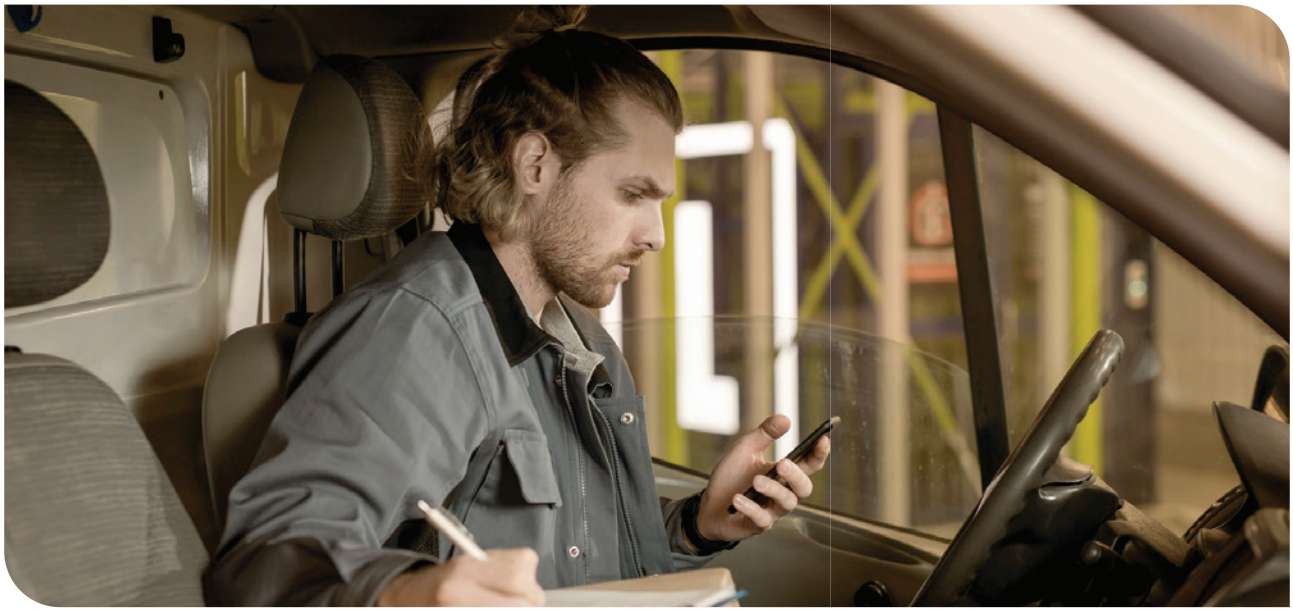
February 2026

LH News

THE NEWSLETTER OF LANGTONHUDSON



Drug Driving Reform: When Risk Follows Employees to Work

On 15 December 2025, new roadside drug testing powers came into force under the Land Transport Act 1998, following amendments introduced by the Land Transport (Drug Driving) Amendment Act 2025.

Police can now conduct saliva (oral-fluid) screening tests at roadside checkpoints and in other situations where alcohol testing may occur, such as following a crash. The tests screen for qualifying drugs including THC (cannabis), methamphetamine, MDMA (ecstasy), and cocaine. The Government has indicated a target of approximately 50,000 roadside tests per year.

Not all of the qualifying drugs are illicit drugs (full list here), and the Act provides a medical defence to a criminal liability where medication has been taken in accordance with prescription instructions.

Where a screening test returns a non-negative result, confirmatory laboratory analysis is undertaken. Depending on the concentration detected, the outcome may be either an infringement (with fines and demerit points) or a criminal offence, potentially resulting in licence suspension or disqualification.

At first glance, this appears to be a transport law development. In practice, its implications for employers are wide-ranging.

WHY THIS MATTERS FOR EMPLOYERS

Risks at work

Under the Health and Safety at Work Act 2015, employers (as persons conducting a business or undertaking) must eliminate risks to health and safety so far as is reasonably practicable or otherwise minimise those risks.

