

Regulatory Impact Statement: Extending the availability of 90-day trial periods

Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing Cabinet decisions
Advising agencies:	Ministry of Business, Innovation and Employment
Proposing Ministers:	Minister for Workplace Relations and Safety
Date finalised:	5 December 2023
Problem Definition	
<p>Employers that are not currently able to use 90-day trial periods may be wary of hiring new employees, due to the risk that new employees may not be a good match and could result in an unproductive employment relationship.</p> <p>If an employer takes steps to bring the unproductive relationship to an end, it will face higher process costs and the risk of a personal grievance action for unjustified dismissal, compared to employers who can use 90-day trial periods.</p>	
Executive Summary	
<p>Extending the availability of 90-day trial periods is a commitment of the Coalition Government's 100-Day Plan and the New Zealand National Party and ACT New Zealand Coalition Agreement.</p> <p>Currently, trial periods of up to 90 days are available for employers with fewer than 20 employees to use in employment agreements with new employees. Trial periods enable an employer to dismiss an employee for any reason during the period (of up to 90 days), and the employee cannot bring a personal grievance claim for unjustified dismissal.</p> <p>There is limited research on the prevalence and extent of impacts of trial periods in New Zealand. The Treasury commissioned research from Motu Economic and Public Policy Research (Motu) in 2016 to evaluate the impact of trial periods. The evaluation did not find any significant economy-wide effect of the policy change on: the quantity of hiring; the quantity of hiring into employment relationships that are short or that last beyond the trial period; the probability that a new hire is a disadvantaged job seeker; the survival rate of new employment relationships; or employees' willingness to change jobs. There are a number of older surveys which provide some insight of prevalence, though information on the impact on employees is limited.</p> <p>This impact analysis considers both the Government's preferred option to extend the availability of trial periods to all employers and an alternative option of extending availability to employers with fewer than 100 employees, against the status quo.</p> <p>We consider that the main impacts of the 90-day trial policy are perceived insecurity for employees who are on a trial period and reduced costs for employers that choose to dismiss an employee on a trial period.</p> <p>We consider that smaller employers are more likely to benefit from trial periods because they are less able to absorb the costs of a poor match or dismissal. In comparison, larger</p>	

employers can be more equipped to manage any dismissal processes and absorb the costs. We therefore consider that there are diminishing benefits from increasing the availability of trial periods to larger employers (from 89 percent of employers under the status quo to 100 percent of employers) and that this would not outweigh the costs of insecurity to a greater number of employees.

We consider that the option to extend trial periods to employers with fewer than 100 employees may lead to greater uncertainty than the other options. Some employers may find it difficult to assess whether they are eligible to use trial periods, particularly if their employee numbers fluctuate around the employee threshold.

Although we consider the three options to be finely balanced, our preferred option is to maintain the status quo.

The accelerated timeframes required to meet the 100-day commitment limited stakeholder engagement. The regulatory impact analysis that considered the Government's proposal to restrict the availability of trial periods to employers with fewer than 20 employees in 2018 outlined that:

- Unions want the trial period removed so that all employees have security of employment from the outset.
- Employers would prefer to retain the status quo (at the time trial periods were available to all businesses). Employers also indicated that they wanted to minimise the procedural requirements for an employer to dismiss an employee on a trial period.

Recent media suggests that these stakeholder views have not changed significantly since this time.

Limitations and Constraints on Analysis

This proposal is part of the Government's 100-Day Plan

This proposal is a commitment of the Coalition Government's 100-Day Plan and the New Zealand National Party and ACT New Zealand Coalition Agreement. As such, there have been constraints on this analysis including limited timeframes, including for consultation. The analysis was undertaken within a short timeframe to meet the Coalition Government's timelines, which has in turn limited the scope of options considered.

There is limited data on 90-day trial periods

There is limited data available relating to how often 90-day trial clauses are included in employment agreements, how often employees are dismissed using those clauses, and the impact of dismissals on employees. This data limitation constrained the depth of policy analysis. Key research and data relied on for the purposes of this analysis are:

- research undertaken in 2016 by Motu to evaluate the effect of trial periods on employment
- National Survey of Employers – this survey has been discontinued, with the latest data from the 2018/19 period.
- Survey of Working Life – information regarding the prevalence of 90-day trial periods amongst employees was only taken in the 2012 survey.

Challenges in quantifying the monetised benefits and costs for employers

The costs associated with the options cannot be determined given the lack of data, significant range in costs and unclear prevalence of use. We have not been able to quantify the monetised costs for employers under the status quo, or for the proposed option.

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Privacy of natural persons



5 December 2023

Quality Assurance

Reviewing Agency: Ministry of Business, Innovation and Employment

Panel Assessment & Comment: The requirement for quality assurance of regulatory impact statements (RIS) has been suspended for decisions relating to 100 Day Plan proposals taken within the 100 Days. However, the Ministry of Business, Innovation and Employment notes that the RIS has been internally peer reviewed and considers that it is fit-for-purpose to inform Cabinet's consideration, given the time constraints.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The current trial period policy

1. Employment relationships in New Zealand are regulated primarily through the *Employment Relations Act 2000* (the Act). The Act provides a framework for employers and employees to build productive employment relationships in good faith in all aspects of the employment environment and relationship.
2. The Act enables employers with fewer than 20 employees to include a trial period of up to 90 days in employment agreements. Trial periods enable an employer to dismiss an employee for any reason during the period (of up to 90 days), and the employee cannot bring a personal grievance claim for unjustified dismissal. Employees may still bring personal grievances for other matters not relating to the dismissal, such as discrimination, harassment, or being disadvantaged in their employment.

