



**restaurant  
association**  
of new zealand

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## Guide: Labour Inspectorate Audits

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## It's a question of "when"

As a business owner and an employer operating in New Zealand it is inevitable and can be a question of "when" an Inspector from the Labour Inspectorate of the Ministry of Business, Innovation and Employment (MBIE) will visit the premises, without notice, to conduct an audit of the Company. There is still a focus on the hospitality sector, especially after the COVID-19 pandemic; this is because the hospitality sector typically employs more vulnerable employees such as migrant workers and minimum wage earners. Such a visit can cause some unexpected stress or put you on the spot, especially if the visit happens at a busy service time. However, the audit process can generally be managed and worked through in co-operation with the Inspector in a constructive manner.

***The Labour Inspectorate has a broad range of powers and functions prescribed by the Employment Relations Act 2000, to investigate and audit Companies, to ensure minimum statutory compliance standards are being met in regard to how employees are employed, treated and paid.***

## Functions of a Labour Inspector

**The functions of a Labour Inspector include:**

- Providing early resolution to disputes between employees and employers;
- Ensuring that all employees receive their minimum entitlements;
- Ensuring that employees are treated fairly and receive their minimum entitlements as per the relevant Acts;
- Investigating breaches and taking enforcement action as required;
- Entering workplaces to investigate and check compliance of the business and the employers current practices;

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- Requesting for time and wage records, as well as other documents such as employment agreements to review compliance of the business and employer;
- Other duties and powers as prescribed under any Public Health Order Act.

### Relevant Acts include the:

- o Employment Relations Act 2000
- o Wages Protection Act 1983
- o Minimum Wage Act 1983
- o Holidays Act 2003
- o Parental Leave & Employment Protection Act 1987
- o Equal Pay Act 1972
- o Volunteers Employment Protection Act 1973

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### Here is how the audit process typically works in practice:

#### Onsite Visit – Interviews

##### Company Director & Employees

If an Inspector appears onsite, they will typically request to sit down with you there and then to conduct an interview. Likewise, with the employees working on the day. Please note that in most cases, the Inspectorate will do its interviews at the same time and sit with each employee separately to do so.

**Co-operation with the Inspector from the outset is key.** An Inspector must carry all of this out at a “reasonable” time. So, you can expect that they would ideally come to your workplace outside of typical rush hours. Every

Labour Inspector is required to have a warrant of designation signed by the Chief Executive and must produce it for inspection if requested to do so in the course of their duties. Therefore, you can ask to see the warrant to ensure all is legitimate prior to proceeding to engage in an interview.

### Potential interview questions

- Do you have authority to speak on behalf of the Employer?
- Do you keep a copy of your time and wage records? Can we see and take copiers?
- Can we see your employment agreements?
- Name, position, start date of employment and Date of Birth of person spoken to.
- Contact details of person spoken to
- o Details of Employer – Legal Entity, Trading Name, Registered Office Address
- o Director Names and DOB, Phone, Managers Name(s), Nature of Business, Business Structure. For example, Sole trader, partnership, limited liability, Franchisee, Management tiers/titles. Other businesses/companies the employer owns, specify legal entity, trading name, location of business and number of employees.

## General questions

### Size of workplace

- Total number of:
  - full time employees
  - part time employees
  - casual employees
  - employees on trial period
  - employees on probationary period
- Hours and days the **business opens and closes** – summer days, winter days'
- What are the busy periods/season(s) for the business?
- Does the business open on **public holidays** – New Year's Day, Day after New Year's Day, Auckland Anniversary Day, Waitangi Day, Good Friday, Easter Monday, ANZAC Day, Queens Birthday, Labour Day, Christmas Day, Boxing Day?
- How do you **recruit** your workers?
  - For example, do you use an agency, advertise. If so, specify details, for example, name, contact details.
  - Who else does the hiring and firing of employees?
  - Who issued the Individual **Employment Agreements** on behalf of the Company?



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- o Do your agreements reflect the recent **changes** to employment legislation?
- o Are your agreements up to date?
- o How many employees are **permanent residents and New Zealand citizens**?
- o Do you employ **migrant employees**? Workers on any type of work visa or student visa?
- o Is any work contracted to other people/firms?
- o Do you operate a manual or computerised **payroll system**? If it is a computerised system, what software do you use?
- o How do your employee(s) get **paid**? – Cash, Direct Credit, Cheque, other.
- o How often are your employee(s) paid – Weekly, Fortnightly, Monthly, other.
- o **Do you provide** employment agreements for all your employees? – Full time, part time, casual, probationary, fixed term, and trial period. Inspectors request copies of a random selection of employment agreements.
- o **Do you keep:** wage and time records? The inspector is likely to request copies of a random selection of:
  - o wage and time records
  - o holiday and leave records.
- **Do you maintain** daily timesheet records?

- **Do you make** deductions from employees' wages?

**Do you provide:**

- o accommodation to your employees?
- o payslips?
- o prescribed breaks?

Employees typically will be asked similar questions in regard to their employment status and its nature.

### Employee list

Once an inspector has conducted the onsite interviews, they will email the Employer to request a full list of all employees who have completed or currently work for the company for the past two years. They will set a timeframe for the completion and provision of the former and current employee list. Note, an inspector has the authority to investigate back and up to 6 years. Therefore, in practice you should be housing and filing all employee records and agreements for at least seven years.

