



BRIEFING

Urgent employment law responses to COVID-19

Date:	26 March 2020	Priority:	High
Security classification:	In Confidence	Tracking number:	

Action sought		
	Action sought	Deadline
Hon Iain Lees-Galloway Minister of Immigration	Agree to the recommendations.	

Contact for telephone discussion (if required)			
Name	Position	Telephone	1st contact
Shane Kinley	Policy Director, Labour and Immigration Policy	s 9(2)(a)	✓

The following departments/agencies have been informed or consulted:
DPMC (PAG) informed, SSC, Treasury and Ministry of Health consulted

Minister's office to complete:

- ☐ Approved
☐ Noted
☐ Seen
☐ See Minister's Notes

- ☐ Declined
☐ Needs change
☐ Overtaken by Events
☐ Withdrawn

Comments



BRIEFING

Urgent employment law responses to COVID-19

Date:	26 March 2020	Priority:	High
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Purpose

This note provides advice on urgent employment law issues relating to COVID-19, including suspending timeframes for collective bargaining while the Epidemic Notice is in force.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that that an Epidemic Notice is in force under the Epidemic Preparedness Act 2006 (EPA), which means that under section 15 of the EPA the Governor-General may, on recommendation by a Minister responsible for the administration of an enactment, modify any requirements or restrictions imposed by the enactment

Noted

- b **Note** that a Minister must not make such a recommendation unless satisfied that the requirement or restriction is impossible or impracticable to comply with, and the modifications go no further than is, or is likely to be, reasonably necessary in the circumstances

Noted

- c **Agree** to recommend the following modifications be made to the Employment Relations Act 2000 by Order in Council, which will apply for the duration of the Epidemic Notice:

- i. Modify the requirement in s32(1)(a) of to require parties enter into a bargaining process arrangement as soon as possible after the initiation of bargaining and after the Epidemic Notice has been revoked

Agree / Disagree

- ii. Modify the requirement in s34(2)(d) to state that a request by a union or an employer to the other for information must specify a reasonable time, after the Epidemic Notice has been revoked, within which the information is to be provided.

Agree / Disagree

- iii. Modify the requirement in s43(2)(b)(i) and (ii) to exclude the duration of the Epidemic Notice from the calculation of the timeframes in which an employer should draw their employee's attention to the initiation of collective bargaining

Agree / Disagree

- iv. Modify the requirement in s50(2) to say that, if the timeframe for requesting the consolidation of bargaining falls within the period in which the Epidemic Notice is in place, then it is automatically extended until 40 days after the Epidemic Notice has been withdrawn

Agree / Disagree

- v. Modify the requirement in s50(3) say that, if the timeframe for requesting the consolidation of bargaining falls within the period in which the Epidemic Notice is in place, then it is automatically extended until 30 days after the Epidemic Notice has been withdrawn

Agree / Disagree

- vi. Modify the requirement in s53(2) and (3), related to the continuation of expired collectives, to not include the period of time for which the Epidemic Notice is in place

Agree / Disagree

- d **Note** that we will review whether similar modifications are required to provisions for individual employment agreements

Noted

e s 9(2)(f)(iv)

- f **Note** the following modifications would require legislative amendment:

- i. Restrictions on industrial action by workers or employers in essential industries
- ii. Amendments to provide that if an employer unilaterally reduces an employee's hours, the employer's unilateral action is not of itself a breach of the obligation of good faith in s4 of the Employment Relations Act 2000
- iii. Measures to prevent employers or employees from triggering redundancy provisions while using the wage subsidy scheme

Noted

- g **Note** a section 15 notice could be prepared for Cabinet policy approval early next week and submission to Executive Council as early as possible after Cabinet policy approval.

Noted


Shane Kinley
Policy Director,
Labour and Immigration Policy
Labour, Science and Enterprise, MBIE

26.03.20

Hon Iain Lees-Galloway
Minister of Workplace Relations and
Safety

..... / /

Purpose

1. This note provides advice on urgent employment law issues relating to COVID-19, including suspending timeframes for collective bargaining while the Epidemic Notice is in force.

