

RCSA Submission to the Employment and Workforce Select Committee on the Employment Relations Amendment Bill

Introduction

The Recruitment, Consulting and Staffing Association (RCSA) welcomes the opportunity to provide feedback on the Employment Relations Amendment Bill.

RCSA is the peak industry body for the recruitment and staffing industry in New Zealand. With over 800 corporate and individual members, RCSA represents recruitment and human resource professionals, on-hire (labour-hire) firms, and workforce consultants. Our members range from large and some multi-national corporations to small and micro businesses.

The recruitment and staffing industry is a critical and dynamic component of New Zealand's employment landscape. Across the country, the industry employs almost 60,000 people across more than 1,500 businesses and pays around \$2 billion in wages to New Zealand workers.

Those workers are sourced and placed across a variety of industries and workplaces, supporting labour and professional demands across all forms of business, government, and essential services.

RCSA members provide both permanent placement as well as on-hire employment services and take pride in their capacity to connect people with valuable work opportunities, while supporting businesses in accessing the skills and workforce they need to grow. This has been especially crucial during times of economic disruption and unpredictability.

Access to labour when and where it is needed allows businesses to flex up, down, and even across, to meet market demand or try new products/services, promoting innovation, product development and growth. In the health, aged and community care sectors, access to a qualified and work-ready on-hire workforce is essential to continuity of care.

On-hire workforces are engaged for a variety of reasons, and across a variety of industries and occupations. In New Zealand, on-hire services are in highest demand across construction and trades, manufacturing, transport and logistics, IT and professional services, healthcare and medical, retail, education and training and hospitality. Our members also supply substantial workforce for Government across administration, policy and executive functions.

On-hire services also provide important support for critical projects and for seasonal workforce needs. While the most common is to provide contingent labour to fill gaps in the direct-hire workforce, their services are employed to provide non-permanent labour to support and sustain significant infrastructure and other projects, or to support businesses to maintain effective operations in sectors where demand for labour can fluctuate significantly across seasons or based on external factors.

In the healthcare sector, our members provide critical support for hospitals, clinics, and other health facilities, supporting continuity of care by filling gaps in the permanent workforce but also ensuring the supply of skilled medical and nursing specialists across regional and remote areas of New Zealand where there are not enough permanent workers to service demand. The flexibility and opportunity of on-hire work provides an important avenue for keeping doctors and nurses working in healthcare when they are looking for greater flexibility in their employment or are feeling burnt out or overwhelmed by the demands of permanent roles in the healthcare system.

For many workers in the on-hire sector, flexible work offers them greater autonomy over their working lives. They can choose when and where they want to work, how long for, and for which host business. It allows them to structure work around their life and other commitments, ensuring people remain attached to employment and income, while also facilitating and supporting personal priorities such as study, semi-retirement, family, caring commitments, or their wellbeing. As professionals in the labour market, RCSA and its members understand the need for employment legislation to continue to evolve to reflect the changing way New Zealanders are choosing to live and work.

RCSA position overview

As a proud member of Business NZ, RCSA supports and endorses the submission made by that organisation to this committee. Like Business NZ, we recognise that this Bill represents a positive step toward reducing regulatory burden and addressing a number of long-standing employer concerns around excessive compliance and disproportionate exposure to personal grievance claims.

That being said, RCSA does have significant and specific concerns that the contractor gateway test proposed in this Bill has implications for a far broader cohort of contracting and work arrangements than just rideshare and platform work. Our industry engages contractors across almost every industry and sector, and is a significant supplier of skilled, specialist and highly paid white-collar workers across the government and private sector.

While these types of workers have clear agency and control in their working arrangements, RCSA members are acutely aware of the risks that exist for many lower income workers who are forced into contracting arrangements by unscrupulous employers. Often these workers are unclear of their obligations or the implications of contracting over an employment relationship.

The on-hire industry is strongly aligned with government in its commitment to eliminating bad practice and ensuring every worker is treated fairly, ethically, and in compliance with the law. We recognise that the actions of a small number of rogue operators can undermine trust, harm vulnerable workers, and distort fair competition.

It's important we strike the right balance between flexibility and responsibility in the labour market. Regulation in this space needs to ensure vulnerable workers are protected while also ensuring the broader workforce is not unnecessarily restricted in their choice and work opportunity.

While designed to provide clarity for workers and businesses engaged in the platform work environment, RCSA is concerned that the gateway test in its current form has the potential to severely restrict the environments under which workers can be engaged as contractors, reducing flexibility and choice for workers.