The Employment Court has upheld strict requirements for employers in 90-day trial cases

3. While an employee cannot challenge their dismissal if they have a valid 90-day trial clause, employees can still challenge the validity of the 90-day trial period.
4. The Employment Court has taken a strict approach when determining whether employers have complied with the Act. They considered this is justified as trial provisions remove longstanding employee protections, access to dispute resolution, and access to justice.¹ This has led to a significant proportion of cases finding trial periods invalid. A trial period can be deemed invalid when an employer does not meet the formal requirements for trial provisions, or when an employer does not comply with proper procedure for the employee's dismissal. When a trial provision is deemed to be invalid, an employee may then bring a personal grievance for unjustified dismissal.

The Employment Relations Authority has also upheld strict procedural requirements

5. Trial periods at the Employment Relations Authority (the Authority) have been found to be invalid largely due to employers falling short of the procedural requirements. 133 out of 178 90-day trial provisions (75 percent) considered by the Authority between 2015 and 2023 were found to be invalid.² Common reasons for an invalid trial period include:
 - A general contractual failure with the employment agreement.
 - The person with a trial provision in their employment agreement was not considered to be an employee who had not previously been employed by their employer. This can include a person who has worked only for a few days before signing their employment agreement.
 - The trial provision itself was incorrectly stated.
 - Notice of dismissal was not properly given.
 - A miscellaneous procedural error.

Without further government intervention, we expect that small employers will continue to make use of trial periods

6. Trial periods are available to employers with fewer than 20 employees who represent around 89 percent of total employers in New Zealand but employ only 28 percent of employees. Conversely, around 72 percent of employees are employed by employers with more than 20 employees.³ Data from the 2018/19 National Survey of Employers found that, of employers with fewer than 20 employees who had hired an employee in the previous 12 months, 67 percent had included a trial period in at least one employment agreement.⁴
7. We expect the current provision (the status quo) will continue to be used by employers with fewer than 20 employees. The case law will continue to develop, clarifying the expectations on employers when using trial periods. It can be a challenge for small

¹ Smith v Stokes Valley Pharmacy (2009) Ltd NZEmpC 111 [2010] at [48].

² Internal data from MBIE.

³ Data from Statistics NZ, available at: [New Zealand business demography statistics: At February 2023 | Stats NZ](#).

⁴ See: MBIE (2019), *National Survey of Employers 2018/19: Summary Findings*. Available at: [National Survey of Employers 2018/19: Summary of findings](#).

employers to know about the case law requirements and to learn about any new requirements that develop.

8. Employers with 20 or more employees will continue to be required to follow a proper process for dealing with the dismissal of any employee and incur the related costs, no matter how long they have been employed. However, there are several employment types available to all employers that provide flexibility to define the nature of the employment relationship, such as:
 - Probation periods are legislated for in section 67 of the Act. Probation periods must be in writing and agreed to in the employment agreement. A probation period enables an employer to test the suitability of an employee but requires the employer to engage with the employee regularly on their performance until the conclusion of the probationary period. An employee dismissed on a probation period has access to the full suite of legislated employee protections, including unjustified dismissal.
 - A fixed-term (temporary) employee's employment will end on a specified date or when a particular event occurs. This can include replacing another employee on parental leave, to cover a seasonal peak or to complete a project. The employer must have a genuine reason to hire an employee on a fixed-term arrangement.
 - Casual employment situations can involve where an employee has no guaranteed hours of work, no regular pattern of work, and no ongoing expectation of employment. The employer doesn't have to offer work to the employee, and the employee doesn't have to accept work if it's offered.⁵
9. However, fixed term and casual employment are not intended to be used to address the risk associated with hiring new employees.
10. Larger employers are likely to be better resourced than smaller employers to mitigate the risks of new employment relationships without trial periods. This can include developing extensive recruitment processes that enable them to reduce the risk of a poor match or the ability to move a poor match to another area of the business where they might be better suited.

History of the trial period provision

11. In 2009, trial periods were introduced for employers with fewer than 20 employees. This was intended to provide employers with confidence when hiring new employees and, through reducing the risk of new hires to employers, enable extra opportunities for employees, particularly those who are disadvantaged in the labour market [CAB Min (08) 45/3].
12. In 2011, the availability of trial periods was extended to all employers, allowing them to benefit from the reduced potential cost of a poor match via the use of trial periods. This was part of a package of reforms intended to reduce costs, support more effective and efficient processes, and improve workplace productivity [CAB Min (10) 24/6A].
13. In 2019, the availability of trial periods was restricted to employers with fewer than 20 employees. The intent was to balance:
 - providing employees with security from the outset of employment; with

⁵ More information is available on Employment New Zealand, Types of Employee (website). Available at: [Employment New Zealand](#).

- reducing the costs associated with hiring for small to medium-sized businesses who they considered may be less able to manage the costs and risks associated with the hiring process [CBC-18-MIN-0016 refers].
14. The previous Government restricted the use of trial periods in the Accredited Employer Work Visa (AEWV). This restriction came into effect on 29 October 2023. The restriction only applies to the AEWV and does not apply to other work visas (eg Working Holiday Visa holders). As the restriction is set out in Immigration Instructions and not employment law, the proposed expansion of 90-day trials to all employers will not remove the restriction for employers of AEWV holders.