### Notice to supply

The inspector will then email and courier you a notice requiring the supply of records, typically for **three sample employees** as per the list, within seven days. The notice will require you to send the Inspector, by email, all wage and time records, holiday and leave records, employment agreements and any other documentation you use to record the remuneration of the sample employees. Failure by the employer to supply these records can lead to the Inspectorate seeking penalties from the Employment Relations

Authority – up to \$10,000 for an individual or \$20,000 against a company or corporate body. Likewise, it is a criminal offence to delay or hinder compliance prohibiting the obstruction of an Inspector lawfully exercising their power, function, and duty. A fine of up to \$10,000 can be imposed by the Employment Court on conviction.

### Extension of time

**If you need a longer period of time to compile and pull together the requested documentation for each of the three employees, you can request an extension of time. It is best to set out genuine reasons for the request to ensure it is granted.** Working and communicating with the Inspector is best practice and will inevitably ensure a better outcome, unless the audit reveals significant issues with non-compliance which extends beyond technical administrative errors with the accuracy of your wage, time records and employment agreements.

### Preliminary Audit Report

The Inspector will review and assess the documentation supplied. A preliminary investigation audit report will outline any non-compliance issues identified. You will be given a month to provide a response in writing about the preliminary findings of the report. This stage of the audit process is an opportunity for you to **mitigate, reduce and minimise** any of the issues identified, if possible. Any remaining issues will then be reduced in writing to enforceable undertakings or an improvement notice. If a company is found to be noncompliant, this will automatically trigger the Inspectorate to investigate and audit all other companies directed by the company director of the first company under investigation.

### Undertakings



A Labour Inspector and an employer may agree in writing for the employer to undertake by a specified date (an enforceable undertaking) to—

- o rectify the breach of any provision of the relevant Acts;

**OR**

- o pay money owed to an employee under a provision of the relevant Acts;

**OR**

- o take any other action the Labour Inspector determines is appropriate

Having regard to the nature of the breach of the provision of the relevant Act;

- o An enforceable undertaking may be enforced by the Authority making a compliance order;
- o An employer who fails to comply with an enforceable undertaking that remains in force is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.

## **Improvement Notice**

A Labour Inspector who believes on reasonable grounds an employer is failing, or has failed, to comply with any provision of the relevant Acts may issue the employer with an improvement notice that requires the employer to comply with the provision breached.

Issuing an **Improvement Notice** seems to be the current emerging trend in the hospitality industry at present, especially if there are a significant

number of breaches identified. Undertakings are being utilised for more low level, minor issues of non-compliance, but less frequently.

**An improvement notice will set out the following:**

- o the provision the Labour Inspector reasonably believes the employer is failing, or has failed to comply with the provision;
- o the Labour Inspector's reasons for believing the employer is failing, or has failed, to comply with the provision;
- o the nature and extent of the employer's failure to comply with the provision;
- o the steps that the employer could take to comply with the provision;
- o the date before which the employer must comply with the provision;

An improvement notice may state the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).

**An improvement notice may be issued:**

- o by giving it to the employer concerned; or
- o if the employer does not accept the improvement notice, by leaving it in the employer's presence and drawing the employer's attention to it.
- o An improvement notice may not be issued in the period commencing on 17 December and ending with the close of 8 January in the following year.

- o An improvement notice may be enforced by the Authority by way of a compliance order.

### **Objection to improvement notice:**

An employer may, within 28 days after the improvement notice is issued to the employer, lodge with the Authority an objection to the notice.

### **The function of the Authority in respect of an objection is to determine:**

- o whether the employer is failing, or has failed, to comply with the specified provision of the relevant Acts; and
- o the nature and extent of the employer's failure to comply with the provision; and
- o the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable); and
- o The Authority may confirm, vary, or rescind the improvement notice as the Authority sees fit.

### **Penalty**

A failure to comply with an improvement notice will hold a company liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority or the Employment Court. Penalties and infringement notices extend beyond monetary, with far reaching implications for employers.

From 1 April 2017 an amendment to immigration instructions was introduced. Consequently, employers who have received a penalty or

infringement notice for non-compliance with minimum employment standards with employment law will face a set “**standdown period**”, typically one year, from the ability to support a visa application. However, a suspension penalty can be imposed for a period of up to 10 years. Ultimately, this means the affected company will be suspended from employing migrant employees for the duration of the stand down period.

This measure applies to all who support visa applications, including employers who are supporting work visa applications, seeking accredited employer status, or supporting residence class visa applications based on employment as well as employers who are part of the Recognised Seasonal Employer scheme.

Therefore, to avoid these types of extreme ramifications, it is imperative an onsite visit from the Inspectorate is managed with care from the outset. In addition to the above it is important to note how far reaching the powers of the Labour Inspectorate are.

Most recently, in May 2021, the Labour Inspectorate: ***applied to the Employment Court of New Zealand for an order so that the Employees could recover interest on the arrears owed to them from the directors of the company, even though the company had gone into liquidation. In this case, the Court ordered the directors to pay the employees interest on the outstanding wages and holiday pay.***

**The Helpline Team at the Restaurant Association is available to advise, assist and help manage you through the process. Please do not hesitate to call us on 0800 737 827.**



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