

Privacy Commissioner's submission to the Education and Workforce Committee on the Employment Relations Amendment Bill

Introduction

1. The functions of the Privacy Commissioner include examining new legislation for its possible impact on individual privacy. Central to that examination is the principle that policy and legislation should be consistent with privacy rights unless there is very good reason (and evidence) to override those rights.
2. The Employment Relations Amendment Bill (the Bill) seeks to implement the Government's commitments in employment relations by changing minimum standards and protections to strengthen collective bargaining and union rights in the workplace. The changes are intended to introduce greater fairness in the workplace between employees and employers, in order to promote productive employment relationships. The Bill amends the Employment Relations Act 2000 (the Act).
3. This submission focuses on Clause 18 of the Bill that will insert new section 63AA into the Act. Section 63AA provides that an employer who enters into an individual employment agreement with a new employee must share certain information about the employee with the union unless the employee objects.
4. I do not support the approach taken in section 63AA to require an employer to disclose employee information to unions. It goes beyond what is necessary to achieve the policy objective of ensuring employees are being provided with a genuine choice about joining a union. Requiring an individual to opt-out of having their personal information disclosed is poor privacy practice and is against an individual's right to exercise some autonomy over their personal information.

How new section 63AA will work

5. New section 63AA applies to an employer who enters into an individual employment agreement with a new employee. The employer must provide the employee with a form that the employee may complete and return for the purpose of notifying the employer:
 - whether the employee elects to join a union (or a particular union)
 - objecting to the employer providing information about the employee to,—
 - if the employee elects not to join a union, any union; or
 - if the employee elects to join a particular union, any other union.

6. In addition to providing an employee with the form, the employer must also provide the employee with a notice (subclause 3) that sets out when the form must be completed by the employee and explains that unless the employee objects, the employer will provide the following information to each union that is a party to a collective agreement that covers the work to be done by the employee:
- the name of the employee:
 - whether the employee has—
 - elected to join the union during the period; or
 - elected not to join the union during the period; or
 - not completed and returned the form during the period.

Why new section 63AA should be amended

7. I question the basis for employers to be required to disclose to unions personal information about individuals who have chosen to accept an individual employment contract. It is an employee's right to choose the type of employment contract they sign up to and whether or not to be represented by a union. Once the decision has been made by an individual to accept an individual employment contract I see no reason why their details should be provided to a union.
8. New Zealanders are increasingly aware and concerned about privacy, especially over information held about them by government agencies, by businesses and others. Unnecessarily providing information to unions may heighten privacy concerns and is a backward step for both employment law and for privacy.
9. Placing the burden on employees to opt-out of sharing their details may unduly influence their decision. Obliging or shy employees may not speak up for fear of appearing negative or uncooperative to their prospective employer. It is only when employees decide to engage the services of a union that their personal information should be provided to that union.
10. The proposal to share employee information with unions goes against the general regime of the Act. The Act places obligations primarily on employers and empowers Labour Inspectors to monitor and enforce employers' compliance with minimum employment standards. An employer's obligation to inform a new employee that their work is covered by a collective agreement is one of these standards.

Alternative options to meet the objective

11. Rather than require employees to opt-out of having their details disclosed to unions, employees should provide their express consent to their choice of employment agreement being communicated to unions. This is the current position in the Act under section 62(2)(c) and is good privacy practice.
12. I encourage the Committee to turn its mind to whether, consistent with other minimum standards, monitoring employees being provided with a genuine choice is more

appropriately the responsibility of Labour Inspectors rather than a union. Implementing compliance checks could provide sufficient comfort that employers are meeting their obligations to inform employees about the role and functions of unions.

13. Another option for the Committee to consider is that employers could provide anonymised data about workers who chose to have an individual employment agreement rather than provide each employee's details. Anonymised information could provide unions with sufficient information to identify opportunities or highlight concerns about particular workplaces.

Conclusion

14. I do not support the approach taken in section 63AA to require an employer to disclose employee information unless the employee opts-out. I question the basis for employers to have to disclose and for unions to collect personal information about individuals who have chosen to accept an individual employment contract.
15. I consider that the opt-out policy runs counter to the Bill's purpose to introduce greater fairness and enhance employee rights in the workplace. I recommend that employees provide their express consent prior to their choice of employment agreement being communicated to unions.
16. I make three **recommendations** to the Committee:
- Section 63AA should be removed so that the current position in the Act under section 62(2)(c) remains as is.
- Alternatively:
- Consideration is given to the disclosure of anonymised employee information to provide unions with sufficient information to identify opportunities or highlight concerns about particular workplaces.
 - Consideration is given to the role Labour Inspectors could play in ensuring employers comply with their obligations to provide employees with a genuine choice about joining a union.
17. I seek to speak to this submission and would be pleased to appear before the Committee should the Committee find that helpful in its consideration of this Bill.



John Edwards
Privacy Commissioner

