

VISA PAK ISSUE 343 — 2 FEBRUARY 2018

ADVICE ON ASSESSING AN EMPLOYER'S COMPLIANCE WITH EMPLOYMENT LEGISLATION

This item sets out guidance for immigration officers assessing an employer's history of compliance with New Zealand employment law for a visa application. The advice relates to when the Labour Inspectorate has issued an employer with an Improvement Notice (IN), or entered into an Enforceable Undertaking (EU), which is subsequently complied with. This advice can similarly be applied when assessing other instances of non-compliance with employment law to which the mandatory stand down periods in the stand down list do not apply.

Immigration Officers should be cautious about relying solely on a single event of past non-compliance as the basis for declining a visa application as it is likely to be seen by a Court as too strict an application of immigration instructions. This is particularly so when considering an IN or EU that has been, or is being, complied with to the satisfaction of the Labour Inspectorate. Complying with an IN or EU could be viewed positively by a Court as evidence of compliance, rather than non-compliance. Furthermore, the use of an IN or EU is often an indication that the non-compliance by an employer is relatively low level. A firmer approach may be justified if the breach is particularly serious, or if the employer has compounded the original breach by failing to comply with an IN or EU requiring them to remedy it. However, advice should generally be sought before declining an application on the basis of a single breach.

When assessing whether the supporting employer has a history of compliance, whether for a single instance or multiple instances of past non-compliance, a holistic view should be taken. In particular, an immigration officer should consider:

- The surrounding circumstances of each breach/event (e.g. whether the breach is deliberate or due to a genuine misunderstanding of legal requirements)
- The severity of the breach(es) (e.g. whether the breach was merely technical or whether it had a serious negative impact on an employee or on a large number of employees)
- Whether there were multiple or reoccurring breaches (i.e. whether there is a pattern of non-compliant behaviour)
- The timeframe since the non-compliance (e.g. whether the matter is historic and no further breaches have occurred since)
- The outcome of each event (e.g. did the employer remedy the non-compliance to the satisfaction of the Labour Inspectorate or are they actively engaging in a manner that shows their willingness to comply)

Weighing these factors will enable Immigration Officers to assess whether faults in the employer's employment history can appropriately be regarded as amounting to a history of non-compliance.

Please also note that breaches of employment standards which led to the inclusion of an employer on the non-compliant employer stand-down list may still be considered when determining if an employer has a history of compliance with employment law. Note that the temporary nature of the stand down list shows that it is not intended to be a permanent barrier to an employer's ability to recruit migrant workers. Instead, it indicates that it is possible for employers to meet employer requirements again in the future. Those employers who have recently come off the list are not automatically deemed to have a history of compliance. Rather, these employers are again subject to the generic 'history of compliance' instructions, and the same considerations set out above may be applied in assessing their applications. The assessment should also take into account: 1) the



NEW ZEALAND
IMMIGRATION

period of time they have already been stood down for; and 2) the employer's processes implemented during that time to remedy the non-compliance.