Submission by

The Employers and Manufacturers Association

to the

Education and Workforce Select Committee

on the

Employment Relations (Restraint of Trade) Amendment Bill

September 2023

P. Bag 92066
Auckland 1142
Ph: 09 3670963
paul.jarvie@ema.co.nz

About the EMA

The EMA has a membership of more than 7500 businesses, from Taupō north, employing around 300,000 New Zealanders.

The EMA provides its members with employment relations advice from industry specialists, a training centre with more than six hundred courses and a wide variety of conferences and events to help businesses grow.

The membership covers all industry sectors and all business sizes. The EMA (N) has a duty to our members to keep them informed on what changes are planned that will both positively and negatively alter the way they manage their business. We are actively encouraging our members to be more proactive in this space to enable them to mitigate the slow and unrelenting changes that are unfolding.

The EMA also advocates on behalf of its members to bring change in areas which can make a difference to the day-to-day operation of our members, such as RMA reform, infrastructure development, employment law, skills and education and export growth.

CONTACT

For further contact regarding this submission:

Paul Jarvie
Employment Relations and Safety Manager
Employers and Manufacturers Association
Private Bag 92-066
Auckland 1142
New Zealand

027 494 628 Mob
09 367 0963 DDI
E-mail: paul.jarvie@ema.co.nz

Introduction

Thank you for the opportunity to make a submission on the Employment Relations (Restraint of Trade) Amendment Bill ("Bill").

Our business mandate is to advocate on behalf of business. Our goal is to make business more successful. Anything that creates barriers to this must be questioned and debated.

Discussion

1. Business owners assume significant risks when establishing and maintaining a business, playing a pivotal role in New Zealand's economy. They are responsible for employing staff, purchasing goods and services, paying wages/salaries, and contributing to both local and central taxes.

2. For businesses, maintaining a competitive edge often relies on retaining customer relationships and proprietary knowledge. The compromise of these can be devastating for a business, and once lost, are irrecoverable.

3. Advancements in information technology have made it increasingly easy to copy and transfer files, data lists, customer information, and trade secrets. This poses a further significant risk when employees leave an organisation or during their employment.

4. The Bill as currently introduced, imposes unreasonable limitations on an employer's ability to safeguard their business and proprietary interests, goodwill, customers, and intellectual property, which all pivotal to a business. The Bill seeks to achieve this by unreasonably restricting the use of restraint of trade clauses (non-compete, non-solicitation and non-dealing) for departing employees.

5. The majority of NZ employers are smaller/medium sized businesses – where owners have a lot on the line – often including their house etc., as collateral/security. Many of these smaller/medium employers cannot survive if their one or few customers are poached by ex-employees working for competitors or as opposition business start-ups.

6. The Bill takes a one size fits all approach without understanding the realities of the economy. It seeks to protect employees at all costs at the expense of many employers already facing financial and other difficulties.

7. The Bill proposes that for a restraint of trade to be utilised, the employee's income must be three times the adult minimum wage (equivalent to around $141,000). There is no evidence supporting income as a precursor to breaking employment clauses or protection of an employer's legitimate proprietary interests.

8. The minimum income threshold for restraints to be utilised under the Bill would effectively cover 95% of all workers in NZ. Accordingly, it would likely significantly limit the utilisation and enforceability of restraints even where there are legitimate proprietary interests to protect.

9. The income threshold also does not cater to small start-up businesses who have lower paid employees as the business is in its infancy stages, but those employees may have other monetary interests such as shares in the business. Should the Bill proceed, it will not factor into account other forms of compensation employees may receive that could still be worth significant value and a one size fits all approach of an employee receiving a minimum of three times the minimum wage for a restraint to be utilised is not practical.

10. Some roles of workers even though being on a lower pay scale or position can still have access to intellectual property and customers lists. Income and or role is not a sound method of determining who could cause hurt to the business.

11. Under the Bill, where a restraint of trade clause is utilised, employers must pay employees who are subject to a restraint of trade provision an amount equal to half of the employee's weekly earnings for each week that the restraint of trade remains in effect. We consider this approach excessive. It also applies uniformly, irrespective of the employee's income. This approach means that highly paid executives to employees receiving the three times minimum wage income will be receiving 50% of the income for up to six months. Given the Bill is to protect those on lower incomes this appears to be at odds with its intent.

12. The Bill provides that payment of reasonable compensation for the restraint above is to be assessed during the end of employment. This essentially could also have the effect of stifling wage increases because of businesses having to pay employees 50% of their average's weekly earnings for each week until the end of the restraint period.

13. Under the proposed Bill, employees will be able to double-dip in that they may receive reasonable compensation for a restraint period in accordance with the Bill while concurrently pursuing alternative employment that does not violate the restraint.

14. The Bill further requires that the duration of a restraint is limited to six months maximum. There may be circumstances where there is a legitimate justifiable reason for the utilisation of lengthy restraints for employees in Senior roles. This is an intrusion on the parties' ability to freely negotiate contracts.

15. Employers invest substantial resources in employee training and development opportunities, including enabling more junior members the ability to have firsthand interaction with clients in specific industries. The Bill could stifle development of more junior members of staff by limiting direct client and customer interaction due to their market salaries reasonably not being three times the minimum wage and employer being required to pay this amount if employees are to have direct customer or client relationships.

16. The Bill's explanatory note suggest that employees have zero negotiating power and specifies that "Challenging provisions in the Employment Relations Authority or in a court can be expensive and uncertain and, as a consequence, many unreasonable restraints of trade have the effect of restraining an employee even though they are probably unenforceable. This means many employees on modest incomes choose to stay in lower paid work or to abide by the restraint." However, the Employment Relations Act 2000 already provides many protections to employees/prospective employees – including the right to seek independent advice regarding an individual employment agreement and its terms and an employer's obligations to advise the employee of this right. The employer is also liable for a penalty for failing to do this.

That many employees do not avail themselves of such rights should not result in employers having to be penalised by this via an onerous one-sided Bill. Further, the reality is that employers face significant barriers to enforcing restraints.

17. We consider the existing legal framework has clearly evolved to determine acceptable utilisation and enforceability of restraints of trade. Further, any clauses that are too wide/vague and/or unenforceable are able to be overturned by the Employment Relations Authority. The current employment law framework offers effective remedies for addressing breaches of restraint of trade clauses. If cost is perceived as a barrier to seeking remedies, financial solutions or improved access to remedies should be explored instead of implementing a one-size-fits-all approach. Further education on the utilisation and enforceability of restraints should be actioned to better equip employers and employees on the utilisation of these provisions, rather than seek to penalise employers.

18. The Bill is a solution looking for a problem. There are sufficient avenues available within the employment law that have proven to be effective to address inadequate restraints.

19. The Bill clearly does not adequately consider that lower-paid employees can also pose significant risks to a business. Income should not be the sole determinant for potential lawbreaking or misconduct.

20. Should the Bill be implemented, it will fundamentally erode employers' ability to safeguard their proprietary interests.

21. From our experience the "do it yourself' culture of writing your own IEA's with Restraint of Trade clauses or following other official advice causes these clauses to become onerous and if challenged un enforceable. Education or a Code or Practice would be beneficial.

22. In light of these concerns, we **recommend** that the **Bill does not proceed** in its current form. We believe that the existing legal framework and remedies, with potential improvements for better access, and education are sufficient to address any issues related to restraint of trade clauses.