The development of a gateway test through the narrow focal lens of platform work has significant unintended consequences for the myriads of contracting arrangements that exist in New Zealand's labour market. *Stats NZ* estimates 1 in 20 workers in New Zealand (around 130,000 people), are contractors. This equates to around 5% of the total workforce.

Application of the Gateway Test in its current form runs the very real risk of removing the ability of a significant proportion of the New Zealand workforce to continue choosing to work as a contractor into the future.

Feedback on specified contractors and the Gateway Test

Broader implications of too narrow and specific a test

While RCSA appreciates the gateway test was developed with a specific focus on platform work, we believe it has significant implications for a far wider range of contracting arrangements. For that reason, we believe the lens and scope of its coverage necessarily needs to be broader and ensure it is not excluding traditional contracting arrangements in a way that may render them extremely high risk for employers in future.

We appreciate that the intent of the legislative change is for workers who do not fall within the definition of a specified contractor to continue to be assessed under the existing 'real nature of the relationship' test. However, we are concerned that this has led to a prevailing view that 'nothing changes' in relation to contractor assessments within the traditional contracting workforce. We believe this position is naïve and that the creation of a gateway test will result in enormous complexity and unintended consequence for traditional contracting arrangements which do not meet all elements, and for the tens of thousands of New Zealand on-hire workers who choose to be engaged as contractors.

RCSA agrees that the existing 'real nature of the relationship' test is uncertain and complex. To that end, we applaud moves by the government to enhance certainty for employers through the introduction of a clearer, more defined statutory test.

If that test fails to capture a broad range of contracting arrangements however, it will indirectly make it substantially more difficult for any other form of contractor to convince a court they are genuinely independent if they fall outside of the statutory definition.

While a statutory gateway for "specified contractors" will not directly alter how courts assess non-specified contractors, it does create a new benchmark. In practice, it will shift the reference point for what courts, lawyers and even clients consider to be a 'contractor'. Over time, the gateway criteria have the potential to influence judicial reasoning in ways that make it harder for non-platform or 'traditional' contractors, who don't meet those criteria, to resist reclassification under the "true nature" test.

Higher practical threshold

Even though it is not the intent for the statutory gateway to have influence outside of the specified contractor model, it raises the bar for what a contractor arrangement should look like in future, especially from the perspective of judicial mindset

Contractors who, for instance, are exclusively tied to one client, cannot subcontract, or have specific hours, may struggle to demonstrate independence. These are precisely the gateway features that courts will see statutory importance in.

Hidden Judicial Standard

The gateway test has the potential to become the de facto legal reference standard, even when it doesn't strictly apply. Judges may implicitly compare non-gateway arrangements against it, which might sway them toward employment findings.

Courts may start viewing the statutory gateway as Parliament's benchmark for what "real" contractor status looks like. Over time, judges might implicitly measure other cases against those statutory features, even if the statute doesn't formally apply.

Higher evidentiary bar and legislative signalling

A non-platform contractor who does not meet the gateway test features (right to work for others, clear control over hours, freedom to subcontract) could find it harder to persuade the court they are a genuine contractor under the 'real nature of the relationship' test.

Codifying one model of "authentic" contractor work provides a signal from Parliament to the courts that relationships falling short of those features may be deemed as employment. That signal can influence judicial reasoning, even under the current "totality" test.

There will be an enormous number of contracting arrangements left in this more challenging environment as a result of a gateway test that is too narrow in its focus and coverage. They exist across the spectrum of New Zealand's labour market and include:

- Trades tied to a single builder or employer (common in on-hire agreements where trades work to a single employer across multiple sites and clients)
- Consultants on exclusive engagements
- IT contractors working in a host business on a dedicated project or bringing specialist skills
- Specialist skills sourced for dedicated project work in infrastructure, policy or other consulting environments.

These are just a few of the established forms of contracting across our labour market that could be severely disrupted by the gateway test as it is currently drafted. While specified contractors get greater clarity, these contractors will find the line between contractor and employee harder to defend, facing greater uncertainty and higher risk of misclassification unless they mimic gateway criteria. Unfortunately, the requirement to be able to either subcontract work or nominate their own hours will preclude the majority of these forms of contracting.

