BusinessCentral

EMPLOYER BULLETIN

17 April 2023

A Weekly News Digest for Employers

EMPLOYER NEWS

Thirty-two new health sector roles added to Green List Straight to Residence pathway

The Government has added 32 new health sector roles to the Straight to Residence pathway of the Green List to help prepare our health system for the coming winter, Immigration Minister Michael Wood and Health Minister Dr Ayesha Verrall announced last week.

"We've listened to the health sector and these changes ensure that immigration settings are as helpful and competitive as possible," Michael Wood said.

"The 32 health roles being added to the Green List's Straight to Residence pathway span across the wider health sector from enrolled nurses, nurse practitioners, dentists and dental technicians, MRI scanning technologists, paramedics, optometrists and pharmacists to counselling.

"The Green List now has a total of 48 health roles, all of which are nationally important and all of which will be on the Straight to Residence pathway.

"The list already includes midwives and registered nurses, which were added to the Green List in December. Last month alone we saw almost 900 overseas nurses apply to register to work in New Zealand.

"These immigration settings will be among the most competitive in the world, and are yet another positive step, along with better wages for nurses and immigration support, to influence the number of health workers who come to New Zealand.

"These changes are in addition to the steps we have taken to make pay fairer for nurses working in our health sector, some of whom saw up to a 15% increase to their base pay last month.

The Green List also includes roles that contribute to the wellbeing of Kiwi families, including social services, education, justice, and are critical to health service delivery in New Zealand.

Transport sector agreement to be extended to skippers and deck hands

"In our seaside cities, ferries form an essential part of the public transport system, so it is critical that ferry service operators have access to key workers to enhance the reliability of these services," Michael Wood said.

"Following discussion with the sector I can confirm that skippers and deckhands will be added to the transport sector agreement.

"The market rate for skippers is already above the median wage. Operators will need to continue to pay migrant worker skippers the market rate and migrant worker deckhands will need to be paid at least the median wage to utilise this sector agreement.

"The Government is providing a time limited pathway to residence for skippers piloting boats essential to public transport routes, our supply chain, along with tourism operators and other operators who use skippers and deckhands.

"Final details of the transport sector agreement will be confirmed shortly, with implementation expected to begin from late May," Michael Wood said.

New Zealand Government [11 April 2023]

Leveraging the FIFA Women's World Cup to create a lasting legacy for Aotearoa

With less than 4 months to go until the opening match of the FIFA Women's World Cup Australia & New Zealand 2023 at Eden Park on 20 July, work is well underway across Government to ensure the social and economic benefits of co-hosting one of the world's largest women's sporting events are locked in.

The Ministry of Business, Innovation & Employment (MBIE), as the lead government agency for the event, has worked closely with other government organisations to develop a FIFA Women's World Cup 2023 leverage and legacy programme.

The programme is supported by a $10 million fund and includes projects that will drive outcomes in 4 key focus areas: Mana Wāhine (raising the profile of women and girls in sport and wider society), Te Tangata (thriving communities), Te Ao (enhancing our international relationships), and Ōhanga (economic growth).

MBIE's Manager Major Events, Kylie Hawker-Green says one of the main reasons Aotearoa New Zealand bids to host major international events like the FIFA Women's World Cup is because of the significant benefits and lasting legacy they provide to our country.

A number of other projects that will drive benefits for Aotearoa New Zealand in education, sport, tourism, international relations, communities, business, health culture and conservation will be announced over the coming months.

Ministry of Business, Innovation and Employment [11 April 2023]

Government announces final changes to the CCCFA Regulations

The Government has announced a final set of changes to the Credit Contracts and Consumer Finance Act (CCCFA) and the Responsible Lending Code to improve safe access to credit for Kiwis. The changes will be applied from 4 May 2023.

The final set of changes will include:

- narrowing the expenses considered by lenders to exclude discretionary expenses more explicitly
- providing more flexibility for lenders about how certain repayments may be calculated
- extending exceptions from full income and expense assessments for refinancing of existing credit contracts.

The changes aim to increase ease of access to credit while maintaining a strong level of consumer protection. Coupled together with the initial changes that came into effect in July 2022, they will address the remaining unintended impacts of the December 2021 changes.

More information on the changes to the CCCFA Regulations and Responsible Lending Code can be found on our website.