The introduction of roadside testing materially increases the likelihood that information about drug presence will surface outside employer-controlled processes, including in circumstances arising in personal time and in private vehicles. Once that information becomes known to an employer, however, it cannot be ignored.

A confirmed positive drug test result (whether from roadside testing or employer testing) is capable of giving rise to a reasonably held concern that the employee is at risk of impairment. In safety-sensitive environments, including transport, construction, heavy machinery, healthcare, and other high-consequence sectors, that risk may be obvious.

But the analysis need not only be confined to traditional "safety-sensitive" roles. Many positions depend fundamentally on unimpaired cognitive function. Professional judgment, financial authority, governance decision-making, and advisory responsibilities all require clarity of thought, risk assessment capability, and sound executive functioning.

For employers, the relevant question is not whether a criminal offence has been committed. It is whether the newly available information about an employee's drug consumption gives rise to a foreseeable risk at work. It may be appropriate to seek further clarification, temporarily adjust duties, or implement proportionate risk-mitigation measures. The focus should always be on risk management rather than punishment or moral judgment.

Disclosure obligations

A practical difficulty lies in how employers become aware of roadside testing outcomes in the first place.

Testing typically occurs outside the core workplace and so employers may have no visibility of a positive result, licence suspension or prosecution. For that reason, policy frameworks should address disclosure obligations. Employers should consider requiring employees in roles involving driving, safety-sensitive functions or significant decision-making authority to disclose:

- any loss, suspension or restriction of a driver's licence; and
- any roadside drug test outcome that may affect the safe performance of their duties.

The scope of these obligations should be carefully framed and linked to genuine safety or capacity concerns, rather than conduct generally (particularly conduct undertaken in the employee's private time).

Consequences of employees losing a licence

In addition to the risks above, if the roadside testing results in licence suspension or disqualification, there can be an immediate impact on business operations.

Where driving is an inherent requirement of the role, loss of licence may render the employee unable to perform the position in whole or in part. However, if the failed test arises from conduct in the course of employment (such as while driving a company vehicle or during work hours), disciplinary considerations may also arise.

Where the issue is capacity, employers will need to assess the practical consequences for the role. This may include considering whether driving is truly an essential requirement of the position, whether alternative duties are available, the likely duration of any suspension of licence, and whether the employee might obtain a provisional licence. If no reasonable alternatives exist, then the final step will be to consult on a proposal to terminate employment for incapacity.

BEYOND ROADSIDE TESTING: UPDATED AS/NZS STANDARDS

The AS/NZS 4308:2023 standard is now being phased in, replacing AS/NZS 4308:2008. The updated standard introduces material changes, including:

- Lower screening cut-off levels for cocaine metabolites;
- Lower confirmatory cut-off levels for benzodiazepines; and
- More detailed guidance on the interpretation and reporting of results.

POLICIES

With the introduction of roadside testing materially increasing the likelihood that drug use will be detected outside employer-initiated processes, employers should ensure their policies are agile enough to respond when an employee fails a roadside drug test (either in their own time or in work time).

A modern policy framework should:

- Reflect the concept of risk of impairment;
- Address disclosure obligations where licence status changes or safety risk arises (such as a change to or introduction of a medicine);
- Allow for proportionate, role-specific responses; and
- Be applied consistently and in accordance with broader employment law principles.

If you would like a drug and alcohol policy review or have any questions about employee drug or alcohol use please contact our team.

Changes to KiwiSaver Contributions

On 1 April 2026, several changes to the KiwiSaver program will come into effect. Two key changes are:

- an increase to the default KiwiSaver contribution rate to 3.5% (from 3%) for both employees and employers. Employees can apply for temporary rate reductions for three to twelve months from 1 February 2026.
- 16 and 17 year-olds will be eligible to participate in KiwiSaver.