Background

An Epidemic Notice has been issued

2. An Epidemic Notice (EN) is a vehicle for introducing a broader range of powers on a national scale. Under the Epidemic Preparedness Act 2006 (EPA), the Prime Minister may issue an EN on recommendation of the Director-General of Health, and must be satisfied that the effects of an outbreak of a quarantinable disease are likely to significantly disrupt (or continue to disrupt) essential government and business activity in New Zealand. The Prime Minister did so on 23 March 2020.

Epidemic Notices can enable modifications to other statutes in response to an epidemic

3. Once an EN has been issued, section 15 of the EPA allows the Governor-General to make Orders in Council on recommendation by a Minister responsible for the administration of an enactment to modify any requirements or restrictions imposed by the enactment.
4. Section 15 allows modification of any enactment only to the extent that there is a **legislative requirement or restriction, that is impossible or impractical to comply with**. Any modifications must not go further than what is reasonably necessary in the situation.
5. It should also be noted that employment agreements also set requirements on employers and employees (ie employment standards or requirements are minimum standards or requirements that can be expanded upon in employment agreements and frequently are). A notice under the EPA cannot modify those agreements.

An Enhanced Wage Subsidy Scheme is being considered by Ministers

6. The Enhanced Wage Subsidy Scheme (or furloughed worker policy) aims to ensure:
 - a. People are supported to stay at home and firms to cease trading, rather than being forced to work or trade for financial reasons; and
 - b. Otherwise viable firms survive the shutdown period and remain connected to their employees, so that the economy is better able to restart when COVID-19 has been eliminated.

There are currently no active strike applications

7. Employment Services has no high impact mediations or actions scheduled in the next two weeks. 'High impact mediations or actions' include collective bargaining, employment disputes or industrial action in an essential industry, or an otherwise sensitive matter with high public interest and/or high potential impact.
8. Similarly, there are no current requests for Collective Bargaining mediation. This may change over the coming week as we work through past collective bargaining applications to understand where parties are at.
9. There are also no current strike applications. In the month of March, there were 26 notices of strike action involving seven organisations, most notably, strike action by Auckland bus drivers and APEX laboratory workers. Both notices have been withdrawn.

10. Since 6 March we have received two applications where the mediation topic itself relates directly to COVID-19. They are all individual work related problems. COVID-19-related mediations will continue to be prioritised. There is currently one application received this week involving an individual's absence from work in the medical sector. The parties will be offered telephone mediation.
11. Employment Services has observed that parties do not want to mediate at the moment. Mixed reactions are received to suggestions of telephone mediation, with either request for deferral or just one party agreeing to the changed process. Six Employment Relations Authority Directed or Referred matters have been received in the last two days.

Urgent modifications are needed for requirements that are impossible or impractical to comply with

12. We recommend urgent modifications to some requirements in employment law are required, to ensure the operation of the epidemic does not result in employers or employees breaching their obligations under employment law, if those obligations are impossible or impractical to comply with.

Framework for decisions

13. In assessing which employment laws could be modified during the period that an Epidemic Notice is in place (or the government's broader response to COVID-19 is in place), where possible we sought to uphold freedom of choice, good faith and the promotion of agreement. However, in some circumstances, this had to be balanced with the need to ensure swift action.
14. For example, modifications to restrictions or requirements in employment law may be appropriate to reduce the risks of liability that may impact on employer's ability to remain solvent, and ultimately, the greater good for more employees in the longer term.
15. The options recommended would be time-limited to enable recovery and confidence in the rule of law when the Epidemic Notice is lifted. This approach is consistent with the ability recognised by International Labour Organisation to make reasonable modifications, in a time of national emergency, to New Zealand's international obligations to respect labour standards, including of freedom of association and the right to collectively bargain.

