



BRIEFING

Further advice on urgent employment law responses to COVID-19

Date:	31 March 2020	Priority:	High
Security classification:	In Confidence (legally privileged)	Tracking number:	2842 19-20

Action sought		
	Action sought	Deadline
Hon Iain Lees-Galloway Minister for Workplace Relations and Safety	Agree to the recommendations.	1 April 2020

Contact for telephone discussion (if required)			
Name	Position	Telephone	1st contact
Tracy Mears	Manager, Employment Relations Policy	s 9(2)(a)	✓
Harry Chapman	Senior Policy Advisor, Employment Relations Policy		

The following departments/agencies have been consulted
State Service Commission, Department of the Prime Minister and Cabinet (Policy Advisory Group), Treasury

Minister's office to complete:

☐ Approved

☐ Declined

☐ Noted

☐ Needs change

☐ Seen

☐ Overtaken by Events

☐ See Minister's Notes

☐ Withdrawn

Comments



BRIEFING

Further advice on urgent employment law responses to COVID-19

Date:	31 March 2020	Priority:	High
Security classification:	In Confidence (legally privileged)	Tracking number:	2842 19-20

Purpose

This note provides further advice on urgent employment law issues relating to COVID-19 and seeks your decisions on outstanding points.

Recommended action

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

a s 9(2)(h)

[Redacted]

b

[Redacted]

c **Agree** to not proceed with changes to the reasonable timeframe for information provision during collective bargaining (s34), as we consider there is already flexibility in the law.

Agree / Disagree

d **Agree** to not proceed with changes to make it easier to initiate collective bargaining, as we do not consider they are necessary and unions see more need for an extension to the 12-month extension period (s53).

Agree / Disagree

e **Agree** to change the requirement for unions to follow ratification procedures they notified at the beginning of collective bargaining (s51), to allow the parties to agree another ratification process if the original process is impractical due to the COVID-19 pandemic.

Agree / Disagree

f **Note** the draft Cabinet paper attached for consideration at the COVID Group of Ministers.

Noted



Tracy Mears
Manager, Employment Relations Policy
Labour, Science and Enterprise, MBIE

31 / 3 / 2020

Hon Iain Lees-Galloway
**Minister for Workplace Relations and
Safety**

..... / /

Proactively Released

Background

An Epidemic Notice has been issued

1. The Prime Minister issued an Epidemic Notice (EN) on 23 March 2020. 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.

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

2. 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.
3. 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.
4. It should be noted that employment agreements also set requirements on employers and employees, but employers and employees can agree to arrangements that exceed minimum employment standards, and frequently do. A notice under the EPA cannot modify those agreements.
5. We are not aware of any other proposed changes through the EPA across MBIE, but there are likely to be some proposals coming soon.

We advised you on a number of modifications to requirements which we considered were needed in light of COVID-19

6. On 26 March 2020, we provided you with a briefing which set our advice on which modifications are needed to requirements in the Employment Relations Act 2000 (ER Act) s 9(2)(f)(iv). On 27 March you had a videoconference with officials to discuss the briefing.
7. A summary of your directions is set out below.

Section in Act	What it provides	Suggested amendment	Minister's decision
ER Act 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 bargaining in an effective and efficient manner.	Modify the "as soon as possible" requirement to: "enter into an arrangement as soon as possible after the initiation of bargaining and after the Epidemic Notice has been revoked"	Can the modification reflect the characterisation as a 'backstop'. MBIE to consider whether the modification can be more nuanced, and prepare communications messaging.
ER Act 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.	Modify the "reasonable time" requirement to: "reasonable time after the Epidemic Notice has been revoked".	MBIE to reconsider whether this is needed.