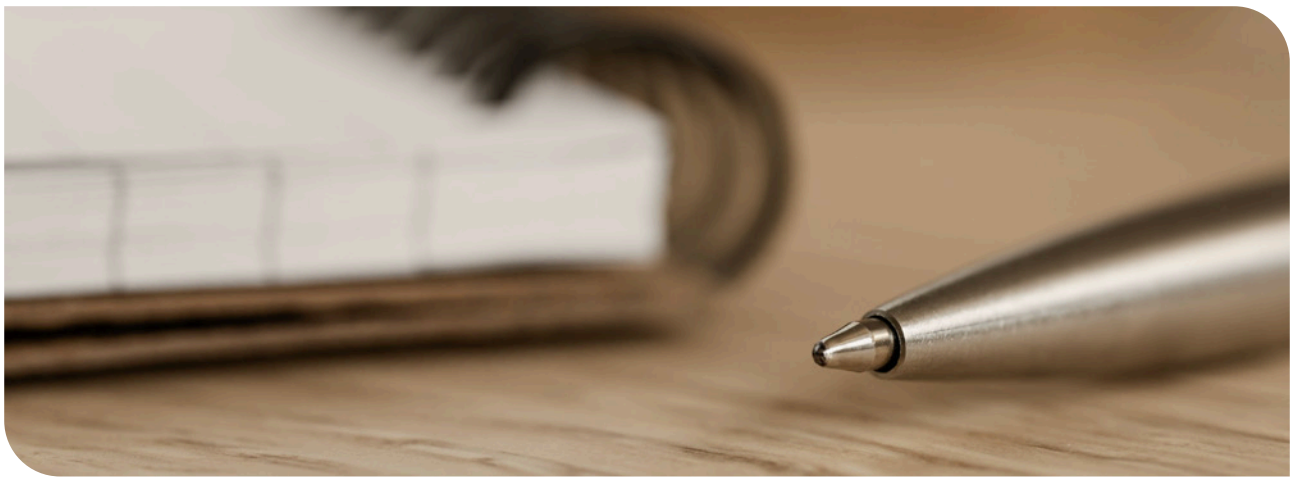
In April 2028, the default contribution rate for both employees and employers will increase to 4%.

Employment Relations Amendment Act 2026

The Employment Relations Amendment Act 2026 came into force on 21 February 2026. See our recent Stop Press for our summary of the key changes and when they take effect.

Minimum Wage Increase

From 1 April 2026, the adult minimum wage will increase from $23.50 to $23.95 per hour, and the training and starting-out rates will both increase from $18.80 to $19.16 per hour.



Case Notes

NO JAB, NO JOB, AND NO PG WIN

In *Berryman v Fonterra Co-operative Group Limited [2025] NZEmpC 272*, the Employment Court dismissed an employee's claims that (i) his dismissal for refusing vaccination or rapid antigen testing under Fonterra's COVID-19 policy was unjustified; and (ii) he had been subjected to workplace bullying and unlawful discrimination arising from the implementation of that policy.

Carl Berryman was employed as a Fonterra milk tanker driver. Although he worked largely alone, his role involved regular interaction with colleagues and the community. Fonterra, as part of the national food supply chain, was classified as an essential service, and so Mr Berryman continued working throughout the COVID-19 pandemic.

After the Government advised that employers could impose vaccination requirements if supported by a risk assessment rather than rely on the Government's generic tool, Fonterra undertook its own detailed, role-based assessment. It concluded that vaccination was required for milk tanker drivers.

Mr Berryman declined vaccination and later refused rapid antigen (RA) testing when it was introduced as an alternative. Fonterra terminated his employment on the basis that he could not comply with its health and safety requirements.

He challenged the safety of RA testing and the validity of Fonterra's risk assessment, arguing the Government's tool would not have required vaccination for his role. The Court rejected these arguments, holding that Fonterra was entitled to adopt a bespoke assessment, it had considered the available scientific and Government guidance, and it had properly consulted on its policy (which was reasonable in the circumstances of a global pandemic).

Because Fonterra had presented RA testing as an alternative, meaning vaccination was not strictly mandatory, the Court held the legislated vaccine mandate provisions (Schedule 3A) of the Employment Relations Act 2000 were not engaged. The dismissal was therefore assessed under the usual test for justification, and the Court held it was substantively and procedurally justified. Mr Berryman's bullying and discrimination claims were also dismissed.

