enterprises Act 1986– EEO requirements for those organisations in this category.
- Parental Leave and Protection of Employment Act 1987 – requiring you to hold a position open for up to 12 months if an employee takes parental leave unless there are extenuating circumstances. Outlines paid parental leave provisions. The 2005 Amendment Act ensures that employees who take parental leave are aware of their entitlement to claim payment for the first 14 weeks.
- Criminal Records (Clean Slate Act) 2004 – applies to recruitment. Job applicants are not required to disclose criminal past if they meet provisions of the Act.
- Crown Entities Act 2004 – EEO reporting requirements of Crown Entities.
- Health and Safety in Employment Act 1992 – relates to hazards and harm including harm caused by work-related stress.
- Equal Pay Act 1972- provides for equal pay for men and women performing the same job.
- Disabled Person Employment Promotion Order 2002 – this order repealed the Disabled Person Employment Promotion Act 1960.

For information on employing children and young people, go to this Employment Relations Service [fact sheet](#).

Human Rights Act 1993

This legislation incorporated the Race Relations Act into it, so now the one law covers all grounds of illegal discrimination.

Section 21 of the Act outlines the 13 grounds on which it is prohibited for an employer to discriminate against an employee or an applicant for employment.

The grounds are:

- a) sex, which includes pregnancy and childbirth
- b) marital status
- c) religious belief
- d) ethical belief (which here means lack of a religious belief)

- e) colour
- f) race
- g) ethnic or national origins
- h) disability, including physical, intellectual or psychological disability or impairment; physical or psychiatric illness, reliance on remedial means (eg guide dog, wheelchair) loss or abnormality of psychological, physiological or anatomical structure, of the presence in the body of organisms capable of causing illness
- i) age
- j) political opinions
- k) employment status, which here means being unemployed or in receipt of a benefit
- l) family status, including whether or not you have children, or who you are related to
- m) sexual orientation, which means heterosexual, homosexual, lesbian or bisexual.

This law does not override other legislation, so if discrimination is allowed by another Act, that law will take precedence – eg age requirements on those who serve alcohol.

Note: this legislation does not protect people from discrimination on the basis of their:

- criminal convictions
- appearance – unless it is linked to one of the other grounds eg race
- smoking
- educational achievements
- what school they attended
- height or weight.

Direct and indirect discrimination

It is unlawful to directly discriminate against people on the grounds listed above. For example generally it would be unacceptable to say: “Only Polynesians may apply” as this is clearly discriminatory on the basis of race.

It is also unlawful to indirectly discriminate against people (section 65). Indirect discrimination occurs where there is an apparently neutral requirement in the position, but the outcome is to have an adverse impact on one or more groups of people. For example, asking that people be at least 180 cm tall is a requirement that would apply to every applicant. However, it is likely to have a much greater discriminatory impact on women and Asian people. The employer would be required to show why this height requirement was a necessary part of the job for it to be lawful.

Exceptions

The Human Rights Act has a number of exceptions, with the main ones listed here. The Act is also very clear that if the employer can show that any one of the grounds of prohibited discrimination is in itself a bona fide qualification, then that is lawful. For example, a department store may want to hire a female

security guard for its lingerie department as the guard may need to search customers etc.

Section 23 Application forms and interviews: it is unlawful to ask any applicant for employment anything which indicates, or could reasonably be understood as indicating, an intention to commit a breach of the Act. In an interview for example, it would be legitimate to ask all employees if they had any issue with working on Saturdays or Sundays (if these are a required part of the job – eg shift work); it would not be lawful to ask “are you Seventh Day Adventist, or an Orthodox Jew?” Such people may certainly have difficulty working the required days, but others also may choose to disqualify themselves through their commitments to other religions, sports, hobbies, or childcare needs for example.

Section 24: ships and aircraft: allows for discrimination in employment of ships and aircraft if the person employed was engaged outside New Zealand.

Section 25: national security: covers national security issues, and allows discrimination on the basis of religious or ethical belief, political opinion, psychiatric illness, intellectual or psychological disability, family status or national origin of the person or a family member of that person, or aged under 20.