Previous analyses of the trial period provision in New Zealand

Motu research on the impact of trial periods

15. The Treasury commissioned Motu to evaluate the impact of trial periods, with the evaluation published in 2016. The study compared how the hiring behaviour of small employers (15-19 employees) compared with slightly larger employers (20-24 employees), in the period before the 90-day trials was extended to include all employers.⁶
16. The researchers then compared both groups of employers (15-19 employees and 20-24 employees) after the extension in 2011, allowing them to test the impact on hiring behaviour and to control for the impacts of the global financial crisis.
17. The research focused mainly on employers with 15-24 employees because the impacts were expected to be most accurately identified by comparing employers that were of a similar size, but differently affected by the legislation that was in place from 2009-2011.
18. The evaluation did not find any significant economy-wide effect of the policy change on:
- the quantity of hiring
 - the quantity of hiring into employment relationships that are short or that last beyond the trial period
 - the probability that a new hire is a disadvantaged job seeker, such as youth, young Māori or Pasifika, former beneficiaries, job seeker beneficiaries, recent migrants, people who were previously non-workers, and school or tertiary education leavers
 - the survival rate of new employment relationships
 - employees' willingness to change jobs.
19. However, when examining construction and wholesale trade, two industries that had made relatively high use of trial periods, the study found statistically weak evidence that the policy change increased hiring.
20. The research concluded that while the policy has had little aggregate impact on employers' hiring and retention decisions, it is likely to have reduced dismissal costs for employers that do decide to dismiss a new employee, and increased uncertainty for employees who are hired on a trial period.

⁶ Nathan Chapell and Isabelle Sin (2016), *The Effect of Trial Periods in Employment on Firm Hiring Behaviour*, available at: [The Effect of Trial Periods in Employment on Firm Hiring Behaviour | Motu](#).

21. The researchers suggested a number of potential reasons why 90-day trials had a limited impact:
- The cost of the hiring process in addition to the investment in training for new employees can make employers more reluctant to dismiss an employee, as they would need to incur the training costs again.
 - There is inherent risk in the matching process, and employers face the same risk of a poor match if they were to hire a new employee.
 - If a new employee was a poor fit, an employer may have dismissed them regardless of whether a trial period was in place.
 - Employers already had a number of mechanisms for reducing the risks of hiring available to them such as casual and fixed-term contracts.
 - Employers hiring decisions may be primarily based on their need for the role (ie expected demand for labour as determined by demand for output), rather than dismissal costs.
22. Qualitative evidence from the Motu report also suggests divergent views between employees and employers. Employers took the view that trial periods were very important, allowing them to take more risks in employment decisions. Employees, on the other hand, preferred not to be on trial periods because of the insecurity it created.

National Survey of Employers

23. Data from the National Survey of Employers 2018/19 when trial periods were available to employers of all sizes, suggests that 90-day trials were widespread amongst all employers. 67 percent of employers with fewer than 20 employees had hired at least one employee with a trial period in the previous 12 months. The same survey found that 23 percent of those using trial periods dismissed an employee during their 90-day trial period. These findings were consistent with previous years.
24. When asked why they used a trial period, employers most commonly cited checking the person's ability to do the job. Smaller employers were more likely to report using a trial period 'to avoid dismissal costs and issues if the person is unsuitable'.
25. The 2018/19 National Survey of Employers also found that the proportion of hiring employers using trial periods was similar across all industries.⁷

Survey of Working Life

26. Statistics NZ's 2012 *Survey of Working Life* survey found that approximately 36 percent of employees who started their current main job in the preceding year began on a trial period. This equated to 131,100 people who had started their current job on a trial in 2012. There was a higher likelihood of starting on a trial period for those:
- born overseas and who had lived in NZ for less than five years
 - those of Asian ethnicity and Pacific peoples

⁷ See: MBIE (2019), *National Survey of Employers 2018/19: Summary Findings*. Available at: [National Survey of Employers 2018/19: Summary of findings](#).

- with vocational or trade qualifications or school qualifications working in the construction, wholesale trade, and retail trade and hospitality industries
 - who were technicians and trade workers, sales workers, or managers
 - earning lower wages
 - on individual employment agreements.
27. There was little variation by gender. Māori were less likely to have started employment on a trial period.⁸

International context

28. International Labour Organization (ILO) Convention 158 *Termination of Employment Convention* allows for workers to be removed from regular protections during a probation or qualifying period.⁹ ILO Convention 189 *Domestic Workers Convention* also refers to probation or trial periods, and states that the length of that period should be set out in an employment agreement.¹⁰ New Zealand has not ratified either convention. However, the text suggests that international labour standards do not prohibit the use of trial or probation periods.
29. ILO conflates trial and probationary periods and defines these as “a minimum employment period during which an employee is not fully covered by employment protection legislation”.¹¹
30. Across countries, statutory provisions differ in the exemptions that are permitted, including whether:
- protection against unfair dismissal does not apply
 - different valid grounds for dismissal, as compared to the general regime, are applied
 - different notification or severance pay rules apply.
31. Trial periods are specific to New Zealand employment law, but many other countries (and New Zealand) have approaches with similar intentions. The approach of each country is in the context of their own employment legislation. For example, many countries have statutory redundancy payments and notice periods, whereas New Zealand has no minimum requirements for those policies:¹²
- In the United Kingdom, probation and trial periods are not legislated for. Probation periods and unpaid trial periods are generally agreed between the employer and employee. There is a qualifying period of employment of two years that an employee must work continuously for, before being eligible to raise an unjustified

⁸ Available at: [Trial periods at a glance](#).

⁹ Available at: [Convention C158 - Termination of Employment Convention, 1982 \(No. 158\) \(ilo.org\)](#).