OUR VIEW

This case confirms that in the context of a pandemic or other outbreak of disease, an employer could lawfully implement vaccination or testing requirements where supported by a well-reasoned health and safety risk assessment and genuine consultation.

You can read the Employment Court decision here.

SUPREME COURT FINDS FAMILY CARERS ARE EMPLOYEES

Christine Fleming and Peter Humphreys provide full time care to their adult disabled children, Justin and Sian. After almost five years of litigation, the Supreme Court has ruled that they are 'homeworkers', and therefore employees of the Ministry of Health. The decision is most important for Ms Fleming, who the Court of Appeal found against.

Ms Fleming and Mr Humphreys were found to be homeworkers under s 5 of the Employment Relations Act 2000, as persons who had been engaged, employed or contracted by another to perform "work" in a dwellinghouse (their own homes), when caring for Justin and Sian. The Supreme Court found Ms Fleming had been engaged despite there being no formal agreement or clear starting point to her engagement. The Ministry was aware of the care provided and if it was not provided by her the Ministry would have been required to provide the same care.

This was "work" because of the constraints placed on Ms Fleming's freedom, the nature and extent of her responsibilities and the benefit to the Ministry of Health of her care.

As a result, Ms Fleming is likely to be entitled to payment under Government funding schemes for up to 40 hours per week, paid at the rate of the minimum wage for adults. The exact amount is to be determined.

OUR VIEW

This judgment is most relevant to organisations who employ or engage homeworkers. A fact-specific analysis is required to determine whether an individual is a homeworker despite arrangements being relatively informal, and, if so, to calculate payments for their work. Please get in touch with a member of our team if you need any further advice.

You can read the judgment here.

HOLIDAY PAY PROVIDED IN ADVANCE DOES NOT DISCHARGE OBLIGATIONS

In *Smart Sushi Northwest Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2025] NZEmpC 236, the Employment Court upheld an Employment Relations Authority determination requiring remediation payments for breaches of minimum holiday entitlements under the Holidays Act 2003 (the "Holidays Act").

The appeal centred on whether earlier payments made by Smart Sushi (although unlawful) could be credited when determining the remediation amounts. The Authority rejected Smart Sushi's arguments, and the Employment Court subsequently agreed, dismissing the challenge.

Smart Sushi had a longstanding practice of paying employees 8% of their wages each December to "buy out" future annual leave. Employees could still take leave, but were not paid when the leave was taken. The company also paid out alternative holidays in advance when employees worked public holidays. Following complaints, a Labour Inspector issued improvement notices requiring remediation.

Smart Sushi accepted it had breached the Holidays Act but argued that the amounts already paid should be credited against what was owed, to avoid "double dipping". It relied on older authorities under the Holidays Act 1981 supporting the principle that early payment can discharge a future obligation.

The Court rejected that argument. It held that annual and alternative holiday entitlements under the Holidays Act are statutory minimum protections that cannot be discharged by unlawful advance payments. Where holidays are incorrectly paid out, the entitlement remains in force as if the payment had not been made. Accordingly, the earlier payments could not be set off when calculating remediation.

The Court found Smart Sushi was not barred from bringing a separate claim or counterclaim to recover mistaken payments. However, any such recovery would need to be pursued independently and would not reduce the employer's obligation

to comply with the statutory remediation process. The challenge was therefore dismissed.

OUR VIEW

This decision is a reminder that minimum holiday entitlements are strictly guarded statutory entitlements. Informal or historic payroll practices, even if longstanding and accepted by employees, will not cure non-compliance.

While employers can bring separate claims to recover mistakenly paid amounts, doing so may present practical difficulties, particularly where multiple former employees are involved.

You can read the Employment Court decision here.

A NARROW (BODIED) DEFENCE TO AGE DISCRIMINATION

In *McGearty v Air New Zealand* [2025] NZEmpC 223, the Employment Court considered the scope of the *"genuine occupational qualification"* defence to unlawful age discrimination, finding that there is a significant onus on employers to try and reasonably accommodate senior pilots in the face of age-related international flying restrictions.