Ministry of Business, Innovation and Employment [12 April 2023]

Retail card spending increases in March 2023

Retail card spending rose 0.7 percent in the March 2023 month compared with February 2023, when adjusted for seasonal effects, according to data released by Stats NZ.

"Retail card spending rose across all categories except for groceries and liquor," business performance manager Ricky Ho said.

Groceries and liquor (consumables) fell $32 million (1.2 percent) in March, which came after a rise of a similar magnitude in February.

Total seasonally adjusted card spending rose in March, up $278 million (3.1 percent).

Seasonally adjusted card spending on non-retail industries, up $225 million (11.3 percent) from the previous month, drove this increase. Non-retail industries include travel agencies and tour arrangement services, health and pharmaceuticals, wholesaling, and other industries.

March quarter retail card spending increases

Seasonally adjusted retail spending in the March 2023 quarter increased by $227 million (1.2 percent), while the total spend increased by $401 million (1.7 percent) from the December 2022 quarter.

The largest increase in the retail industries was seen in the groceries and liquor spending category, up $146 million (1.9 percent). It was partly offset by a fall in fuel spending, down $147 million (8.1 percent).

"The rise in total card spending during both the March quarter and March month was largely attributed to a lift in spending within the non-retail industries," Ho said.

Actual retail card spending was $19 billion in the March 2023 quarter, up 9.7 percent from the March 2022 quarter. Spending on hospitality had the largest increase, up $933 million (32.3 per cent) compared with the March 2022 quarter.

Values are only available at the national level and are not adjusted for price changes.

Electronic card transaction data covers the use of credit and debit cards in shops or online and includes both the retail and services industries.

Statistics New Zealand [12 April 2023]

Major shakeup will see affordable water reforms led and delivered regionally

- 10 new regionally owned and led public water entities to be established
- New approach avoids a rates blow out and delivers savings to households between $2,770-$5,400 per year by 2054
- Entities will be owned by local councils on behalf of the public, and entity borders to be based on existing regional areas
- Each entity to be run by a professional board, with members appointed on competency and skill
- Strategic oversight and direction to be provided by local representative groups with every local council in the country, as well as mana whenua, getting a seat at the table

The Government has listened to feedback from local government and is announcing major changes to New Zealand's affordable water reforms by agreeing to establish 10 new regionally led entities, which will still deliver big cost savings to New Zealand households says Local Government Minister Kieran McAnulty.

"These reforms are absolutely essential. Leaving things as they are will mean unaffordable rate bills," Kieran McAnulty said.

New Zealand Government [13 April 2023]

EMPLOYMENT RELATIONS AUTHORITY: FOUR CASES

Young employee wins unjustified dismissal and disadvantage claims

In October 2020, Mr McBeth and Mr Wood were colleagues at Torpedo7. Mr McBeth was 16 at the time and Mr Wood was 28. Mr Wood had attended primary school with Mr McBeth's cousin and was good friends with him. Mr Wood offered Mr McBeth employment in his furniture removal business, Export Moving Group. Mr McBeth made claims for unjustified disadvantage and unjustified dismissal after his employment ended on 16 November 2020. Mr McBeth sough recovery of wages and compensation for hurt and humiliation for unjustified dismissal. He did not seek lost wages.

Mr McBeth commenced working for Mr Wood on 9 November 2020 and worked five days for a total of 33 hours in mid-November 2020. Mr McBeth stated that on 14 November 2020 Mr Wood offered him three different pay rates to choose from. He chose the third option of being paid $150 per day plus a bonus if he worked for over eight consecutive hours in a day.

On 19 November 2020, Mr McBeth was paid $270 into his bank account. Given that he agreed to be pay $150 per day and had worked five days already, Mr McBeth said he should have been paid $750. Mr McBeth sought to recover the difference.

In addition to this amount, Mr McBeth sought recovery of $20 that he loaned to Mr Wood as petrol money on 16 November 2020. He also sought to recover a $70 deduction from his wages which Mr Wood deducted as transport costs for driving Mr McBeth to a worksite in Auckland.

Mr Wood did not provide Mr McBeth with any more work for the two weeks that followed from the 16 November 2020. Screen shots of text messages from Mr McBeth to Mr Wood were provided to the Employment Relations Authority (the Authority). These showed that he had inquired when he could expect to work next.