¹⁰ Available at: [Convention C189 - Domestic Workers Convention, 2011 \(No. 189\) \(ilo.org\)](#).

¹¹ Available at: [ILO-EPLex](#).

¹² Although, the Act requires that notice periods be ‘fair and reasonable’. This includes both employers dismissing staff (except for serious misconduct), and employees leaving employment.

dismissal claim (noting that employees can still raise wrongful dismissal claims during this time for concerns such as breach of contract).

- In Germany, the employer and employee may agree to a probationary period, which is limited by law to a maximum of six months.
- In the Netherlands, a probationary period must be agreed in writing. In the case of both an employment contract for an indefinite period and for a fixed period of two or more years, the maximum probationary period is two months. In other cases, the maximum probationary period is one month. A probationary period is not allowed in an employment contract for a fixed period of six months or less.
- In Spain, if there is no special provision in an applicable collective bargaining agreement, probationary periods cannot exceed six months for qualified technical employees or two months for other (non-qualified) workers.
- In Australia, probation periods are not legislated for, but an employer and employee may agree to one when negotiating an employment agreement. These are typically between three and six months in duration. Australia has a minimum employment period of six months (12 for small businesses with fewer than 15 employees), before an employee is eligible to raise an unjustified dismissal claim.¹³

What is the policy problem or opportunity?

There is a risk that new employment relationships are a poor match for employers and employees

32. The objective of the Employment Relations and Standards Regulatory System is to enable productive, mutually beneficial employment relationships. As such, the system assumes an ongoing relationship between an employer and employee.
33. Entering a new employment relationship is a point of risk for employers and employees because there is potential for a bad match. There are a range of reasons why finding a good labour market match may be challenging, including:
 - large search costs for employees and employees, including taking time to search for a job for workers, and recruitment costs for employers
 - imperfect information, for example job seekers not knowing about job opportunities
 - imbalances between supply and demand, for example during a recession
 - barriers to labour mobility.¹⁴
34. Given this, the OECD notes that some level of mismatch is expected in the labour market.¹⁵ For employers and employees, this means there is always a risk that one or

¹³ OECD (2019), *Description of OECD Countries Employment Protection Legislation*. Available at: [OECD Employment Protection](#).

¹⁴ Barbara Pentronglo (2010), *The Diamond, Mortensen and Pissarides Nobel: Search and market frictions* (blog post), see: [The Diamond, Mortensen and Pissarides Nobel: Search and market frictions | CEPR](#).

¹⁵ OECD (2017), *OECD Economic Surveys: New Zealand 2017*.

both will find their new match to be poor. New Zealand tends to have greater levels of mismatch than other countries,¹⁶ but evidence of the cause is limited.¹⁷

There are costs associated with ending an employment relationship, particularly for employers

35. In situations where the relationship is not working for the employee, they can leave the employment relationship by giving notice as outlined in their employment agreement. In comparison, if the relationship is not working for the employer, because of the assumed power imbalance,¹⁸ there are greater procedural requirements imposed on them to end the relationship.
36. Employers may only dismiss an employee for a good reason, which includes:
 - serious misconduct
 - repeated misconduct
 - performance issues
 - redundancy
 - incompatibility
 - incapacity.
37. As well as having a good reason for dismissal, employers must follow a fair and reasonable process, underpinned by the requirement to act in good faith. This generally includes investigating the matter, communicating concerns to the employee, providing clear standards to meet and a genuine opportunity to improve, considering mitigating factors, and alternatives. This process can require a significant investment in time and effort for employers.
38. An employee may bring a personal grievance for unjustified dismissal if they believe that the employer did not have a good reason to dismiss them, or that the process was unfair. Parties may seek assistance from government dispute resolution services (eg Employment Mediation Services provided by the Ministry of Business, Innovation and Employment (MBIE)) or the employee may bring their grievance directly to the Employment Relations Authority (the Authority) for determination. Either party may challenge the Authority's determination in the Employment Court if unsatisfied with the result.
39. The cost impact of these procedural requirements may vary depending on the size of the employer. Larger employers are more likely than smaller employers to have the capacity and capability to be able to mitigate or absorb the risk of a new employment relationship and the cost of an employee who is a poor match. However, the risk of a

¹⁶ Müge Adalet McGowan and Dan Andrews (2015), *Skills Mismatch Public Policy in OECD Countries*, and OECD (2017), *OECD Economic Surveys: New Zealand 2017*.

¹⁷ A range of causes have been suggested, including poor labour mobility due to high housing costs, the relationship between skills and industry growth, particularly for knowledge industries (Haini and Tan, 2022), and immigration may also play a role. See Müge Adalet McGowan and Dan Andrews (2015), *Skills Mismatch Public Policy in OECD Countries*, Finn Robinson (2020), *Vacancies, unemployment and labour market slack in New Zealand*, and Hazwan Haini and Pauline Tan (2012), *Re-examining the impact of sectoral- and industrial-level FDI on growth: Does institutional quality, education levels and trade openness matter?*.

¹⁸ This is acknowledged in the Object of the Act, specifically s3(a)(ii) which refers to “acknowledging and addressing the inherent inequality of power in employment relationships”.

poor match cannot be eliminated, and the impact of a poor performing employee can be significant, even for larger employers. These employers still face disincentives to end an employment relationship due to a poor match because the costs of a dismissal process and risk of a personal grievance remain. Even if successful in defending a personal grievance claim, an employer will incur costs which can include dedicating resources and paying for legal representation.