Impact for non-platform contractors and the businesses who place them

There are several RCSA members who engage their workers as independent contractors. This method of engagement occurs predominantly at the top end of the employment market, where wages sit significantly above minimum entitlements, such as IT contractors, white collar consultants and medical locums. It also occurs across members supplying into infrastructure, construction and other blue-collar environments but again, only in scenarios where wages are substantially above minimum employment entitlements. In most cases, contracting is the preferred engagement method for these workers, for the financial benefits it affords them and because their personal tax and financial arrangements are set up to facilitate contracting rather than employment engagements.

The limited scope of the gateway test will create significant uncertainty and risk for employers engaging contractors who do not meet its criteria.

The gateway test as drafted introduces a significant risk for on-hire businesses in engaging individuals as independent contractors. A legal environment where there is less certainty around contractors who don't meet the gateway test will leave employers significantly exposed to the potential for workers to be reclassified as permanent employees.

This is especially challenging in an on-hire context, given work opportunity and placement for that worker is determined by the client, not by the on-hire firm. Reclassification would result in an on-hire firm, as the employer, being liable for the corresponding permanent benefits and historic entitlements but unable to pass those costs through to their client for any work already undertaken.

The implications for contractors won't relate directly to a court challenge, but to the removal of the opportunity to engage in this manner in future due to the risk involved for employers.

In Australia, we recently saw changes that introduced a definition of employment that created the potential for many forms of 'traditional' contracting to be captured. The response overwhelmingly from our industry and other employers in Australia has been to move away from engaging contractors, even highly paid ones, and moving workforce into temporary employment arrangements, against the preference of the workers themselves.

RCSA believes the increased commercial risk associated with a narrow-focused gateway test will result in New Zealand employers becoming reluctant to engage many New Zealand workers in the manner of their preference. Distinct from its impact on business, the proposed gateway test has the potential to impose a specific way of working on individuals, disregarding the practical reasons many people to choose not be employees. Aside from its impact on personal rights and choice, forcing highly skilled individuals into employment arrangements that are not their preference also has implications for access to skills and talent in key areas of our labour market. There are many and varied offshore opportunities available for highly skilled IT professionals, medical specialists and other high-end contracting and consulting services.

In addition, changes to the ability to engage workers as contractors in the on-hire sector pose other unique challenges in the New Zealand context. At present, there are no insurance products available in the marketplace that will allow on-hire firms to cover their employees in the same way they do contractors working at a client's site.

The practical impact of higher commercial risk is that the changes will remove choice and agency from workers, inserting government direction into personal decisions about how people choose to live and work. The increased possibility of these workers being found to be 'misclassified' - even where the engagement mechanism is driven by their choice – will be too great a risk and will pose significant liability risks for employers, especially those in the on-hire sector.

In short, it may remove the opportunity for thousands of New Zealanders who currently engage in genuine contracting to be their own boss in the future.

Concerns with the Gateway Test

The Bill defines a specified contractor is an individual who has entered into an arrangement to perform work for another party where:

- The arrangement includes a written agreement that specifies the person is an independent contractor
- The person is not restricted from performing work for any other organisation, except while performing work for that organisation and;
- The person is either
 - Not required to perform work for the organisation at a specified time or on a specified day or for a minimum period OR;
 - Allowed to sub-contract the work for the organisation to another person
- The arrangement does not terminate if a person declines work offered by the organisation in addition to the work they had already agreed to perform and;
- The person had a reasonable opportunity to seek independent advice before entering into that arrangement.

For many 'traditional' contracting engagements in the on-hire sector, workers are placed on a temporary basis with clients in a role that mimics arrangements for that client's 'core' direct hired workforce. For example, policy workers doing project work for government, engineers on infrastructure sites, IT specialists contracted to work in a client organisation to bring specific skills to support a project. Those workers have no capacity to subcontract their work, they are screened and placed specifically on the basis of their skill and talent. Likewise, they do not have the capacity to set their own hours, as they agree at the time of assignment to work terms dictated by the client to support their business needs and activity.

It is specifically those two conditions (or the requirement to meet at least one of them) that causes RCSA's concern with the gateway test as it is drafted.

RCSA is comfortable with all other elements of the gateway test.

Recommendations

RCSA is comfortable with all elements of the gateway test with the exception of the requirement a contractor must either be able to nominate their own hours or subcontract out their work. We do not feel that is a broad enough definition to capture the multitude of contracting arrangements that exist in market. We are concerned defining a test for a single industry poses significant implications for other forms of contracting which are unnecessary and easily addressed through changes to the test itself.