ER Act 43(2)(b)(i) and (ii)	Employer must draw the initiation of collective bargaining to the attention of all employees whose work would be covered by it, within: <ul style="list-style-type: none"> • 10 days after the initiation (SECA) • 15 days after the initiation (MECA) 	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.	Agreed
ER Act 50(2) and (3)	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. Union must then agree or withdraw the notice within 30 days.	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 EN has been withdrawn.	Agreed
ER Act 53(2) and (3)	Collective agreements continue in force for up to 12 months beyond expiry date, if collective bargaining for a replacement agreement has been initiated	Modify to say that where s53 applies, the 12 month timeframe specified in s53(3) does not include the period of time for which the EN is in place, and can be extended if a collective agreement expires during the period of time for which the EN is in place.	The proposed modification does not provide an extension of the term of an existing collective agreement for parties that cannot initiate bargaining to renegotiate it. MBIE to consider how this could be achieved.
ER Act 51	Requires union to ratify a collective agreement in accordance with procedures it notified to the other party at the beginning of bargaining.	New issue raised by unions – no previous advice. Requirement for face-to-face meetings may be problematic.	MBIE to look into whether this can be addressed in the Order in Council process under the EPA

s 9(2)(f)(iv)

8. Below we set out further advice on each of the outstanding topics. A summary of our proposed approach is attached at Annex One.

We have received Crown Law advice on which proposals are consistent with the Epidemic Preparedness Act 2006

9. Officials submitted proposed changes to Crown Law for a decision on whether they met the requirements under section 15 of the Epidemic Preparedness Act 2006 for an Order in Council.

s 9(2)(h)

Issue 1: Reasonable timeframe for information provision (s34)

13. Section 34(2)(d) of the ER Act requires that:

"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."

14. We previously noted that it is likely to be impossible or impractical for parties to gather and provide such information while the EN is in force, and suggested modifying the "reasonable time" requirement to "reasonable time after the Epidemic Notice has been revoked".
15. After reconsidering this proposed modification, we now do not believe that this change is required. This provision does not create an obligation, so much as it enables parties to create an obligation, and therefore may be outside of scope of the EPA process in any case. In addition, we consider that it should be possible for parties to recognise that what is 'reasonable' will change given the pandemic.

Issue 2: Ratification procedures during pandemic (s51)

16. Section 51 of the ER Act requires unions to ratify collective agreements in accordance with procedures it notified to the other party at the beginning of bargaining.

17. We have not previously provided advice on this issue, but it was noted at the meeting that this could be problematic because union rules typically require a face-to-face meeting for the ratification of a collective agreement, which will not be possible under the current level 4 status.
18. We consider that for collective bargaining which is already underway, the circumstances will have changed substantially since they notified their employer of the intended ratification procedure, and if it does involve in-person meetings, these will no longer be possible due to the pandemic.
19. Therefore we recommend a modification to the requirements in the ER Act. The modification would be that while an EN is in place, if the method/means by which the parties agreed to at the beginning of the process is such that it requires parties to ratify in a way which is impractical (e.g. in person), then allow the parties to agree other means in which to ratify.

Issue 3: Expiration of collective agreements during pandemic (s53)

20. Section 53 of the ER Act sets out that in the event that a collective agreement has expired, it will continue in force for 12 months so long as the union or the employer initiated collective bargaining before the collective agreement expired and for the purpose of replacing the collective agreement.
21. When a collective agreement expires, section 61 sets out that each existing employee who was covered by the expired collective employment agreement automatically has an individual employment agreement based on the expired collective agreement (plus any additional terms and conditions agreed previously). The employer and employee can agree to change this individual employment agreement or negotiate a brand new individual employment agreement. If a collective agreement later comes into effect, then union members will automatically move off any individual employment agreement onto the collective agreement.
22. We understand moving employees from a collective to individual employment agreements is not desirable from a union perspective. The negative consequences could include losing the benefits of terms in the collective which are not strictly employment terms (e.g. union access provisions), the 30-day rule would not apply to new employees, and it may be disadvantageous tactically to bargain for a new collective rather than renegotiating a current one.

We continue to see a need for more flexibility for the 12-month extension period ...

23. As previously advised, we have identified a need to provide an extension to the 12-month period where collective agreements continue after the specified expiration date. We still consider this change is required, so collective agreements do not expire during the pandemic period when collective bargaining is not likely to be feasible.
24. s 9(2)(h)

However, we do not think any changes are required to make initiation easier for unions

25. At the meeting to discuss our previous advice, it was noted that the proposed modification did not provide an extension of the term of an existing collective agreement for parties who cannot initiate bargaining to renegotiate it.