These costs can lead to sub-optimal outcomes for employers and employees

40. The cost arising from any dismissal process and risk of a personal grievance claim can lead to further suboptimal outcomes for both employers and employees. High dismissal costs could lead to employers being less willing to hire new staff, particularly those disadvantaged in the labour market, who may be seen as a higher risk of being a poor match. Further, employers may be less likely to dismiss employees who are a poor match. This could reduce employment levels overall, to the detriment of both employers and (potential) employees. In a survey relating to the introduction of 90-day trial periods, some employers noted that dismissal costs reduced the willingness of employers to take on new staff.¹⁹
41. However, the process requirements and opportunity to challenge a dismissal could also have positive impacts by:
 - increasing security for workers, leading to a greater willingness to shift jobs
 - reducing dismissals for workers and the associated poor outcomes, including hardship, re-employment challenges, and a shift to more precarious and lower-earning jobs upon re-employment
 - incentivising employers to improve their hiring processes, or to invest in their capability to ensure a productive relationship.²⁰

Trial periods are currently available for some employers

42. The availability of trial periods is currently restricted to employers with fewer than 20 employees. Trial periods allow an employer to dismiss an employee without having to give a reason during the period (of up to 90 days), and the employee cannot bring a personal grievance claim for unjustified dismissal. Trial periods reduce the costs of dismissal for employers and reduce the risk of personal grievance. However, trial periods do cause insecurity for employees on a trial for up to the first 90 days of their employment.

The problem

43. Overall, the key problem is that employers that are not currently able to use 90-day trial periods may be wary of hiring new employees, due to the risk that new employees may not be a good match and could result in an unproductive employment relationship. If an employer takes steps to bring an unproductive relationship to an end, they will face higher process costs and the risk of a personal grievance action for unjustified dismissal, compared to employers who can use 90-day trial periods.

¹⁹ Rosalind Houghton (2012), *Employers' Perspectives – Part One: Trial Periods*. Available at: [Employers' Perspectives – Part One: Trial Periods](#).

²⁰ For a more in-depth discussion, see: Productivity Commission (2015), *Workplace Relations Framework: Productivity Commission Inquiry Report (Volume 2)*. Available at: [Volume 2 - Workplace Relations Framework - Inquiry report \(pc.gov.au\)](#).

44. Trial periods reduce the risks associated with hiring and costs of dismissal for employers, making it easier to dismiss employees. While this could have benefits for employers (and potentially for employees, if the reduction in 'friction' results in greater demand for labour overall), it would also reduce employee security at the beginning of employment. In theory, this could:
- make employees less likely to shift jobs, as employees are less likely to take on the risk associated with a new job
 - lead to increased dismissals and the poor outcomes potentially associated with losing a job, such as income loss or unemployment.

What objectives are sought in relation to the policy problem?

45. We consider there to be two objectives of regulatory change in this area:
- 1 To encourage employers to take on more employees, particularly disadvantaged job seekers
 - 2 To balance:
 - a. the risks of a mismatch when starting a new employment relationship, which could result in high process costs and risk of a personal grievance for employers, with
 - b. security for workers in beginning a new employment relationship.
46. There are tensions inherent within the second objective. To reduce the risks faced by employers in hiring, a trade off with security for employees may occur. For example, trial periods reduce costs of dismissal for employers, making it easier to dismiss an employee, which causes insecurity to employees on a trial period for up to the first 90 days of employment.
47. The challenge for regulatory change in this area will therefore be striking an optimal balance between the elements of the second objective, in order to encourage employers to take on more employees, particularly disadvantaged job seekers.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

48. The options have been assessed against the following criteria:
- Does the policy encourage employers to take on more employees, particularly disadvantaged job seekers?
 - Does the policy reduce the process costs and risk of a personal grievance for employers?
 - Does the policy increase security for employees when beginning a new employment relationship?
 - Does the policy provide certainty for employers and employees regarding their employment rights and obligations?
 - Is the option simple to implement?
49. There is a trade-off between increasing protections to employees and decreasing the costs and risks to employers associated with hiring employees. The Government's policy intention is to shift the current balance towards reducing risks and costs for employers.

What scope will options be considered within?

50. The proposal to expand the availability of 90-day trial periods is part of the National – ACT New Zealand Coalition Agreement. We have included the assessment of two other regulatory options in this RIS.
51. Reduced timeframes limited our ability to assess the feasibility of a broader range of options, including non-regulatory options. A non-regulatory approach to the problem could involve the provision of employer training on hiring practices to encourage good employment matches and productive employment relationships, as well as increasing support for employers to manage the dismissal process by providing further guidance and resources.
52. We did not undertake analysis on an option of removing trial periods altogether as this does not align with the Government's objectives.

Stakeholder views

53. Due to the accelerated timeframes required to meet the 100-day commitment, we did not engage further with stakeholders on this policy. However, past stakeholder engagement regarding trial periods provides insight to stakeholder perspectives. The RIS associated with the 2019 amendment limiting 90-day trial periods outlined that:
- Unions want the trial period removed so that all employees have security of employment from the outset.
 - Employers would prefer to retain the status quo (at the time this was trial periods available to all businesses). Employers also indicated that they wanted to minimise the procedural requirements for an employer to dismiss an employee on a trial period.
54. Recent media suggests that stakeholders' views have not changed significantly since 2019:

