

14 September 2023

Education and Workforce Committee  
Parliament Buildings  
Wellington

### **Employment Relations (Restraint of Trade) Amendment Bill**

1. Retail NZ is a membership organisation that represents the views and interests of New Zealand's retail sector. We are the peak body representing retailers across Aotearoa, with our membership accounting for nearly 70 per cent of all domestic retail turnover. New Zealand's retail sector comprises approximately 27,000 businesses and employs around 220,000 kiwis. We have consulted our membership in preparation of this submission.

### **Retail NZ support for a statutory restraint of trade regime in principle**

2. Retail NZ is supportive of the overall aim of the bill, which is to protect employees on lower incomes. It will reduce the chance of worker exploitation which can happen through the overuse of restraints on lower-income employees seeking new employment opportunities.
3. We also support the introduction of a well-structured restraint of trade regime that offers a standardised and consistent approach, as this gives employers a legal framework to protect their legitimate business interests.
4. However, in our view the bill goes too far towards the protection of higher paid employees and disadvantages employers who have legitimate right to protect their business interests.

### **The threshold of three times the minimum wage is too high and goes beyond the intended scope of the bill**

5. The bill provides that a restraint of trade provision will have no effect when an employee earns less than three times the minimum wage. At the current minimum wage rate this is \$68.10 per hour, which equates to \$141,648 per annum for a full-time worker.
6. This threshold is too high and goes beyond the intended scope of the bill, which is to prohibit the use of restraints of trade clauses in employment relationships for lower- and middle-income employees.
7. Employees earning more than three times the minimum wage are likely to have had a higher education, have extensive work experience, and be highly skilled.
8. These workers typically have a greater ability to understand the consequences of any restraint of trade clause that they agree as part of their employment contract negotiations and are also better able to protect their personal interests.

### **Median wage, not minimum wage, should be used as the measure in the bill**

9. Retail NZ believes that it would be more appropriate to use median wage to calculate when restraint of trade clauses have effect. This is because median wage can be used to calculate the threshold more accurately for middle- and higher-income workers.
10. Further, the median wage is the measure used by Immigration New Zealand when assessing work visas. It would make sense, from an employer perspective, to standardise this measure across all employee related areas, including restraint of trade clauses.

**Restraint of trade clauses should have no effect when an employee earns less than twice the median wage**

11. Retail NZ recommends an amendment to the bill so that the threshold for when restraint of trade clauses can be used be changed to *twice the median wage*. At the current median wage rate this is \$59.32 per hour, which equates to \$123,385 per annum for a full-time worker.
12. It is the employees who earn more than twice the median wage rate who will usually hold critical roles within a company and have access to commercially sensitive information, proprietary knowledge, and valuable client relationships. It is these employees for whom a business should be able to restrict the ability to work for a competitor, or start a competing venture, immediately after leaving the business.
13. An amendment to a threshold of twice the median wage would align more closely with the objective of safeguarding the interests of those employees in lower and middle-income brackets, while still protecting employers' interests.

**Compensation should only be due to workers earning less than three times the median wage, not to those on the very highest incomes**

14. Retail NZ does not support the requirement to pay all employees who are subject to a restraint of trade an amount equal to half of the employee's weekly earnings for each week that the restraint of trade remains in effect.
15. We recommend an amendment to the bill so that an employer is only required to pay compensation to employees who are paid **less than three times the median wage**. At the current median wage rate this is \$88.98 per hour (or \$185,078 or more per annum on a full-time basis). As we noted above, the highest paid workers have the skills and knowledge to understand restraint of trade clauses and negotiate these at the time of employment. We also note that the salary levels for these highly paid workers already provide a level of compensation. For these reasons we do not support the highest paid workers having a mandatory entitlement to any compensation payments under restraint of trade clauses.
16. We believe that a mandatory compensation payment would ensure that a business carefully considers the duration of the restraint of trade clause, and not use the default six months maximum as drafted. It is likely that with the new requirement for compensation, employers would move towards shorter restraint of trade provisions which in principle we support.
17. A requirement to make a compensation payment to all employees under a restraint of trade provision would financially disadvantage employers as it is likely an employer will be required to pay both the restraint of trade compensation and the salary of the person employed to fulfil the vacant position. This proposal will better balance the protection of employees versus protection of an employer's interests.
18. We note that employees and employers will continue to be able to negotiate restraint of trade clauses with compensation if this bill passes into law, regardless of this threshold.

**Conclusion**

19. Thank you for the opportunity to make a written submission. We would like the opportunity to make an oral submission to the committee about our submission.
20. No part of this submission should be withheld under the OIA.

Sincerely,



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