Measures to suspend timeframes for collective bargaining could be achieved via an EPA notice

16. You have asked about the ability to use s15 EPA in relation to collective bargaining.
17. We have applied the following principle in our advice: to not remove collective bargaining rights, nor to end any collective bargaining that is underway, but merely to delay obligations until they can reasonably be fulfilled following the revocation of the EN.
18. In order to do this we consider that the following restrictions or requirements would need to be modified, and could be done under s15 of the EPA:

Section in Employment Relations Act	What it provides	Why this is a problem in an epidemic	Suggested solution
32(1)(a)	The union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the	Both parties may not have capacity to enter an arrangement and would not be able to set up a process because of uncertainty around the length of the EN period.	Modify the "as soon as possible" requirement to: "enter into an arrangement as soon as possible after the initiation of bargaining"

Section in Employment Relations Act	What it provides	Why this is a problem in an epidemic	Suggested solution
	bargaining in an effective and efficient manner.	<p>Alternatively, it is possible that 'as soon as possible' would be interpreted in light of the circumstances (ie there would be leeway to defer setting a bargaining process agreement).</p> <p>We consider it is safer to temporarily modify this obligation, to ensure parties do not feel they are obliged to begin arrangements while movement and business as usual work are constrained by the EN.</p>	and after the Epidemic Notice has been revoked"
34(2)(d)	A request by a union or an employer to the other for information must specify a reasonable time within which the information is to be provided.	It is likely to be impossible or impractical for parties to gather and provide such information while the EN is in force.	Modify the "reasonable time" requirement to: "reasonable time after the Epidemic Notice has been revoked".
43(2)(b)(i) and (ii)	<p>Employer must draw the initiation of collective bargaining to the attention of all employees whose work would be covered by it, within:</p> <ul style="list-style-type: none"> • 10 days after the initiation (SECA) • 15 days after the initiation (MECA) 	<p>It is likely to be impossible or impractical for some employers to notify/ draw all employees' attention to the initiation of collective bargaining while an EN is in place.</p> <p>Impracticality is more likely for larger workforces, or those unable to be connected to the employer's electronic systems during the EN period.</p>	Modify the times in which the employer should draw their employee's attention to the initiation of bargaining to exclude the EN duration in the calculation of this period.
50(2) and (3)	<p>If an employer receives 2 or more notices of initiation of collective bargaining, relating to the same type of work, employer can request consolidation within 40 days.</p> <p>Union must then agree or withdraw the notice within 30 days.</p>	It is likely to be impossible or impractical for some employers to comply with these timeframes while an EN is in place. It would not be desirable for the consolidation of bargaining to fail, or a request lapse, because parties cannot practically deadlines.	Modify to say that if the timeframe falls within the period in which the Epidemic Notice is in place then it is automatically extended until 40 and 30 days respectively after the Epidemic Notice has been withdrawn.
53(2) and (3)	Collective agreements continue in force for up to 12 months beyond expiry	It will be impractical or impossible for some employers or unions to	Modify to say that where s53 applies, the 12 month timeframe

Section in Employment Relations Act	What it provides	Why this is a problem in an epidemic	Suggested solution
	date, if collective bargaining for a replacement agreement has been initiated	initiate collective bargaining while an Epidemic Notice is in place. This may mean that some collective agreements expire, despite a willingness to negotiate for a replacement collective agreement.	specified in s53(3) does not include the period of time for which the Epidemic Notice is in place, and can be extended if a collective agreement expires during the period of time for which the Epidemic Notice is in place.