- In a November 2023 Radio New Zealand interview, Kirk Hope from BusinessNZ asserted that 90-day trials enable businesses to take a risk on those who may not have all the skills for the job. He discussed that trial periods save employers from an expensive dismissal process if the new employment relationship does not work out.²¹
- The Council of Trade Unions (NZCTU) have published opinions on the expansion of trial periods with Unite, E tū and FIRST Unions supporting the position that trial periods are ineffective and create insecurity for employees. They maintain that trial periods do not improve hiring, but only make it easier for employers to dismiss.²²
- In an opinion piece released in November 2023, Richard Wagstaff, President of NZCTU, highlighted the Motu evaluation’s conclusion that trial periods have little to no impact. He asserts that New Zealand has a relaxed set of labour laws and expanding trial periods would put workers at a further disadvantage based on no evidence of impact aside from decreased cost for employers.²³
- Simpson Grierson’s 2023 pre-election survey of employers revealed that re-introducing 90-day trials for all employers was top of mind for 29 percent of employers surveyed.²⁴ BusinessNZ identified the reinstatement of 90-day trial periods for all employers as an election priority for them.²⁵

What options are being considered?

55. We consider the following options in this RIS:

- Option one: The status quo – Continue to limit the availability of 90-day trial periods to employers with fewer than 20 employees.
- Option two: Extend the availability of 90-day trial periods to employers with fewer than 100 employees.
- Option three: Extend the availability of 90-day trial periods to all employers.

Options being assessed

56. In this section we set out a description of each of the options and the key associated considerations. These options are also assessed in the options table below.

Option One – Status quo: Continue to limit the availability of 90-day trial periods to employers with fewer than 20 employees

57. **Description:** This option maintains the status quo, which limits the availability of trial period provisions to employers who employ fewer than 20 employees. Employers who employ 20 or more employees are not able to use trial periods in their employment agreements with new employees. The current policy strikes a balance where trial

²¹ Available at: [Business leaders want to see changes from new government | RNZ](#).

²² Available at: [90-day trials – didn’t work then, won’t work now - NZCTU \(union.org.nz\)](#).

²³ Available at: [Bringing back 90-day trials is not supported by evidence | The Post](#).

²⁴ Available at: [Simpson Grierson - Pre-election survey 2023: employers identify top three employment priorities for incoming government and reveal impending restructures](#).

²⁵ BusinessNZ (2023), *Election Priorities For a Better Future*. Available at: [Election Priorities \(businessnz.org.nz\)](#).

periods are available to most employers (89 percent²⁶) who employ a moderate proportion of employees (28 percent).

58. We consider that large employers are not likely to benefit from trial periods to the extent smaller employers do given they are more likely to have the capacity and capability to be able to mitigate the risk of new employment relationships in other ways and are more likely to have resources to absorb cost and risk compared to smaller employers.
59. The insecurity that 90-day trial periods may cause employees being less willing to change jobs, reducing labour market dynamism, and increasing the negative impacts of a poor match as an employment relationship extends beyond the 90-day period. However, the Motu research indicates that this risk is not borne out in practise.²⁷
60. As discussed, the Authority and the Employment Court have strictly upheld procedural requirements for employers using trial periods. However, since the 2019 change to limit the availability of trial periods, there have been only two cases at the Authority where the validity of the trial period was at issue due to the employer having 20 or more employees. Therefore, under the status quo we do not consider that there is a significant certainty issue specifically regarding the restriction on size of employer able to use trial periods.
61. Overall, the key impacts (and the core trade-off) of the status quo are a reduction in costs for employers who dismiss an employee during the 90-day trial period, and increased insecurity for workers who are on a trial period. On balance, MBIE considers this is an appropriate balance between risks and costs to employers and security for employees.

Option Two – Extend the availability of trial periods to employers with fewer than 100 employees

62. Description: This option would make trial periods available to 98 percent of employers in New Zealand who employ 51 percent of employees.²⁸ Extending to this size of employer could maintain the benefits of trial periods to almost all employers whilst limiting insecurity from trial periods to new employees of employers (where their employment agreement includes a trial period) who employ just over half of New Zealand employees.
63. As mentioned above, we do not consider there to be a lack of certainty about the 'size of employer able to use trial periods' under the status quo. However, moving the boundary to fewer than 100 employees is likely to create more uncertainty. It may be more difficult for larger employers around the threshold to know at any given time if they are able to use trial periods, as they may move in and out of the threshold at different points in time. This could also give rise to more validity challenges from dismissed employees.

Option Three – Extend the availability of trial periods to all employers

64. Description: This option would remove the current limit on trial period provisions, extending it to allow employers of all sizes to negotiate trial periods in employment agreements with new employees. This option would extend availability from employers

²⁶ Data from Statistics NZ, available at: [New Zealand business demography statistics: At February 2023 | Stats NZ](#).

²⁷ Nathan Chapell and Isabelle Sin (2016), *The Effect of Trial Periods in Employment on Firm Hiring Behaviour*, available at: [The Effect of Trial Periods in Employment on Firm Hiring Behaviour | Motu](#).

²⁸ Data from Statistics NZ, available at: [New Zealand business demography statistics: At February 2023 | Stats NZ](#).

of fewer than 20 employees who represent around 89 percent of total employers (under the status quo), to 100 percent of employers.

65. Extending the availability of trial periods would reduce process costs and risk of personal grievance claims for any employer that chose to dismiss an employee during a trial period. However, it would also significantly increase the number of employees who are potentially impacted by trial periods, as any new employment relationship could include a trial period.
66. Based on current information, there appears to be some lack of certainty in using trial periods correctly, and this is likely to affect a greater number of employers with the expansion in availability of trial periods. Although we do not consider there to be lack of certainty around size of employer able to use trial periods to be an issue in relation to the status quo, any potential uncertainty would be removed by extending availability to all employers.