Section 26: work outside NZ: allows an employer to discriminate on the basis of sex, religious or ethical belief or age if the duties of the position are to be performed mainly or wholly outside New Zealand, and the laws, customs or practices of the country the job is to be performed in are ordinarily carried out by a person of a particular sex, religious or ethical belief, or within a particular age group.

Section 27: authenticity and privacy: provides for discrimination on the basis of sex or age where these are genuine requirements for authenticity (eg putting on a play; modelling clothes). Further exceptions are in relation to sex, religious or ethical belief, disability, age, political opinion or sexual orientation where the concerns are in relation to privacy, either to preserve reasonable standards of privacy, or where the job requires a live-in position, and premises are not available for separate sleeping accommodation. Where a position is that of counsellor on highly personal matters, such as sexual matters or the prevention of violence, employers may discriminate on the basis of sex, race, ethnic or national origins or sexual orientation.

Section 28: Religion: allows organised religions to prefer one gender over another for positions within that religion – eg the Catholic Church may have men only offering the sacrament. Private schools may discriminate on the basis of religious or ethical belief where the position is that of a teacher, or pastor equivalent, or social worker with adherents of that religion. This section also requires that employers must accommodate religious practices (eg praying to Mecca five times a day) as long as the practice does not unreasonably disrupt the employer’s activities.

Section 29: Disability: requires employers to make reasonable accommodation for disabled people, in either physical terms, or in terms of minimising risk in the event of potential infection of others.

Section 30: Age: allows for youth rates of pay and also for discrimination on the basis of age where it is a genuine occupational qualification for reasons of safety for example.

Section 31: Political positions: political opinion may be a reason for discriminating against people who are going to be members of the staff of a political party, or are political advisers.

Section 32: Family Status: allows for discrimination on the basis of family status where there would either be a line reporting relationship between the two people, or where there is potential for collusion between the two people to the detriment of the employer of either.

Section 33: Armed Forces: The Chief of Defence may choose to give preferential treatment on the basis of sex in combat positions.

Section 34: regular forces or Police: - relates to Police only

Section 35: Generally, an employer may not discriminate against anyone within the exceptions allowed by the above sections if the employer could, without unreasonable disruption, make an adjustment that would allow the employee to carry out the particular duties of the position. A reasonableness test is applied here so what may be considered reasonable for a large employer is likely to be very different for a small employer.

Section 62: Sexual harassment

This section makes it unlawful for any person to be sexually harassed, either by having a request for some sort of sexual activity made that has an implied or overt threat of detrimental treatment, or promise of preferential treatment; or to be subjected to sexual behaviour that is unwelcome or offensive to the recipient, and is either repeated or so significant that the person experiences some form of detriment in their employment.

Section 63: Racial harassment:

It is unlawful under this section for any person to use any behaviour that expresses hostility against or brings into contempt or ridicules anyone on the basis of that person's race, colour, national or ethnic origins, and which behaviour is offensive to that person, and is either repeated or so significant that it has a detrimental effect on the person's employment.

Section 64: Choice of procedures

This is the same as section 112 of the Employment Relations Act, which states that if someone wishes to make a complaint of sexual or racial harassment they may use either the Human Rights Act or the Employment Relations Act, not both.

Section 66: Non-victimisation

It is unlawful to victimise a person for making a complaint of discrimination under this Act, or for making a disclosure under the Protected Disclosures Act 2000,

Questions to ask in employment interviews

Employers may be tentative about asking questions that are relevant to the position in case they inadvertently discriminate.

Examples:

If the position requires rotating shifts, and employees need to be available to work on any particular day, it is legitimate to ask whether they would be available on Saturdays and Sundays. It would not be legal to ask if they were an Orthodox Jew, or Seventh Day Adventist or if their religion precluded them from working any day of the week. It would be legitimate to say that the position requires the employee to be able to work any 4 or 5 or 6 days per week – is there anything that would stop that from happening? Not only is this question legal, but it would also give you more information than one limited to religion. It may be that the applicant for the position is a keen sportsperson who trains on weekends; or is involved in cultural/hobby groups that meet only on Saturdays, or their partner may work those days and the applicant is the child carer for the weekend. Make your questions as specific as possible in this area, and ensure that they are job related.

Some examples of acceptable and risky questions are listed here.