Other collective bargaining provisions do not need modifications, or do not meet the requirements for EPA modification – we will also review the provisions for individual employment agreements

19. We also considered other provisions but do not believe they need to be modified because they specify no hard timeframe for compliance. We expect parties to take the Epidemic Notice period into account in what they consider to be reasonable timeframes for the following provisions:
 - s32(1)(b) Duty to meet each other, from time to time, for the purposes of the bargaining.
 - s32(1)(c) Duty to consider and respond to proposals made by each other.
 - s33 Duty to conclude collective agreement
20. We also considered s50B (facilitation grounds). The Employment Relations Authority is continuing to operate via teleconference through the duration of the EN, so it is not “impracticable or impossible” to comply with these provisions.
21. We will review whether similar modifications are required to provisions for individual employment agreements and will provide advice on this early next week.

Non-collective bargaining measures could also be achieved via an EPA notice

s 9(2)(f)(iv)

Other measures may be desirable but we believe they would require new legislation

28. Other urgent modifications to employment law may be desirable to achieve two purposes:

- a. Limit the risks of essential services workers or employers taking industrial action while the EN is in place (discussed further below).
- b. Provide the right set of rules and incentives, to support businesses to remain solvent through the period of COVID-19 restrictions, through modifications to rules on good faith and redundancy.

29. s 9(2)(g)(i)

Further advice can be provided on the impact of these measures if you wish.

30. s 9(2)(h)

There is a risk of industrial action involving essential service workers in relation to collective bargaining or health and safety grounds

31. Some essential service workers are currently collective bargaining. There is a risk that industrial action in relation to that collective bargaining may be taken under the Employment Relations Act 2000 (ER Act). Depending on the nature of the essential service, workers or employers are required to provide between 24 hours (bus drivers) to 28 days' (health care workers where the impacts affect the public interest, including public health and safety) notice of any industrial action.
32. Based on the absence of current notices of industrial action (see paragraphs 7 to 9), we consider that this is a low risk, but industrial action occurring during the period the Epidemic Notice is in place cannot be ruled out. To minimise this risk, public messaging from the Prime Minister or other Ministers and the Council of Trade Unions could emphasise that strikes relating to collective bargaining are not appropriate at this time.
33. There is also a potential risk that essential services workers will strike on health and safety grounds while the Epidemic Notice is in place, particularly in the health sector. Strikes are permitted by s84 of the ER Act if the employees who strike have reasonable grounds for believing that the strike is justified on the grounds of safety or health.
34. The Ministry of Health advises that there is a risk that some unions may use the ability to strike for health and safety grounds to respond to changes to workplace arrangements made by DHBs in their COVID-19 response, such as changes to shift patterns and rosters.

35. There are real risks to essential workers from catching COVID-19, as well as other impacts from long hours in a high-stress environment. Health and safety risks may justify industrial action. However, a strike could result in a protracted debate on the extent of these risks, which would not factor in the greater good of having those essential tasks performed.

You could also make changes to support the Enhanced Wage Subsidy Scheme

36. The overarching objective of the Enhanced Wage Subsidy Scheme (or furloughed worker policy) is to support otherwise viable employers to survive the shutdown period and remain connected to their employees so that the economy is better able to restart when COVID-19 has been eliminated.
37. We have identified that the following changes to employment law could potentially support the Enhanced Wage Subsidy Scheme (depending on final decisions for that scheme):
- a. Amendments to provide that if an employer unilaterally reduces an employee's hours, the employer's unilateral action is not of itself a breach of the obligation of good faith in s4 of the Employment Relations Act 2000
 - b. Measures to prevent employers or employees from triggering redundancy provisions while using the wage subsidy scheme
38. Further advice can be provided on these matters if requested.

Next Steps

39. Once you have made decisions on this paper, the following steps will be required if an immediate modification notice under s15 of the EPA is to progress:
- Legal approval that the provisions can proceed (Crown Law and PCO)
 - Policy approval (Cabinet or Ministers with Power to Act)
 - Order-in-Council drafting then approval (by Cabinet or Ministers with Power to Act)
 - Executive Council / Governor-General approval and publication of the Order-in-Council.
40. To expedite this process, you may wish to share this paper with Ministers with Powers to Act, if you agree to an immediate modification notice proceeding.