How do the options compare to the status quo/counterfactual?

	MBIE's preferred option		Government's preferred option
	Option One – Status Quo	Option Two - Extend the availability of trial periods to employers with fewer than 100 employees	Option Three – Extend availability to all employers
Does the policy encourage employers to take on more employees, particularly disadvantaged job seekers?	0 The intent of trial periods is to encourage employers to take on more employees. Evidence suggests that trial periods do not affect employers hiring decisions and therefore have no impact on the number of employees hired or opportunities for disadvantaged job seekers.	0 This option likely has no change compared to the status quo.	0 This option likely has no change compared to the status quo.
Does the policy reduce the process costs and risk of a personal grievance for employers?	0 Employers incur costs in the dismissal process in terms of both time and financial resources. There is a risk to employers that an employee will challenge a dismissal decision with a personal grievance. Trial periods reduce these risks and costs for small employers (0-19 employees) under the status quo. Employers of this size account for about 89 percent of all employers. Larger employers are more likely to be able to absorb cost and risk compared to smaller employers.	0 for employers (between 20-99 employees) that do not use trial periods. + for employers (between 20-99 employees) who use trial periods and <i>do not</i> use it to dismiss. ++ for employers (between 20-99 employees) who use trial periods and <i>do</i> use it to dismiss. This option makes trial periods available to more employers (98 percent) who can benefit from reduced costs and risks if they dismiss an employee on a trial period.	0 for employers (greater than 19 employees) that don't use trial periods. + for employers (greater than 19 employees) who use trial periods and <i>do not</i> use it to dismiss. ++ for employers (greater than 19 employees) who use trial periods and <i>do</i> use it to dismiss. As per option two but extends to all employers so potential benefits are accessible to all employers.
Does the policy increase security for employees when beginning a new employment relationship?	0 Trial periods reduce costs of dismissal for employers, making it easier to dismiss an employee. This causes insecurity to employees during the trial period which is associated with negative outcomes. Under the status quo, new employees of an employer with fewer than 20 employees (these employers employ 28 percent of employees) could be subject to a 90-day trial period.	0 for employees that do not change employment or new employees that do not have a 90-day trial period in their employment agreement with an employer with 20-99 employees. - for the first 90 days for newly hired employees who have a trial period in their employment agreement with an employer with 20-99 employees. -- for employees who are dismissed by an employer with 20-99 employees during a valid 90-day trial period. This option increases the number of employees who may experience insecurity caused by trial periods. Around 23 percent of employees work for employers with between 20 and 99 employees. Employees that join those employers on a trial period will face insecurity for the period of the trial. The increased availability of trial periods means that this number will be greater than under the status quo.	0 for employees that do not change employment or new employees that do not have a 90-day trial in their employment agreement with an employer. - for the first 90 days for newly hired employees who have a trial period in their employment agreement with an employer with 20 – 99 employees. -- for employees who are dismissed by an employer during a valid 90-day trial with 20 – 99 employees. This option increases the number of employees who may experience insecurity caused by trial periods compared with options one and two, as trial periods will be available to all employers.
Does the policy provide certainty for employers and employees regarding their employment rights and obligations?	0 Trial periods have procedural requirements that are strictly enforced by the Authority and courts. There is some uncertainty for employers and employees surrounding the rights and obligations of trial period provisions. Smaller employers may find it more difficult to comply with procedural requirements of trial periods. However, we do not consider there is a certainty issue for the size of employer able to use trial periods in the status quo.	- for employers near the cusp of the 100-employee threshold 0 for other employers. We anticipate trial periods to be widely used under this option, compared with option one, and therefore more employers and employees would need to have certainty of rights and obligations for trial periods. Shifting the threshold higher may cause uncertainty as to which employers can use trial periods, particularly for those employers whose employee numbers are on the cusp of the threshold.	0 We anticipate trial periods to be widely used under this option, compared with options one and two, and therefore more employers and employees would need to have certainty of rights and obligations for trial periods.

Is it simple to implement?	There would be no amendment to existing legislation.	An amendment to legislation would be required in addition to updated guidance.	An amendment to legislation would be required in addition to updated guidance.
Overall assessment	0	+/- Finely balanced with the status quo. Will provide potential benefits for almost all employers but many employees will still benefit from existing protections when taking on a new role. The boundary at 99 employees and how it is measured is likely to lead to increased complexity for employers operating near the cusp when dealing with disputes.	+/- Will provide potential benefits for all employers but will create potential insecurity for a larger number of employees when taking on a new role.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