Captain McGearty was a 65 year-old Air New Zealand Boeing 777 pilot. Pilots aged 65+ face international restrictions on flying wider-bodied B777s, unless their country has opted to disapply the rule (as New Zealand has). Pilots over 65 could only fly B777s on domestic and to some Pacific nations and Australia where the rule had also been disapplied.

The applicable collective agreement provided that pilots prohibited from operating an aircraft to sufficient destinations could either (i) move to a narrow-bodied fleet with a different rank, which usually involved a drop in pay and status; or (ii) take leave or retire.

Captain McGearty declined both these options and sought to continue flying the larger aircraft. He was placed on extended leave while Air NZ explored whether he and other pilots over 65 could be rostered to fly the larger aircraft routes to Australia and the Pacific.

Air NZ decided this was technically possible, but creating a bespoke roster would affect other pilots and complicate rostering. Mr McGearty remained on unpaid leave and raised personal grievances for unjustified disadvantage and unlawful age discrimination.

The Court found that not rostering Mr McGearty on the B777 routes was discriminatory on the basis of age. It rejected Air NZ's reliance on the genuine occupational qualification defence, finding it had failed to:

- assess Captain McGearty's situation individually (even though the issues had wider application);
- consider any reasonable accommodation that would allow him to keep working but not unreasonably disrupt its activities. Air NZ could have explored bespoke rostering provisions for Captain McGearty to enable him to fly the Australia and Pacific routes, but the Court found insufficient "levers" had been pulled to accommodate his individual need in the roster; and
- comply with its obligations under the collective agreement to conduct a genuine and active inquiry into alternative suitable work.

OUR VIEW

This decision is a strong reminder that even where an exception to unlawful discrimination applies, employers must consider reasonable accommodations for each impacted individual. The bar for what constitutes a reasonable disruption to business activities (which must be accommodated) is high, and inconvenience alone will not suffice. We recommend seeking advice when considering the genuine occupational qualification defence.

You can read the Employment Court decision here.

Laws, Laws, Laws – an Employment Legislation Round-up

WHAT'S NEW

LEGISLATION	DESCRIPTION	STATUS
Modern Slavery and Worker Exploitation	The National and Labour parties announced on 29 January 2026 that they would introduce a new Modern Slavery Bill to Parliament together. The Bill would require certain organisations to report on the identification, mitigation, and remediation of modern slavery within operations and supply chains. Large public and private organisations (those with significant annual revenue) would be required to publish annual modern slavery statements, to be published on a register. The Bill also includes civil and criminal penalties for non-compliance or the provision of false information (including fines and liability for directors).	The Bill will bypass the ballot process for Members' Bills as it has cross-party support, and will be introduced to Parliament shortly.

Health and Safety at Work Amendment Bill	On 9 February 2026, the Health and Safety at Work Amendment Bill was introduced to Parliament. The Bill intends to: • reduce unnecessary compliance costs; • increase certainty for businesses and organisations about their obligations; and • continue to reduce the incidence of workplace fatalities, injuries, and illnesses. The proposed amendments include the introduction of the following new defined terms: • "Small PCBU", being a business with under 20 workers; • "critical risks", being hazards that are likely to result in death, notifiable injury, incident, or illness, or an occupational disease, and which PCBUs are required to prioritise (listed in Schedule 1A); and • "scopes of duties" of Small PCBUs, whereby Small PCBUs only need to comply with particular provisions in relation to critical risks (including the primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers). The Bill also specifies that where an officer is also a worker, due diligence requirements only apply to their role as an officer.	The Bill passed its first reading on 12 February 2026. The Education and Workforce Select Committee report is due on 13 June 2026.

RECENTLY PASSED

LEGISLATION	DESCRIPTION	STATUS
Employment Relations Amendment Act 2026	The Government has enacted a suite of changes to the Employment Relations Act 2000, including: • providing greater certainty for contracting parties with the introduction of a "gateway" test; • strengthening the consideration of and accountability for the employee's behaviour in the personal grievance process; • introducing a threshold for unjustified dismissal personal grievances; and • removing the "30-day rule" for new employees where their role is also covered by a collective agreement.	The Bill came into force on 21 February 2026.