On 8 December 2020, Mr McBeth texted Mr Wood seeking clarification about his work hours per week, his pay rate, and what day in the week he could expect to be paid. Mr Wood texted back stating that he had done a lot to get Mr McBeth onto a worksite because he was not 18 and that he no longer wished to bother with the "drama and bulls---" of providing him with the requested information. He then proceeded to dismiss Mr McBeth stating that "this is what happens when a know-it-all questions me." Here Mr McBeth was dismissed by text message by Mr Wood.

The onus was on Mr Wood, as the employer, to show that at the time of dismissing Mr McBeth, his actions were what a fair and reasonable employer could have done in all the circumstances.

The dismissal came immediately after Mr McBeth had texted Mr Wood to provide him with greater clarity around his employment as he had not been provided with any work by Mr Wood for two weeks. The request was neither onerous nor unreasonable and the context was that he had been kept waiting for two weeks but had not been provided with any work.

Mr Wood's text response was that he had done a lot to get Mr McBeth onto a site because he was not 18 years of age. While Mr Wood's text did reference the fact that Mr McBeth was under 18 years of age, the text does not expressly attribute his dismissal on account of his age. Rather, the Authority found that Mr Wood dismissed Mr McBeth because he had the fortitude to question Mr Wood about his employment situation which Mr Wood interpreted as a sign of him being ungrateful for what he had done for Mr McBeth.

A fair and reasonable employer would have communicated any concerns to their employee and provided them with an opportunity to respond to those concerns before arriving at the decision to dismiss. Mr McBeth was unilaterally dismissed without any proper process being followed. The claim of unjustified dismissal was made out.

Mr McBeth provided evidence that when he was dismissed, he was stressed and worried about how he would pay his rent, bills and other expenses. He did not find alternative employment until March 2021.

In quantifying compensation, the Authority took into account Mr McBeth's vulnerability on account of his young age and lack of life experience, matters that Mr Wood would have appreciated. Mr Wood would have known that Mr McBeth was dependent on him for ongoing work, having left his previous job at Torpedo7 in order to work for him.

The impact of the dismissal on Mr McBeth was not insignificant. His dismissal without notice left him in financial hardship, resulting in unnecessary anxiety and stress for a young person. The Authority awarded $12,000 for hurt and humiliation, loss of dignity and injury to feelings. The Authority further awarded wage arrears of $500 to be paid by Mr Wood to Mr McBeth.

Finally with respect to a deduction of $70 from Mr McBeth's wages, the Authority confirmed that the deduction was unlawful because it was made without Mr McBeth's written consent or request as required the Wages Protection Act 1993. However, no penalty was warranted as the appropriate remedy was the recovery of wages.

Mr Wood was ordered to pay $750 towards the Young Workers Resource Centres legal costs, who advocated for Mr McBeth.

McBeth v Export Moving Group [[2022] NZERA 589; 10/11/2022; P Fuiava]

Union denied penalty against employer due to employees not being union members

The Manufacturing and Construction Workers Union Inc (the Union) claimed that Wellington City Transport Limited (WCTL) breached the 2017 collective agreement between the parties after employing three new employees on individual employment agreements. The Union claimed the employees should have instead been employed on the collective agreement for the first 30 days of their employment.

The Union further claimed that one employee was employed on less favourable terms than those set out in the collective agreement, and that none of the employees were provided with copies of the collective agreement. The Union sought a declaration that there had been a breach by WCTL and a penalty of $20,000 payable to the Union.

WCTL denied the claims, explaining that because of changes required by the NZ Public Transport Operating model, Cityline (NZ) Limited (Cityline), another company within the NZ Bus group of companies, closed all its depots. This meant three of Cityline's workshop employees at that depot were faced with a redundancy. Meanwhile, WCTL had three vacancies for workshop employees in its new Kaiwharawhara depot.

WCTL offered employment to the three employees on their then current terms and conditions of employment with Cityline. WCTL claimed the employees were not members of the Union at the time but, in any event, were provided with a copy of the collective agreement and met with the Union organiser, Mr Thomson.