Risky question	Acceptable question
Do you have children? How many children do you have? Who will look after your children?	We require someone who can be here from the hours of 8.00 am – 5.00 pm – is there anything that would impact on that for you?
Are you a Mormon? (or any specific religious group?)	We require availability 7 days a week – are you available to work any day of the week?
Are you pregnant?	This project requires full time attention for 12 months? Are you able to contract for that time?
Are you Indian?	Our restaurant serves Indian food – can you cook in Gujarat style?
Are you married or do you have a partner? Would they object to your travelling for work?	This job requires that you be away from home for approximately 3 days a week. Are you available for that amount of travel?
Are you sure you'll have enough energy for this job, seeing that you are in a wheelchair?	This position is full-on for 8 hours a day. Have you been in this type of position before? Does that work for you?

The acceptable questions all relate the question specifically to the position in question. Note You **may** ask questions in relation to gender, race etc for statistical purposes only, **as long as** you do not use the answers to

discriminate against any applicant or employee, **and** as long as the data is used **only** for the purposes for which they are collected eg EEO reporting purposes; targeting of resources for EEO development. If you are asking prospective employees such information, it is useful to do this on a sheet of paper separate from their employment application, so it is clear that the data will not be used to illegally discriminate against applicants. Applicants and employees are not compelled to disclose this information if they do not want to.

Employment Relations Act 2000

Personal grievances are covered under Part 9 of the Act.

Section 103: Personal grievance: an employee may make such a claim if they feel that they have been:

- a) unjustifiably dismissed; or
- b) had their employment affected to their disadvantage by an unjustifiable action of the employer; or
- c) been discriminated against; or
- d) been sexually harassed; or
- e) been racially harassed; or
- f) subject to duress because of union or employee organisation membership or non-membership.

This Act includes all the prohibited grounds of discrimination covered in the Human Rights Act, (section 105) and in addition prohibits discrimination on the basis of a person's involvement in the activities of a union (section 104). Sexual harassment (section 108) and racial harassment (section 109) are also included, and section 117 specifically covers harassment of an employee by a person other than the employer (ie a colleague, a customer or client of the employer). Section 118 makes it clear that in the event that harassment does occur, the employer has a duty to take steps to prevent repetition of the behaviour.

An amendment to the Act came into force on 1 July 2008 allowing employees who care for another person and who have worked for their employer for the preceding six months to request a variation in their hours of work, days of work or place or work.

Section 69AAC: Employees must, amongst other things, make their request in writing, explain how it will assist them to meet their caring responsibilities and what changes the employer may need to make to accommodate their request.

Section 69AAE: The employer must deal with the request as soon as possible and not later than three months after receiving it, explaining if the request has been approved and, if not, why not.

Section 69AAF: The employer may refuse the request for a number of reasons including inability to reorganise work, detrimental impact on quality or performance or the burden of additional costs. The employer must refuse the

request if the employee is bound by a collective agreement and requested working arrangements which would be inconsistent with the collective agreement.

Section 69AAG-I: The Act details a process for resolving disputes using Labour Inspectors and mediation or, if that fails, the Employment Relations Authority (ERA).

Section 69AAJ: If the ERA finds that an employer did not comply with Section 69AAE it may impose a \$2000 penalty.

Section 69AAK: Employees can only challenge their employers' refusal to meet their request or failure to respond to their request if they believe the employer has not complied with Section 69AAE.

The Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008

This Act was passed in September 2008 and came into effect from 1 April 2009. It requires that all employers provide facilities and breaks for employees who wish to breastfeed (including expressing breast milk), as far as is reasonable and practicable in the circumstances. The breaks are unpaid unless the employee and employer agree otherwise. The breastfeeding breaks are to be provided in addition to the standard paid rest breaks and unpaid meal breaks. The rest and meal breaks can also be used as breastfeeding breaks if the employer and employee agree on this

The employer and employee need to agree on the length and frequency of breaks. Appropriate facilities are likely to include a separate space with enough privacy for mothers to breastfeed or express away from the view of others without disrupting normal business operations. If a mother is expressing she will need to have access to a fridge or chilly bin to store milk in.

Guidelines for employers are available from the Department of Labour [website](#).