KiwiSaver contribution update	Significant changes to KiwiSaver were announced in May 2025 as part of the government's budget. The Taxation (Budget Measures) Act (No 2) 2025 introduced amendments to the KiwiSaver Act 2006 specifically increasing the default employee and employer contribution rate from 3% to 3.5% by April 2026, and to 4% by 2028. Employees have the temporary option to remain on 3% contribution rates and remain matched at that rate by their employer.	The Taxation (Budget Measures) Act (No 2) 2025 received its royal assent on 29 May 2025. The specific changes to KiwiSaver contribution rates commence from 1 April 2026 and 1 April 2028.
Privacy Act Amendment Bill	This Bill has amended the Privacy Act 2020 in several ways, including: • by creating a new information Privacy Principle (IPP 3A) that requires agencies to notify individuals when they collect personal information about the individual indirectly, subject to certain limited exceptions; and • extending the grounds upon which requests for access to personal information can be refused where the individual concerned is under the age of 16 or disclosure would be likely to prejudice the safe custody or rehabilitation of the individual.	The Bill received Royal Assent on 23 September 2025 and comes into effect on 1 May 2026.
Use of Biometric Information in New Zealand	The Privacy Commissioner sought public submissions on whether further regulations are necessary in respect of the use of biometric information in New Zealand, such as verifying people's identities online, border control, security, and policing and law enforcement. The Privacy Commission has now issued the Biometric Processing Privacy Code 2025.	The Biometric Processing Privacy Code 2025 was issued on 21 July 2025. The Code came into force on 3 November 2025, and employers already utilising biometrics have until 3 August 2026 to comply.

COMING UP

LEGISLATION	DESCRIPTION	STATUS
Holidays Act Reform	The Government has announced a plan to introduce new legislation (the "Employment Leave Act") to replace the Holiday Act 2003.	The Minister for Workplace Relations and Safety announced that a draft Bill is expected to be issued for public consultation in the first quarter of 2026.
Health and safety regime reform	On 4 February 2026, the Minister announced that WorkSafe would consider alternatives to prosecution first, such as formal warnings and pre-charge enforceable undertakings, for businesses who showed a willingness to remedy issues and improve workplace safety quickly.	More changes are coming by way of the Health and Safety at Work Amendment Bill, above.

Employment Relations (Termination of Employment by Agreement) Amendment Bill	This Bill seeks to protect negotiations between an employer and an employee to terminate the employee's employment, whether or not there is a dispute on foot. The fact an exit offer is made by an employer would not constitute grounds for a personal grievance and evidence of the negotiations would be inadmissible, except in limited circumstances.	This Bill was introduced to Parliament on 7 November 2024 and passed its first reading on 9 April 2025. Submissions closed on 10 April 2025 and the Select Committee issued its report on 29 October 2025. The Bill is awaiting its second reading.
Crimes (Increased Penalties for Slavery Offences) Amendment Bill	The Crimes (Increased Penalties for Slavery Offences) Amendment Bill proposes to amend the Crimes Act 1961 to increase the maximum prison term and fine for slavery offences.	The Crimes (Increased Penalties for Slavery Offences) Amendment Bill passed its first reading on 17 December 2024, and the Select Committee's report was issued on 22 August 2025. The Bill is awaiting its second reading.
Public Service Amendment Bill	The Bill proposes to amend the provisions in the Public Service Act that mandate the sector prioritises diversity and inclusiveness. The Bill seeks to: • remove the Public Service Commissioner's duty to develop a workforce that reflects societal diversity; • repeal section 75 entirely, which mandates promoting diversity and inclusiveness in public service workplaces; and • exclude workforce diversity and inclusiveness from government workforce policy considerations.	The Select Committee issued its final report on 27 November 2025, and the Bill is awaiting its second reading.

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If you have any queries or you need advice on any of the matters raised in this Newsletter, please contact us.