The parties accepted that as the three employees were employed after 6 March 2015, but prior to 5 May 2019, the then section 62 of the Employment Relations Act 2000 (the Act) was in effect during that period and applied. That section required WCTL to inform the employees that a collective agreement covered the work and provide them with a copy; that they could join the Union and be bound by the collective agreement; and inform the Union as soon as practicable when the employees entered individual employment agreements. Notably, however, it did not require WCTL to place the new employees on the collective agreement for the first 30 days of their employment as required by the current version section 62 of the Act.

Mr Thomson's evidence was he was aware new positions were created at Kaiwharawhara and that Cityline employees could apply for them. He said he introduced himself to the employees as the Union organiser, and explained there was a collective agreement that covered their work and asked whether they wished to sign up. A membership form was taken but ultimately not signed.

Concerning the less favourable terms, the Union's evidence was that WCTL asked one of the employees to start at 5.30am when the collective agreement stipulated a 6am start. The Union claimed this was

unfavourable for the employee as the Union had not been consulted which was necessary to vary the collective agreement. The Union also claimed that the terms of employment were different compared to the collective being two weeks less annual leave, less sick leave and no redundancy compensation. In the Union's view, it was illogical for an employee to make such a choice concerning their terms of employment and submitted that it must have resulted from a misrepresentation by WCTL.

Conversely, WCTL claimed it carried out its obligations in respect of section 62 of the Act. The three employees had been spoken to by Mr Gordon, the chief engineer of WCTL, and asked for permission to hand over their personal information to the Union. Each declined. An email from Mr Gordon dated 23 July 2018 evidenced the Union being advised that the employees declined permission to share their information.

Further, Mr Gordon explained that WCTL is a wholly owned subsidiary of NZ Bus Limited, and that the Union's claim arose out of a transfer of the three employees from the Upper Hutt depot to the Kaiwharawhara depot. He explained that, ironically, although NZ Bus Group had shed almost 700 staff due to the restructure, the three employees in this dispute were not made redundant. Rather, they were offered, and accepted, ongoing employment on the same terms and conditions as they had before. They simply shifted from one depot to another. Their employment also transferred from one subsidiary of NZ Bus to another.

Mr Gordon said that to the best of his knowledge, the three employees were very happy with the transfer. He said he had spoken to them from time to time and they never expressed concerns about the transfer, nor had they raised any personal grievance claims or any other disputes about the process.

The Union acknowledged that the current version of section 62 in the Act was not operable at the relevant time and did not compel WCTL to place the employees on the same terms and conditions of the collective agreement for the first 30 days of their employment. However, it sought to rely on the terms of the collective agreement itself that required Union members to be placed on the same terms and conditions of the collective for the first 30 days.

The Authority stated that WCTL was not obliged to do so as the three employees were non-Union employees and did not wish to join. Further, they had the opportunity to speak to the Union organiser, as evidenced by their conversations with Mr Thomson, and reaffirmed their intention not to join the Union as evidenced by Mr Gordon's email of July 2018. The Union could not contradict this evidence. The Authority inferred from the evidence that, each of the employees had access to a copy of the collective agreement despite it not being clear whether or not a physical copy had been given to each of them. While none of the employees gave evidence, the evidence indicated they were happy with their new arrangement with WCTL.

It therefore followed that the Union's claims failed. The Authority opined that even had it found a breach by WCTL, a penalty would not have been appropriate because at the heart of the alleged breach was the transfer of three employees under circumstances where they may have otherwise lost their jobs. Costs were reserved.

The Manufacturing and Construction Workers Union Inc v Wellington City Transport Limited [[2022] NZERA 605; 17/ 11/ 2022; G O'Sullivan]

Employee without an employment agreement won unjustified dismissal claim

Ms Laison worked as a kitchenhand for a restaurant owned by Rapp Hospitality Group Limited (RHGL). Mr Malik was the director of RHGL and both he and Mrs Malik were joint shareholders. After 1 February 2022, RHGL failed to provide Ms Laison with any work. While the job advertisement did not mention the nature of the employment, Ms Laison alleged that she was a permanent employee and not a casual one. She applied to the Employment Relations Authority (the Authority) for unjustified dismissal claiming she was owed wages and annual leave entitlement from RHGL.