Immigration Act 1995

Section 39: This makes it an offence for an employer to knowingly employ, or continue to employ, a person who requires a work permit under the Act. It is quite legal to refuse to employ someone on the basis that they are known to be an overstayer, or don't have a work permit when they need one. It is acceptable to ask all candidates for employment if they have either NZ citizenship, or permanent residency or a valid work permit. They may also be asked to provide evidence of one of the above.

State Owned Enterprises Act 1986

Part I, section 4 sets out the principal objective of State Owned Enterprises (eg NZ Post, Vehicle Testing NZ) is to operate as a successful business, and to this end to be:

- a) as profitable and efficient as comparable businesses
- b) a good employer; and
- c) an organisation that exhibits a sense of social responsibility.

It then defines a good employer as one who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in aspects of their employment, including provisions requiring:

- d) good and safe working conditions; and
- e) an EEO programme; and
- f) impartial selection of suitably qualified people for employment; and
- g) opportunities for the enhancement of the abilities of individual employees.

This legislation did not define what EEO is, but the next enactment regarding employment in the state sector did.

State Sector Act 1988

Section 56 outlines the need for state sector employers to be good employers. This means:

- a) providing good and safe working conditions
- b) having an EEO programme
- c) impartially selecting suitable people for employment
- d) recognition of the aims, aspirations and employment requirements of Maori
- e) providing opportunities for the enhancement of the abilities of individual employees
- f) recognition of the aims, aspirations and cultural differences of ethnic and minority group members
- g) recognition of the employment requirements of women and
- h) recognition of the employment requirements of people with disabilities.

Section 58 requires the chief executives of each department to have annual EEO plans, and to report on them in their annual report. It defines an EEO programme as being one that is aimed at the identification and elimination of barriers that cause or perpetuate inequality amongst different groups.

These requirements are replicated in the Local Government Act.

Local Government Act 2000

Schedule 7, clause 33 requires local body chief executives to be good employers and to promote equal employment opportunities. "Good Employer" is referred to in clause 36, and covers exactly the same requirements as there

are on state sector chief executives regarding employment, but there is no specific reporting requirement on them for EEO.

Privacy Act 1993

This Act outlines some basic principles on which information may be held, and who is entitled to access it. Generally the principles state that you may not use unlawful means by which to obtain information about, for example, employees or potential employees (principle 4), and that any information you have must be securely kept (principle 5).

Individuals are entitled to access information held about themselves (principle 6), so usually your decision making process used in the appointment (or not) of an applicant would be accessible to that applicant. What would not need to be made available to the applicant is information you have gleaned from referees where that information is deemed to be “evaluative material” (section 29(1)(b)). However, you may not seek information from people without the applicant’s express permission. Some organisations ask applicants to sign a release relating to the contact of referees; others rely on the implied permission given by having a referee cited in the applicant’s C.V. Increasingly applicants are not attaching referees names to CVs but are rather giving the prospective employer names on request.

Parental Leave and Protection of Employment Act 1987

This Act gives a right to those who have worked for at least 12 months with the employer, for at least 10 hours on average per week, to apply for maternity, partner and parental leave on the birth or adoption of a child under five.

Section 7 allows for women who are pregnant to take maternity leave of up to 14 weeks, at least 8 of which may be taken after the expected delivery date. Adoptive mothers may also apply for this leave based on the date at which they are to assume care of the infant.

Sections 17 – 20 cover the entitlement of the woman’s partner to partner/paternity leave of up to 2 weeks from the date of delivery or assuming care for an adopted child.

Section 23 onwards outlines the entitlement of parents to up to 52 weeks parental leave.

Section 27 identifies that the 52 weeks of parental leave may be shared between the parents, but not taken at the same time.

Section 31: The employee must notify the employer in writing 3 months before s/he expects to commence leave. This must include a medical certificate which states the expected date of delivery and, if it is not the pregnant woman

taking leave, then there must also be a certificate from her that the person applying is her partner and will be assuming care of her child.

Section 36: The employer must notify the employee within 21 days of receiving the application for leave whether they are entitled to the leave, and the reasons if they are not, and what job can/cannot be kept open and why. The employer must inform the employee that if the job cannot be kept open that they have a right to dispute the employer's decision, and also that for the first 26 weeks of leave, the employer must give the preference over other applicants for any vacancies that are substantially similar to the employee's previous position.