To that end RCSA recommends a range of options for government to consider as a way of either removing elements that have unintended consequences or signalling an intent that the test cover only nominated or particular types of contracting, it should have no impact on assessment of other forms of contracting and it is not intended to have any influence over the existing 'totality' test.

There are many options Government may wish to explore in addressing the problems highlight in this submission. RCSA is keen to work with the Ministry and Government on to identify and develop possible approaches that could include;

Introduction of a contractor declaration form

Government could consider making it a mandatory requirement that any worker being engaged as a contractor be required to sign a clear language, government developed statutory declaration form which clearly communicates not only what employment benefits will not exist in their contract arrangements, but also makes them acknowledge their obligations. The document could be developed to clearly outline in plain language that by conducting work as a contractor they:

Understand they are forfeiting their entitlement to:

- Employee entitlements such as annual leave, sick leave, public holiday pay or redundancy compensation
- Employer co-contributed KiwiSaver contributions

Acknowledges that they are choosing to enter into an arrangement in which they are obligated to:

- Pay their own ACC Work Levy annually
- Ensure relevant insurances- such a public liability and medical indemnity- are procured in advance of any services being provided
- Withhold tax & pay directly to Inland Revenue if those engaging services are not doing that on their behalf
- Register for GST and add it to invoices when earning over \$60,000 over a 12 month period
- Are solely responsible for KiwiSaver contributions.

This approach would ensure that every individual providing contract labour fully understand the financial, legal, and practical implications of working as a contractor before entering into an agreement. RCSA believes this approach will help reduce the likelihood of future disputes, misclassification claims, or non-compliance with tax, insurance, and ACC obligations. It will also provide an additional barrier for employers who are not transparent in hiring processes and utilise naivete around the practical realities of contracting as a mechanism to exploit workers.

This approach aligns with the Bill's broader objective of improving clarity, certainty, and balance in employment relationships by ensuring both parties are aware of their rights and responsibilities from the outset.

Remove elements of the test that cause risk for traditional contractors

RCSA would support the contractor gateway test as drafted with the simple removal of the requirement a contractor be able to either;

- not be required to perform work for the organisation at a specified time or on a specified day or for a minimum period OR;
- Allowed to sub-contract the work for the organisation to another person

Removal of these requirements from the gateway test would address the bulk of concern we have for legal unintended consequences for non-platform contractors.

Broaden the gateway test so it works for legitimate traditional non-platform contractors but include other worker protection measures

Currently, the Bill's 'specified contractor' model is clearly designed to reflect a platform-based contracting environment. To provide greater protection for traditional contractors the gateway requires wider eligibility criteria, but that brings with it greater exposure for vulnerable workers.

RCSA suggests the government could consider widening the control criteria from just sub- contracting and time nomination criteria, which will broaden its coverage. At the same time, introducing additional criteria that help safeguard vulnerable workers from exploitation:

Proposed Gateway Test (red sections indicate suggested additions)

Specified contractor means a natural person (person A)... and—

- a) the arrangement includes a written agreement specifying that person A is an independent contractor, **which is clear, plain-language, and explains the status and implications**; and
- b) person A is not restricted from performing work for any other person (except while performing work for person B); and
- c) **Person A has substantial autonomy, demonstrated by at least one of the following:**
 - i) **Person A has reasonable control over scheduling – for example, the ability to agree hours/project phases in advance**

- ii) Person A is not required to perform, or be available to perform, work for person B at a specified time or on a specified day for a minimum period
 - iii) Person A is allowed to subcontract the work for person B to another person (who may be required to undergo vetting by person B to ensure compliance with any relevant statutory requirements before being subcontracted by person A
- d) The arrangement does not terminate if person A declines any work offered to them by person B that is additional to the work that person A agreed to perform under the arrangement
 - e) Person A had a reasonable opportunity to seek independent advice before entering into the arrangement
 - f) **Person A demonstrates business capability, such as holding an NZBN, GST registration or equivalent evidence, such as maintaining their own tax records, invoicing for services, business insurance**

Introduce a threshold below which the gateway test is applied

Another way government may wish to consider addressing the implications of the gateway test for traditional contractors is through an income threshold. RCSA suggests the introduction of a wage threshold for application of the gateway test to those earning the equivalent of at or below minimum wage (currently \$23.50 per hour) +24% to reflect on-costs such as ACC levies, insurances and the absence of employee entitlements. The 24% surcharge reflects industry standards for on-costs and will ensure those above the threshold (and not subject to the gateway test) are not earning rates of pay that in practice could fall below minimum wage.