Before her dismissal, Ms Laison raised concerns of delayed payments and being provided with less than 25 hours work per week. Mr Malik responded by saying that IRD instructed him not to make any more payments as the IRD number she provided was not hers. Ms Laison explained to IRD that she

mistakenly gave the incorrect number and was told that they would contact Mr Malik. After that, Ms Laison tried to engage RHGL via text message and visited the restaurant on multiple occasions, but without any engagement. Instead, she found someone else working in her place. Ms Laison claimed that she had no option but to conclude that her employment was at an end. She was ready and willing to work but RHGL did not provide her with a valid reason why no work was provided after 4 February 2021. This was a breach of the duty of good faith. The Authority determined that Ms Laison acted reasonably and proportionately in accepting that her employment was terminated, and she was therefore constructively dismissed.

To determine the nature of the relationship, the Authority assessed the agreement and the nature of it in practice. While Ms Laison said she was not provided with a written employment agreement, Mr Malik produced an agreement only signed by him and which Ms Laison claimed she never saw. The unsigned agreement did not specify any hours, mentioned the word 'casual' a few times but the clauses reflected permanent employment. Ms Laison was not advised that the position was causal at any point during her interview but was advised that it was for 25 hours per week. She was advised of her hours each week by a roster and had an ongoing expectation of work. The Authority concluded that she was therefore a permanent employee.

Ms Laison worked 64.5 hours during her employment which she claimed was a shortfall of 35.5 hours since she had an expectation of being provided with 25 hours of work a week. The Authority ordered RHGL to pay wages for 35.5 hours with an additional eight percent holiday pay. As Ms Laison was not provided with a notice period, she was also entitled to one week's payment in lieu of notice. In total, RHGL was ordered to pay $1,197.13 to Ms Laison.

The Authority then assessed the remedies for being unjustifiably dismissed. The Authority made no award for lost wages as it was not satisfied that Ms Laison made a reasonable effort to find alternative employment to mitigate her loss seeing as she took months to find new employment. Compensation of $6,000 was ordered to be paid by RHGL for hurt and humiliation as the loss of her job had a significant impact on her self-confidence. She was placed on a stand-down period and unable to claim support from Work and Income NZ while having to support a young family. No reduction to the remedies were ordered since Ms Laison did not contribute to the situation.

In deciding to impose penalties for statutory breaches for failing to provide a written employment agreement pursuant to the Employment Relations Act 2000 and withholding of payment of wages pursuant to the Wages Protection Act 1983, the Authority ordered $500 to be paid to Ms Laison and $1,500 to be paid to the Authority. The maximum penalty of $40,000 was reduced to fifteen percent considering that RHGL was a small employer lacking the human resource assistance of a larger organisation. Costs were reserved.

Laison v Rapp Hospitality Group Limited [[2022] NZERA 622; 25/11/2022; E Robinson]

Work responsibilities determined to have aligned with employment agreement

Mr Oxley commenced working for Compass Group New Zealand Limited (Compass Group) as a chef manager at its St Patrick's Silverstream (St Patrick's) operations from 6 March 2019 until his resignation on 29 March 2021. Compass Group provides catering services at various locations throughout New Zealand. In 2020, Mr Oxley transferred from St Patrick's to Cumberland House, a student hall of residence for Te Herenga Waka—Victoria University of Wellington. He claimed he was unjustifiably disadvantaged in his employment following the appointment of a head chef by Compass Group which he said resulted in changes to his role, including removal of managerial duties and a demotion. He also claimed that Compass Group failed to act in good faith.

Compass Group rejected the claims made by Mr Oxley and said that, from the time Mr Oxley began working at Cumberland House, he was employed as a chef rather than a head chef. Compass Group

stated that Mr Oxley's role did not change during his employment at Cumberland House, that his terms and conditions of employment were not adjusted to his disadvantage, and that it acted in good faith.

Mr Oxley was initially employed as a chef manager working for Compass Group at St Patrick's. Mr Oxley maintained that, when he moved to Cumberland House, he continued to perform the same duties that he had at St Patrick's. He claimed the duties included menu planning, ordering of food and supplies, rostering, and management of staff.

He met with General Manager, Mr Montgomery, who explained to him that as he was being paid a higher rate than other chefs, that more was expected of him. Mr Oxley said that the "more" included the rostering, ordering, and supervisory responsibilities.