Section 38: Within 21 days of leave commencing, the employer must notify the employee in writing of when the parental leave will end.

Section 39: The employee on leave must give their employer 21 days notice of return to work.

Section 40: If the parental leave does not exceed 4 weeks then the employer must keep the job open. This means that it would be unwise to fill even a key position until after a month of leave has been taken by the employee.

Section 41: The employer may only refuse to take the employee back if a temporary replacement is not reasonably practicable due to the key position occupied by the employee, or because of redundancy of the position. In deciding what is a key position, regard will be given to the size of the employer's enterprise and the skills required for the job.

Section 71T: The employer must notify the employee of their right to have paid parental leave.

Section 71N: Annual adjustments of maximum rates of parental leave payments must be made by 1 July each year by any percentage increase in average ordinary time weekly earnings as determined by Statistics New Zealand's quarterly employment survey.

Section 71V: Non-return to work after parental leave expires does not affect the payment in any way.

The Criminal Records (Clean Slate) Act 2004

Under the Act, people with convictions that meet the criteria set out in the Act have the right to have their criminal history concealed. This means when asked if they have any prior convictions eligible individuals may advise they have no criminal record. Any convictions they have will remain on record but Government departments and law enforcement agencies that hold or have access to their criminal record must conceal that record.

To be eligible the person must have:

- no convictions within the last 7 years

- never been sentenced to a custodial sentence(e.g. imprisonment, corrective training, borstal);
- never been ordered by a Court during a criminal case to be detained in a hospital due to his/her mental condition, instead of being sentenced;
- not been convicted of a "specified offence" (e.g. sexual offending against children and young people or the mentally impaired)(see interpretation section for a full list);
- paid in full any fine, reparation or costs ordered by the Court in a criminal case;
- never been indefinitely disqualified from driving under section 65 Land Transport Act 1998 or earlier equivalent provision.

There are exceptions to this where people are required to disclose their prior convictions. Refer to the Act for full details. Employers can ask prospective employees to sign a form that allows them to conduct a police reference check. This check will come back clear if the eligibility criteria under the Clean Slate legislation apply.

The Act only applies to New Zealand so individuals must disclose convictions if required to do so by another country's law, such as applications for visas or other immigration matters.

The Act makes it an offence to either disclose "concealed" convictions or to request or require disclosure of "concealed" convictions. These offences are punishable by a fine of up to \$20,000 and \$10,000 respectively.

A copy of the Criminal Records (Clean Slate) Act 2004 is available on line at www.legislation.govt.nz. You can refer to the Ministry of Justice's written pamphlets about this legislation. Also see www.fvm.co.nz/criminalrecords.htm for further reading.

Health and Safety in Employment Act 1992

The Health and Safety in Employment Act's object is to promote the prevention of harm to all persons at work and or in the vicinity of a place of work. Section 5 of the Act sets out the object, and lists various means contained in the Act to achieve it, including by:

- Promoting excellence in health and safety management, in particular through being systematic;
- Defining hazards and harm in a comprehensive way so that all hazards and harm are covered, including harm caused by work-related stress and hazardous behaviour caused by certain temporary conditions.
- Imposing duties to ensure that people are not harmed as a result of work activities
- Setting requirements that relate to the taking of all practicable steps to ensure health and safety, and are flexible to cover different circumstances;
- Encouraging the health and safety of volunteers;
- Requiring employee participation in the improvement of health and safety and encouraging good faith co-operation in places of work;

- Providing a range of enforcement methods in response to failure to comply with the Act.

For guidelines on this comprehensive Act download this Department of Labour [guide](#).

Disabled Person Employment Promotion Order 2002

This order repealed the Disabled Person Employment Promotion Act 1960. The 1960 Act was repealed because did not fit with the government's approach to disabilities in that it exempted those who employ people with disabilities from employment legislation

Equal Pay Act 1972

The Equal Pay Act provides for pay equity specifically between males and females doing the same job. The Equal Pay Act states that it is "An Act to make provision for the removal and prevention of discrimination, based on the sex of the employees, in the rates of remuneration of males and females in paid employment, and for matters incidental thereto."

<http://legislation.govt.nz/act/public/1972/0118/latest/DLM407770.html>