67. Research indicates that the availability of 90-day trial periods to all employers does not make a noticeable difference to the dynamics of the labour market. So, we do not consider that any of the three options are likely to meet the objective of encouraging employers to take on more employees, particularly disadvantaged job seekers.
68. We expect that smaller employers would gain the greatest benefit from trial periods. All employers face risks and costs associated with recruitment, performance management, and dismissal processes, and trial periods can reduce these risks and costs. However, smaller employers generally face greater relative risks and costs than larger employers (compared to the resources they have), and are often less able to manage the processes and costs (eg through dedicated human resource advice).
69. The current restriction of the status quo therefore targets the availability of trial periods to employers where the positive impact could be the largest.
70. The options are finely balanced regarding appropriately trading off the risks of hiring for employers and security for employees. In terms of the criteria, the status quo:
 - Provides the vast majority of employers with access to 90-day trials (89 percent). As noted earlier, the key benefit has been to reduce dismissal costs for those employers who do dismiss an employee during the trial period.
 - Provides security for the majority of employees, as 72 percent of the workforce is employed by employers who are not eligible to use the 90-day trial period. The key disadvantage is the increased insecurity for new employees employed under a trial period.
71. Extending the availability of trial periods outlined in option three will increase the number of employers whose dismissal costs are reduced when dismissing a new employee who is not a good match. Due to the availability of trial periods to all employers, the number of new employees likely to experience an increase in insecurity will be greater than under options one and two.
72. The limited data on the inclusion of 90-day trials in employment agreements and whether they are then used to dismiss employees in the first 90 days, makes the comparison of the options difficult. Though it is finely balanced, MBIE considers that the increased benefits to employers under options two and three do not outweigh the costs of insecurity to a greater number of employees under those options, compared with the status quo.
73. We consider that there are diminishing benefits from increasing the availability of trial periods to employers that have a greater capacity to mitigate and absorb the negative impacts of a poor match, generally larger employers. However, as noted above, extending 90-day trials would still benefit larger employers, as they do face procedural costs and a risk of personal grievance claims. By contrast, the increased insecurity for employees will be the same and affect a significantly larger number of employees under options two and three, compared with the status quo.
74. Overall, we consider the status quo to be marginally preferred to both alternatives considered:
 - While option two is more targeted than option three, we consider this option may result in some employers finding it difficult to assess whether they are eligible to use trial periods, particularly if their employee numbers fluctuate around the employee threshold.
 - Option three extends the availability of 90-day trials to employers who are better able to mitigate the costs and risks associated with a poor match, whilst potentially increasing insecurity for the largest number of employees.

What are the marginal costs and benefits of the option?

75. The marginal costs and benefits of the Government's preferred option to extend the availability of 90-day trial periods to all employers (option three) are outlined below:

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the extending availability of 90-day trials to all employers compared to the status quo			
Regulated groups	<p>A greater number of employees will experience perceived insecurity for the first 90 days of employment (ie where starting work on a trial period). This does not appear to affect employees' willingness to change jobs.</p> <p>Employees on trial periods will have reduced access to personal grievance protections and will therefore be easier to dismiss. Impacts for these employees could include loss of income, and/or unemployment. However, this policy does not appear to increase the likelihood of dismissals.</p>	Medium	<p>Medium</p> <p>The Motu evaluation is robust and provides confidence in the direction of impacts.</p> <p>We expect the prevalence of 90-day trial periods to increase.</p> <p>However, there is a lack of evidence on the prevalence of trial periods for employees, the number of dismissals during the 90-day trial periods, or the impact of perceived insecurity on employees. We have low certainty as to the scale of this increase.</p>
Regulators	<p>MBIE to update website, tools, and guidance.</p> <p>Potential cost to MBIE's early resolution and mediation services, the Employment Relations Authority, and the Employment Court where disputes regarding 90-day trials are raised.</p> <p>We would expect fewer disputes to be raised over unjustified dismissals in the first 90 days of employment, as trial periods remove the ability to claim unjustified dismissal. However, there may be more disputes about use of 90-day trials (eg procedural disputes about how employers use trial provisions), as their prevalence increases.</p>	Low	<p>Low</p> <p>The balance of the two effects (more 90-day trial disputes, fewer unjustified dismissal disputes where the trial period is valid) is unknown.</p>
Total monetised costs	Unclear.	Low	Low
Non-monetised costs	Increased perceived insecurity for employees.	Low	Low
Additional benefits of the extending availability of 90-day trials to all employers compared to the status quo			
Regulated groups	Employers will have greater confidence when hiring new staff. In theory this could lead to employers hiring employees that they perceive	Medium	Medium

	<p>as riskier, though the research has not been able to identify such an effect in the data.</p> <p>Employers who dismiss staff during a 90-day trial period will face lower process costs and a lower risk of a personal grievance claim.</p>		<p>The Motu evaluation is robust and provides confidence in the direction of impacts.</p> <p>There is a lack of evidence on the prevalence of dismissals under the 90-day trial periods, meaning the scale of reduced costs cannot be quantified.</p>
Regulators	There will be no disputes about employer size taken to MBIE's mediation services, or the Employment Relations Authority, or the Employment Court.	Low	<p>High</p> <p>Only two cases have been taken to the Employment Relations Authority on this issue since the 2019 restriction of trial periods to employers with fewer than 20 employees.</p>
Total monetised benefits	Unclear.	Low	Low
Non-monetised benefits	<p>Employers have greater confidence when hiring staff.</p> <p>Employers have lower costs when dismissing staff.</p>	Low	Medium

Section 3: Delivering an option

How will the new arrangements be implemented?

76. The legislative proposals need to be implemented through amendments to the Act. MBIE is responsible for administering the Act and provides information for employers, unions and employees through its website, contact centre and other customer services on an ongoing basis. Information provision and updates to website content would be undertaken within MBIE's existing baseline funding.
77. As part of implementing the expansion of 90-day trials, MBIE's Employment Services will update guidance on the Employment New Zealand website, update the employment agreement builder, undertake internal training updates, and inform stakeholders. MBIE will consider more substantive updates to reflect recent Authority determinations.
78. MBIE will complete the necessary updates and information provision by commencement of the amendment.

How will the new arrangements be monitored, evaluated, and reviewed?

79. MBIE will monitor implementation of the policy through media reports, research, and data from the use of mediation services and determinations of the Authority.
80. MBIE will explore whether new or existing sources of information, such as surveys, could include questions on trial periods to contribute to monitoring, evaluation and review.
81. An evaluation to update and supplement information from the 2016 Motu research may be considered in future work programme planning and prioritisation.