That would allow the gateway to apply as drafted but specifically targeted to those contractors earning at or below minimum wage. That application would do little to provide greater clarity for existing traditional contractors but would go a significant way to ensuring the introduction of the test does not have broad reaching implications for future legal determinations around higher income earning contractors.

This concept would complement the introduction of a mandatory statutory declaration for contractors. Together, the measures would ensure that only those who are both fully informed of their obligations and earning at a level that reflects the true costs of self-employment are excluded from employee protections under the gateway test. This approach combines clear, upfront acknowledgement of contractual responsibilities with an objective, evidence-based earnings threshold, ensuring the policy target is precise, fair, and less likely to capture unintended workers.

Clear legislative direction clarifying the gateway test coverage

Another option might be to include specific and clear direction in legislation around to the genre of contractors intended in the development of the Gateway Test, along with provisions and directions that clarify failure to pass the gateway test is not determinative of the status of a worker. The gateway test has been developed for a specific type of contractor and is not intended to influence in any way consideration of other contracting arrangements under the totality test.

Protection for vulnerable workers

RCSA is committed to working with government to strike the right balance between flexibility and responsibility in the labour market. RCSA and its members stand united with governments in a zero-tolerance approach to bad practice and worker exploitation. We are unequivocal: there is no place in our sector for operators who underpay, exploit, or mistreat workers. These behaviours are not only illegal— they are a direct attack on the integrity of our industry and the rights of the people who make it work. Reputable labour hire providers are committed to rooting out these practices, supporting tougher compliance measures, and championing the highest standards of transparency and accountability.

We note however, that many concerning practices we see in market involve employers already in breach of existing New Zealand employment laws, it's just that they are not always being identified by enforcement activity.

We recommend Government consider whether there may be opportunity to ensure any approach on a new test can also support regulators in better identifying, enforcing and stamping out rogue behaviour where it occurs. To that end, some of RCSA's recommendations in relation to the contractor gateway test - such as a minimum wage threshold and a contractor declaration form (if it includes a confirmation on earnings above minimum wage plus 24% on costs) – could support better identification of areas of concern and will help regulators focus their enforcement activity.

Feedback on income thresholds for unjustified dismissal

RCSA supports the intent behind the introduction of an income threshold for unjustified dismissal personal grievances and welcome the Government's motivation to enhance flexibility and reduce compliance costs for employers through measures in this Bill. However, we are relying on a blunt instrument such as a fixed income threshold may produce perverse outcomes, creating a two-tier employment system where workers' access to fundamental protections is determined by income rather than principle.

Even at senior levels, sudden and unfair job termination can cause significant financial, reputational, and emotional harm. It also has the potential to reduce bargaining power for these employees when workplace disputes arise, while how a dismissal is handled can impact future career opportunities at senior levels. High salaries do not guarantee workers immunity from arbitrary or bad-faith actions.

We believe there are better targeted and more appropriate mechanisms to address the issues the legislation is seeking to resolve. These could include extending probationary periods to six months for all employees or reducing barriers for employers to exit employees who have engaged in serious misconduct, or where there is clear evidence of underperformance. Such measures would enable greater flexibility for employers while ensuring fundamental protections remain in place for all employees, regardless of their level of remuneration.

Other changes proposed by the legislation

In relation to other elements within the Bill, including the reduction in remedies for personal grievances and removal of the 30-day rule and transitional arrangements, RCSA supports feedback and recommendations provided by Business NZ in its submission to the Committee. RCSA welcomes those changes as a positive step toward reducing regulatory burden and excessive compliance requirements.

About RCSA

RCSA is the peak industry body for the recruitment and staffing industry in New Zealand. With over 800 corporate and individual members, RCSA represents recruitment and human resource professionals, on-hire (labour-hire) firms, and workforce consultants. Our members range from large and some multi-national corporations to small and micro businesses.

RCSA promotes and facilitates professional practice within the recruitment and staffing industry. It sets the benchmark for industry standards through representation, education, research and business advisory support to our member organisations and accredited professionals who are bound by our Code of Professional Conduct, authorised by the Australian Competition and Consumer Commission (ACCC).

RCSA is a strong voice for employers of flexible workforces, and offers its insights at both a national level, through its membership with Business New Zealand, and at an international level, through the World Employment Confederation (WEC).