Former General Manager of the St Patrick's site, Mr D'Souza, gave evidence that he met with Mr Oxley in June 2020 about the potential transfer and that Mr Oxley raised concerns about his hours of work and pay rate. Mr D'Souza's evidence was that he told Mr Oxley he would retain the same basic contract and pay rate, but the structure would be different. He claimed he discussed with Mr Oxley the need to talk to Mr Montgomery about the details regarding the change of structure. He said that he specifically told Mr Oxley his new role would be that of chef and not chef manager. Mr Montgomery said there was no chef manager role at Cumberland House and that Mr Locsin was the manager there. Mr Oxley agreed to transfer to Cumberland House as a chef rather than as a chef manager. He agreed to the variation of his individual employment agreement and said that he also signed another document but could not recall when that occurred.

An employment agreement variation was signed on 8 July 2020. The variation did not specify any change in Mr Oxley's role. A further employment agreement, signed on 20 October 2020 (October Agreement), mentioned that Mr Oxley was chef, rather than chef manager. Mr Oxley's payslips changed, by at least the pay period of 9 November to 22 November 2020, following the date on which the October Agreement was signed. Mr Oxley's evidence at the investigation meeting was that he could not recall signing the agreement. The Employment Relations Authority (the Authority) asserted that it was more likely than not that Mr Oxley signed the October Agreement. The October Agreement was provided to Mr Oxley together with a copy of position description which was also signed by Mr Oxley and returned to Compass Group. These outlined his role as a chef.

Mr Oxley submitted several text messages between himself and Mr Locsin and other employees, suggesting they evidenced his performance of rostering, ordering and staff management duties. The Authority instead found that they showed that Mr Oxley played a supporting role and that they reflected his duties as a chef. Mr Montgomery claimed these responsibilities primarily rested and remained with Mr Locsin, which the Authority agreed with. He also said that there was no intention to change Mr Oxley's role relating to the head chef being appointed.

Mr Oxley claimed that on 11 February 2021 he "learned that the newly hired head chef was taking over all of [his] responsibilities around rostering, menu planning, food orders and staff management" and that he was "essentially being demoted without cause and consultation". When asked how he knew those duties were being taken away from him, he could not recall. The Authority found that Mr Oxley's duties and responsibilities remained consistent with his role as chef outlined in his employment agreement and were not managerial duties. Mr Oxley was not disadvantaged in his employment. And as such, his claim was dismissed. Mr Oxley is not entitled to the remedies sought and his application is dismissed. Costs are reserved.

Oxley v Compass Group New Zealand Limited [[2022] NZERA 609; 21/11/2022; R Anderson]

LEGISLATION

Note: Bills go through several stages before becoming an Act of Parliament: Introduction; First Reading; Referral to Select Committee; Select Committee Report, Consideration of Report; Committee Stage; Second Reading; Third Reading; and Royal Assent.

Nine Bills are currently open for public submissions to select committee.

- Child Support (Pass On) Acts Amendment Bill (14 April 2023)
- New Zealand Superannuation and Retirement Income (Controlling Interests) Amendment Bill (24 April 2023)
- St Peter's Parish Endowment Fund Trust Bill (26 April 2023)
- Immigration (Mass Arrivals) Amendment Bill (27 April 2023)
- Resale Right for Visual Artists Bill (27 April 2023)
- Land Transport Management (Regulation of Public Transport) Amendment Bill (28 April 2023)
- Regulatory Systems (Education) Amendment Bill (1 May 2023)
- Education and Training Amendment Bill (No 3) (1 May 2023)
- Integrity Sport and Recreation Bill (3 May 2023)v

Overviews of bills-and advice on how to make a select committee submission-are available at: https://www.parliament.nz/en/pb/sc/make-a-submission/

The purpose of the Employer Bulletin is to provide and to promote best practice in employment relations.

If you would like to provide feedback about the Employer Bulletin,
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AdviceLine is your link to first-rate employment relations advice. Business Central understands the difficulties employers can have with managing employees, so supports you with dedicated employer advisors.

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Employment Relations can be a difficult area to navigate. When you need close guidance on employment matters, you can rely upon our seasoned ER Consultants to be there to help.

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When employees test the waters with a personal grievance, Business Central Legal are here to help. We offer representation in all employment law matters.

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Having someone equipped to help you do the work can take the stress out of a tricky situation.

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