26. We have spoken to employment relations practitioners and the NZCTU, and we understand that there are not significant barriers to initiating collective bargaining. The NZCTU was more concerned with extending the 12-month extension period rather than removing any barriers to initiating a collective agreement.
27. Therefore we do not recommend making any changes to the initiation requirements.

Next steps

28. We are seeking your decisions on the recommendations in this paper on 1 April 2020.
29. A draft Cabinet paper is attached (see Annex Two) for you to seek Cabinet approval of these changes. If you disagree with any of our recommendations we will urgently amend the draft Cabinet paper.
30. The item needs to be approved by the Prime Minister's Office and have political consultation undertaken before it can be confirmed on the agenda for a COVID group of Ministers meeting.
31. Once the paper has been approved by the COVID group of Ministers we will develop drafting instructions for Parliamentary Counsel Office for the Order in Council.

Annexes

Annex One: Summary of proposed changes

Annex Two: Draft Cabinet paper

Annex Three: Crown Law legal advice

Annex One: Summary of proposed changes

Section	What it provides	Original suggested amendment	Minister's decision	MBIE's proposed action
ER Act 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 bargaining in an effective and efficient manner.	Modify the "as soon as possible" requirement to: "enter into an arrangement as soon as possible after the initiation of bargaining and after the EN has been revoked".	Can the modification reflect the characterisation as a 'backstop'. MBIE to consider whether the modification can be more nuanced, and prepare communications messaging.	Proceed with modified language to take into account Min's views. E.g. "During the time in which the EN is in force, 'as soon as possible' must take into consideration the circumstances of the employer and union and their ability to agree the bargaining process agreement."
ER Act 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.	Modify the "reasonable time" requirement to: "reasonable time after the EN has been revoked".	MBIE to reconsider whether this is needed.	No action required – after reconsidering this proposed modification, we now do not believe that this change is required.
ER Act 43(2)(b)(i) and (ii)	Employer must draw the initiation of collective bargaining to the attention of all employees whose work would be covered by it, within: <ul style="list-style-type: none"> 10 days after the initiation (SECA) 15 days after the initiation (MECA) 	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.	Agreed	Proceed
ER Act 50(2) and (3)	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. Union must then agree or withdraw the notice within 30 days.	Modify to say that if the timeframe falls within the period in which the EN is in place then it is automatically extended until 40 and 30 days respectively after the Epidemic Notice has been withdrawn.	Agreed	Proceed
ER Act 53(2) and (3)	Collective agreements continue in force for up to 12 months beyond expiry date, if collective bargaining for a replacement agreement has been initiated	Modify to say that where s53 applies, the 12 month timeframe 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 EN is in place.	MBIE to consider how to provide an extension of the term of an existing collective agreement for parties that cannot initiate bargaining to renegotiate it. (see below row).	Proceed with extension to 12 month time period while EN is in place
ER Act 53(2)	Collective agreements continue in force for up to 12 months beyond expiry date, if collective bargaining for a replacement agreement has been initiated.		Can we make it easier to initiate collective bargaining?	No action required – unions do not see barriers to initiation. Rather they see the 12-month timeframe as the biggest issue.
ER Act 51	Requires union to ratify a collective agreement in accordance with procedures it notified to the other party at the beginning of bargaining.	New issue raised by unions – no previous advice. Requirement for face-to-face meetings may be problematic.	MBIE to look into whether this can be addressed in the Order in Council process under the EPA	Proceed. E.g. "While an EN is in place, if the method/means by which the parties agreed to at the beginning of the process is such that it requires parties to ratify in a way which is impractical, then allow the parties to agree other means in which to

s 9(2)(f)(iv)

In Confidence

Office of the Minister of Workplace Relations and Safety

COVID-19 Group of Ministers

Temporary employment law changes in response to COVID-19

s 9(2)(f)(iv)

Proactively Released